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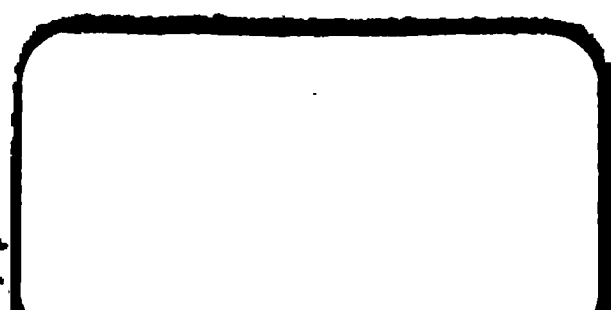
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A
TREATISE
ON
CRIMINAL LAW.

BY
FRANCIS WHARTON, LL.D.,
LATE MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW;
AUTHOR OF TREATISES ON "EVIDENCE," "CONFLICT OF LAWS," "NEGLIGENCE," "AGENCY,"
AND "MEDICAL JURISPRUDENCE."

IN TWO VOLUMES.

VOLUME I.

TENTH EDITION, REVISED WITH LARGE ADDITIONS

BY
WM. DRAPER LEWIS, PH.D.

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PREFACE TO TENTH EDITION.

THE Editor, after a careful examination of the text, concluded that any alteration was unnecessary. He has carefully examined all the recent cases, and inserted in the notes every case which has applied the principles laid down in the text decided since the appearance of the last edition. In this way citations to upward of nine thousand new cases have been made.

At the end of each chapter, under the head of *Points requested for the defence improperly refused, and erroneous charges*, a statement of cases designed as, "Suggestions for the Defence," has been made. All those cases relating to the subject of a chapter in which a conviction has been set aside on appeal, either because the trial Judge has refused to affirm a point submitted by the defendant's attorney which ought to have been affirmed, or because there has been error in his charge to the Jury, have been collected and arranged. In every case the words of the point improperly refused or the erroneous charge are given. It is believed that a lawyer having a client to defend will find practical assistance in the preparation of his "points" from these collections of cases.

It is thought that the addition of the date of the decision to the citation will be of use both to the busy lawyer, who desires to look at only the latest authorities, and to the student, who wishes to follow the development of the law.

PREFACE.

The duties in which I have been recently engaged, as counsel for the Department of State of the United States, have led me to give increased attention to those portions of the following pages which deal with offences against the United States distinctively, with offences against international law, and with conflicts of jurisdiction. I have felt myself obliged, also, in consequence of the great recent increase of adjudications in respect to statutory nuisances, and to violations of liquor laws, to re-write the chapters embracing the discussion of those topics. The other portions of the book have been subjected to numerous modifications, and the text of the whole has been revised. Upward of forty-six hundred new citations have been distributed through the entire work, giving in many instances new aspects to positions previously taken, and in other instances modifying those positions. I trust that in this way the work accurately and exhaustively exhibits the law of which it treats down to the present day.

F. W.

WASHINGTON, MAY, 1885.

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BOOK I.

PRINCIPLES.

CHAPTER I.

I. BASIS OF CRIMINAL JURISPRUDENCE.

I. RELATIVE THEORIES.

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§ 1. WHAT purpose has the State in punishing? Upon the answer to this question depends not merely the extent of the punishment which we inflict upon conviction, but the conception of justice on which convictions rest. It becomes important, therefore, to examine at the outset the several theories which have been propounded as the basis, in this respect, of criminal jurisprudence. These theories may be arranged as follows:

I. RELATIVE THEORIES.

§ 2. Is it the sole object of punishment to prevent the offender from the commission of future crimes? So has it been argued.¹ Damages in civil actions, it is urged, are generally only compensatory for past injuries. This is enough by way of compensation, but it is not enough for prevention. The State is bound to take cognizance of the possible and contingent breach of law which is contained in

That object of punishment is to prevent the offender from further offending.

¹ See 16 Law Mag. and Rev. (4th ser.) 97.

the criminal will; the State must suppress the danger that is thus encountered. By penal jurisprudence this suppression is properly to be worked. By this reasoning the imposition of punishment can be defended. By these tests the extent of punishment may be determined.

Yet in reply to this we cannot escape the following criticism: If the theory be correct, and be logically pursued, then punishment should precede and not follow crime.¹ The State must explore for guilty tendencies, and make a trial to consist in the psychological investigation of such tendencies. This contradicts one of the fundamental maxims of the English common law, by which not a tendency to crime, but simply crime itself, can be made the subject of a criminal issue. And then, again, the object which the prevention theory sets before it, namely, the creation of right *motives*, belongs to the sphere of ethics, and not to law.² Undoubtedly, as will be seen, one of the objects of penal discipline, especially in the case of an inveterate offender, is to put him in a condition in which he cannot be guilty of future mischief. Often enough, in sentencing old convicts, do judges tell the prisoner that he is to be placed where for a time he can do no harm. It may be questioned whether, at least in some of these cases, the prevention idea has not a little too much consequence assigned to it; because so far as concerns most old convicts, imprisonment for a term usually makes them more hardened and more wary in the pursuit of crime when they are discharged. Prevention, however, may, in peculiar cases, be a proper point to be considered in moulding sentences. But prevention cannot be viewed either as forming the proper theoretical justification of judicial punishment, or as one of its invariable results.

§ 3. The right of self-defence has also been invoked as a justification of punishment.³ As the individual has a right to resort to self-defence, to prevent a wrong being inflicted on himself, so has the State. The individual has a right

¹ See Berner, ed. of 1877, § 11.

² To this theory President Woolsey justly objects that "the cardinal doctrine, that the motives to be set before the criminal are simple pleasure and pain, and the *end*, prevention, by overlooking the ill-desert of wrong-doing, makes it and all similar systems im-

moral, and furnishes no measure of the amount of punishment, except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering." Woolsey's Political Science, § 112.

³ Trendelenburg, *Naturrecht*, etc., Berlin, 1876, § 56.

to repel an attack, and even to kill the assailant, it is argued, when his existence is imperilled, and so has the State; and as every crime threatens the existence of the State, by the State every crime may be punished. But to this there are two replies. The first is that there are many crimes which, so far from imperilling the State, strengthen it, being reasons why the State should be invested with increased power; and as the State is not imperilled by such crimes, on the theory now before us such crimes cannot be punished by the State. The second, and less technical objection, is that this theory confounds self-defence with retribution. Self-defence, as we will hereafter more fully see,¹ can ward off a threatened crime, but cannot be invoked to punish a crime that is consummated. It may be preventive, but it cannot be retributive. On this theory, therefore, while the State can seize and even destroy a person threatening a crime, it cannot punish a person by whom a crime has been committed.

§ 4. That the object of punishment is simply reformation of the offender was the theory of the humanitarian philosophers of whom Rousseau was the chief, whose eloquent declamation on this topic was one of the preludes of the French Revolution. The good can take care of themselves—so reads this theory when stated in its baldest terms; it is the duty of the State to take care of and reform only those whom social prejudice is pleased to call the bad. Hence in inflicting punishment the safety of the injured is not to be considered, but simply the reformation of the injurer. Nor is this to be effected by fear; for fear, as an engine of government, is to be discarded. Fear, indeed, it is subtly argued, may produce increased cunning in the execution of crime, but cannot prevent crime from being undertaken. Relapsed convicts, it is declared, are most plenty in the land of hard laws. Crime can only be thoroughly repressed by a system of penalties which, from the benignity they breathe, serve rather to soften than to inflame those on whom they are imposed.

That the object of punishment is the reformation of the offender.

§ 5. Undoubtedly the reformation of the offender is one of the objects which a humane judge will have in view in the adjustment of his sentences; but it cannot be viewed as the primary object, or as supplying the sole standard. The protection of the unoffending, if we reduce the question to a mere personal balance, is at least as important an object of humanitarian consideration as is the reform

¹ See *infra*, §§ 97 et seq.

of the offender. And, again, if we examine the theory critically, we find we are reduced to this absurdity, that we can punish only when we can reform, and hence that the desperate and irreclaimable offender cannot be punished at all.¹

§ 6. Nor does this theory make any distinction as to crimes. While an incorrigible assassin is not to be punished at all, because he is incorrigible, a trespasser, who in sudden heat strikes another, but whose temper it may take twenty years to correct, would be kept in the house of reform for twenty years. Nor is this all. What kind of correction, as has been well asked, is to be applied?² Is it to be preventive, so as to make the supposed offender innocuous? Then we encounter the objections which, as we have just seen, are fatal to the preventive theory. Is it to be purely corrective? Then it is to be graduated by tests which we have no means of applying, and which depend upon the capacity of characters to whose secrets we cannot penetrate. To carry out such a system thoroughly the State must become a church, undertaking, within the bounds of a prison, to extirpate selfishness and implant moral principle. Aside from the objection that this transcends the functions of the State, it makes the State attempt to effect a moral end by immoral means. For it is immoral to punish except for the purpose of vindicating right against wrong.³

§ 7. The barbarism of the old English system of punishment was defended on the ground that cruel and conspicuous penalties are to be inflicted as means of terror. Nor was this peculiar to England. It was the basis of the whole secular jurisprudence of the Continent of Europe. Men were to be scared from crime, and therefore punishment was to be made as shocking and ghastly as possible.⁴ To this was

That the
object is to
terrify
others.

¹ See criticism in Lorimer's Inst. there is no hope of your reform, and (1872), 246. The point in the text is therefore I discharge you."

well put by Lord Justice Fry in an article in the Nineteenth Century, re-

printed in the Criminal Law Magazine for January, 1884. "Prisoner at the bar," he supposes a judge acting on the principle here criticized to say, "you are an incorrigible villain; this is the fourth burglary of which you have been convicted, and the second attempt at murder. It is plain that

² Woolsey's Political Science, § 107.

³ See remarks of the author in 4 South. L. Rev. 245.

⁴ "The State, endeavoring to operate on the fears of mankind, organizes a method of absolutely repressing or of absolutely commanding certain classes of acts." Amos on Jurisprudence (London, 1872), 297. See, also, Maine's Ancient Law (ed. of 1870), 389. To the

to be subordinated not only the humane instincts of the court, but the primary rights of the offender. Criminals were to be broken on the wheel before assembled multitudes, and their bones hung on gallows on the highway. Even now, in nations of imperfect civilization, this continues; and throughout Europe, in 1869, were disseminated photographs of the mangled heads, as they had been empaled on posts in Athens, of the assassins by whom certain English travellers had been massacred at Marathon. Crime in others, it was alleged, is best checked by exhibiting to the public the most horrible penalties inflicted on the criminal himself. Gradually in England, in the reduction of capital punishment and in the introduction of privacy in reference to capital executions, has the coarse side of this theory been abandoned. In the United States it has had no foothold since the Revolution, though it was not without influence in instigating barbarous punishments in our early colonial days. And rightly has mere terrorism been rejected as one of the objects which the judge, in adjusting sentence, is to keep in view. For terroristic penalties, viewing them in their crude shape, undertake to punish the offender, not merely for what *he* has actually done in the past, but for what *others* may possibly do in the future. Terrorism, also, treats the offender not as a *person*, but as

same effect speaks Seneca: "Nemo prudens punit *quia* peccatum est, sed ne peccatur." Seneca, de Ira, lib. i. cap. 16.

Dr. Franklin, in a letter of March 14, 1788, to Mr. Vaughan, argues that "punishment, inflicted beyond the merit of the offence, is so much punishment of innocence;" and, when commenting on a pamphlet just published ("Thoughts on Executive Justice"), which advocated the "example" theory, pure and simple, gives the following characteristic criticism:

"I have read of a cruel Turk in Barbary, who, whenever he bought a new Christian slave, ordered him immediately to be hung up by the heels, and to receive an hundred blows of a cudgel on the soles of his feet, that the severe sense of the punishment, and fear of incurring it thereafter,

might prevent the faults that should merit it. Our author himself would hardly approve entirely of this Turk's conduct in the government of slaves, and yet he appears to recommend something like it for the government of English subjects. He applauds the reply of Judge Burnet to the convicted horse-stealer, who, being asked what he had to say why judgment of death should not be passed against him, and answering that it was hard to hang a man for only stealing a horse, was told by the judge: 'Man, thou art not to be hanged only for stealing a horse, but that horses may not be stolen.' But the man's answer, if candidly examined, will, I imagine, appear reasonable, as being *founded on the eternal principles of justice and equity, that punishments should be proportioned to offences*; and the judge's reply brutal and unreasonable."

a *thing*; not as a responsible, self-determining being with rights common to all members of the same community, to whom justice is to be distinctively awarded as a matter between him and the State, but as a creature without any rights, on whom punishment is imposed so that others should be deterred from acts requiring punishment. The theory, therefore, is open to two fatal objections: (1) It violates the fundamental principle of all free communities—that the members of such communities have equal rights to life, liberty, and personal security. (2) It conflicts with that public sense of justice which is essential to the due execution of all penal laws. For this reason the terroristic system has failed even in producing the result which it sought. For terrorism, as such, has been shown to multiply rather than diminish brutal crime. No places are more prolific in crime than the sites of public executions. Inflicting public capital punishment on minor crimes has been found to generate bolder and more ferocious crimes which no capital punishment can suppress. Hence it is that terrorism has of late days ceased to be one of the elements in the measurement of judicial punishment.

§ 8. But it should be remembered that this criticism applies to terrorism in its coarse and merely sensuous aspect. For there remains to be considered a principle with which terrorism is sometimes unintelligently confounded, but which, when disentangled from the spectacular brutality and the contempt of personal rights by which terrorism is marked, forms an important element in penal jurisprudence. This principle will now be noticed.¹

¹ It is remarkable, in view of the importance of the question before us in the moulding and in the application of criminal law, that it has received such slight attention from English and American jurists. Beccaria—whose treatise on Crimes was translated early in the present century, and who held that as the State rests on social contract it has the right to punish only so far as it has power given to it by such contract—took the ground that the object of punishment was simply preventive and deterrent; and what Beccaria taught it was natural that those who agreed with him in principle, and who were fascinated by the purity and dignity of his style, should adopt as if it were unquestionable. General prevention, it was argued, ought to be the chief end of punishment. General prevention was distinguished from particular prevention in this: that particular prevention has respect to the cause of the mischief, and general prevention to the whole community. This system is, therefore, virtually the terroristic theory of Feuerbach, which is discussed in the text; with this qualification—that pleasure, as well as pain, are to be used by the law-giver as inducements to avoidance of crimi-

§ 9. In another work,¹ the educational bearing of penal legislation is largely discussed, and it is there shown: (1) that the

nal acts. To this, as we will soon see more fully, applies with great force President Woolsey's criticism, that the preventive theory, "by overlooking the ill-desert of wrong-doing, makes it and all similar systems immoral, and furnishes no measure of the amount of punishment except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering."

The founders of the Pennsylvania prison system, it should be added, while laying great stress on reform and prevention, fell back on justice as the main end of punishment.

Mr. Livingston repeatedly gives his adhesion to the preventive theory "We have established it as a maxim," he tells us in his Report on the Penal Code (Livingston's Works, 1873, i. 26), that the object of punishment "is to prevent the commission of crime;" and again (Ibid. 81), "no punishments greater than are necessary to effect this work of prevention ought to be inflicted, and that those which produce it by uniting reformatory with example are the best adapted to the end." Subsequently, however (Ibid. 83), he quotes with approval the preamble to the statute of the Legislature of Louisiana establishing the Code. This preamble contains, *inter alia*, the following:

"The only object of punishment is to prevent the commission of offences; it should be calculated to operate—

"First, as to the delinquent, so as by seclusion to deprive him of the present means, and, by habits of industry and temperance, of any future desire, to repeat the offence.

"Secondly, on the rest of the community, so as to deter them, by the example, from a like contravention of the laws."

The intermediate theory is maintained by Dr. Lieber, in his essay on Penal Law, published in Lieber's Miscellaneous Writings (1881), vol. ii. p. 471. The test proposed by this eminent writer is that punishment "must be just, according to the spirit of the age."

By Dr. Paley, in his Moral Philosophy, we are told that "the end of punishment is twofold—amendment and example." The same view is adopted by the great body of English commentators, with the following exceptions: Lord Auckland (Mr. Eden), in his Principles of Penal Law, chapter ii., maintains the absolute theory. Mr. Bentham, as will be seen, substantially takes the same view. Mr. Lorimer, in his Institutes, page 346, rejects the reformatory theory as inadequate and delusive. Mr. Austin and Sir W. Hamilton follow the modified scheme of Kant, to be presently noticed.

Both the "example" and the "reform" theories were used with great effect by the defenders of Governor Eyre, when he was charged in England with permitting reckless and brutal vengeance to be inflicted on all persons suspected of complicity in the Jamaica negro outbreak of 1865. It will be recollected that after order was entirely restored great cruelties were inflicted, with the apparent permission of the governor, on persons who had not borne arms, and who were not proved to have been actually concerned in the revolt. The subject be-

¹ 1 Whart. & St. Med. Jur. 147, 185, 188.

announcement of punishment as a consequent on crime is essential to just penal jurisprudence ; (2) that such an announcement of punishment is futile unless it is followed up, as a rule, by infliction. Two great instrumentalities, it is alleged, are within the law-makers' control for the suppression of crime. The first is education, showing its moral and economical ill consequences. The second is to be found in penal laws ; such laws to be humanely and justly devised, lucidly expressed, universally promulgated, and firmly executed. Each of these features is essential to enable these laws to be effective on the public at large. Men will not be deterred from crime by unjust or inhuman laws capriciously executed. And the appeal made by a right system of laws is not sensuous, simply agitating the passions, as is the case with the terroristic theory. For just laws, clearly expressed, faithfully disseminated, and firmly executed, address the reason of men. The offender is not, indeed, to be punished simply to make him an example to others, for this would be as objectionable as is the terrorism just condemned.¹ But being justly punished, his case is made public that it may become an example. In other words, example is not the object of punishment, but punishment creates example. Of course we here assume the justice of the punishment, and in so doing we advance toward the absolute theories of penal discipline to be presently discussed. And this distinction it is essential for the judge to keep in mind. To sentence a man to a severe and conspicuous punishment, simply to make him an example to others, not only is open to the objections already noticed

came a matter of active controversy the ground that punishment could in England, and Governor Eyre was only be meted out in retribution of defended by Mr. Carlyle, Mr. Ruskin, crime duly established in a court of and others, on the ground that the law. "Professor Huxley," says Mr. object of punishment is to prevent McCarthy, after narrating the procedure, "disposes once for all of that crime and reform the community ; and sort of argument by the quiet remark that only by atrocious punishment, in that he knew of no law authorizing cases such as that of the late disorders that he knew of no law authorizing in Jamaica, could the still more atrocious persons to put to death less vicious crime of a universal massacre virtuous persons as such." McCarthy's of the white race be prevented. This Own Times, London, 1880, iv. 47. See position was reviewed with great discussion in 4th vol. of Froude's ability by Cockburn, C. J., in his Carlyle. charge to the grand jury, which took

¹ See Gisborne, Moral Philos. 187.

as applying to the terroristic scheme, but exhibits to the community an example of evil and not of good. But in imposing a sentence, it is one of the highest prerogatives of justice so to mould and explain it as to make it the means of the prevention of future crime, not merely in the offender himself, but in the community at large.

II. ABSOLUTE THEORY.

§ 10. The absolute theory of punishment, on which we must therefore fall back, rests on the assumption that crime as crime must be punished; *punitur quia peccatum est*. But then comes the question, by whom? The State, as representing society at large, springs from a moral necessity. It is not a matter of choice whether we will live under government. Some government, some form of civil organization, we must have. And the State is not to be guided simply by expediency, or by the merely external purposes of society. It has an existence of its own to maintain, a conscience of its own to assert, moral principles to vindicate. Penal justice, therefore, is a distinctive prerogative of the State, to be exercised in the service and in the satisfaction of the duty of the State, and rests primarily on the moral rightfulness of the punishment inflicted. Penal discipline undoubtedly is expedient, both for the community and for the individual punished. But the jurisdiction is exercised, not because it is expedient, but because it is right.¹ Another step remains to be taken, which is this: Each *de facto* government is to be viewed as representing, for penal purposes, the State by which it is sanctioned. The State says, "Crime as crime is to be punished, and I constitute each *de facto* government as my agent for this purpose." We have an interesting illustration of this tacit authorization in the recognition given by the Supreme Court of the United States, at the close of the late civil war, to the penal sentences of the Confederate courts. These courts were *de jure* nullities. Yet, nullities as they were, through their sentences thousands of convicted offenders were, when the war closed, confined in Southern prisons. To release them, writs of *habeas corpus* were taken out, and argued before the judges of the Supreme Court of the United States. But the reply to these appli-

That punishment is an act of retributive justice, to which reformation and example are incidental.

¹ In this result, though by different processes of reasoning, concur Hooker, 17. *Infra*, § 13, note. Ecc. Pol. book i., and Hegel, as ex-

cations was substantially that given above: Society, in its large sense, is invested with the right to punish crimes; and each *de facto* government is the agent of society for this purpose. The penal sentences of such *de facto* governments, therefore, will not be disturbed.

§ 11. Relieving ourselves, therefore, of all *jure divino* questions as to the right of particular governments to execute penal justice, we reduce what is called the absolute theory of penal jurisprudence to the following propositions: (1) Crime as such must be punished by society; (2) Each *de facto* government must act as the agent of society for this purpose. Consequently each *de facto* government is bound to punish crime as crime. And every judge exercising penal jurisdiction is bound to do so as the vindicator of Right as such. Crime is primarily to be punished because it is a violation of moral law, and society is to punish crime because society is the divinely appointed vindicator of moral law.

§ 12. But is the absolute theory, as thus delineated, one which is to be nakedly administered? Are the objects which have heretofore been specified as *relative* to be entirely left out of sight? In reply to this, the following answer is to be made:

While punishment is based on justice, it must be proportioned to guilt. If, however, we resolve guilt into its component elements, we find among them some of these very qualities to which the relative theories are distinctively applied. Thus, for instance, all of these theories rest more or less on the danger of crime to society; and punishment, in accordance with these theories, is to be graduated by the extent of this danger. But if, while accepting the absolute theory, we analyze guilt, we find that it becomes subjectively more or less heinous in proportion to the danger to society with which it is fraught. The guilt of drunkenness on the part of a man locked up in his own chamber is comparatively slight. If his drunkenness is concealed, while he is his own enemy, and the enemy, it may be, of his immediate family, he is the enemy, perhaps, of few others. But drunkenness on the part of the engineer of a steamer is a far more flagrant, because it is a more dangerous crime. It displays, when deliberate, a heart not only callous to social duty, but recklessly depraved. So, to adopt another illustration, setting fire to a building at night, when its inmates are unconscious in their beds, is an act exhibiting a guilt far more heinous

and depraved than setting fire to the same building in the day, when, if within doors, they will soon discover the fire, and if they do not extinguish it can at least escape. Graduating the punishment, therefore, by the guilt involved, a far higher penalty will be imposed in the first case than in the second. And so, with regard to the grade of homicide, as settled by our American law. Homicides by poisoning, and lying in wait, are engendered by a deeper guilt, while productive of greater danger, than most other classes of homicide; and hence they are visited with peculiarly condign punishment. In fact, with intelligent agents, the guilt of an act is proportioned, as a general rule, to its dangerousness, since the audacity and profligacy of the offender are measured by the extent of the mischief he attempts. There is no necessity, therefore, for resorting to the ground of expediency, as a means of grading punishability, when we can reach the same result by adopting the right principle of the adaptation of punishment to guilt.¹

§ 13. And so with regard to the *reform* theory. The old convict, who has been twice or thrice previously sentenced, needs severer treatment, and is sentenced to longer imprisonment, with the least ameliorations; and this because his guilt is of the deeper dye. On the other hand, the boy who is tried for his first offence is committed to a house of refuge, surrounded with benignant influences which may tend to his reform. In each case the objects aimed at by the reformatory theory are effected; and yet in each case the punishment is graduated simply by the offender's guilt. The old convict is sentenced to a long imprisonment at hard labor, because his guilt is great; but the very greatness of this guilt invokes the severity of sentence that would be produced by a just construction of the reformatory theory, when it was found that all milder measures failed. The youthful culprit is sentenced to a more lenient punishment, under more generous influences, because his grade of guilt is light, and the very lightness of this grade calls for that mildness of sentence which the reformatory system in such case recommends.²

And so the
reforma-
tion of the
offender.

¹ On the question of the gradation of iii. 874, 900. In our own literature punishment, see 5 Cr. L. Mag. 16; 24 the ablest exposition of this view will Am. L. Rev. 954; 16 Law Mag. & be found in President Woolsey's Polit- Rev. (4th ser.) 99; 18 Law Mag. & Rev. ical Science, §§ 100 *et seq.* It is also (4th ser.) 169. vindicated by Lord Justice Fry, in the

² See vindications of absolute theory article above quoted in the Nineteenth in Hartenstein, Grundbegriffe d. eth. Century, reprinted in the Crim. Law Wiss. 260-274; Rothe, Christ. Ethik, Mag. (Jan. 1884) 16.

According to Kant (see Berner, ed. of 1877, § 18), judicial punishment cannot be employed as a means to obtain a collateral good, but must always be imposed on and made commensurate to a violation of law. A man, so he argues, is not to be treated as a thing, to be sacrificed to the policy of the State; from this he is protected by his inherent personality. He must be justly convicted of a crime before the State can punish him for the public benefit. Penal law is a categorical imperative. Punishment is inflicted, not because it is useful, but because it is demanded by reason. But he insists that social contract is the basis of punishment; and he forcibly illustrates this by saying that even if society, by the consent of all its members, should be on the point of dissolution, a murderer, sentenced to death, should first be executed, and that this would be right. As a rule, he recommends retaliation; the like is to be punished by the like. This, however, is not to be literally carried out, as in the Mosaic system, an eye for an eye, a tooth for a tooth. The principle of equality is to be substantially, not formally, applied. It has, however, been objected to Kant's theory that it is inconsistent with itself. In his view law is the emanation of the united will of the people, following in this the social contract theory of Rousseau. The security of individuals is, by this view, the object of the State. It is difficult to reconcile with this conception, that the State inflicts punishment, not primarily for the sake of the individual, but primarily for the sake of justice. But however inconsistent in this respect Kant may be, his example shows that it is possible for the absolute theory of punishment to be held by an adherent of the social contract hypothesis.

An analysis of Hegel's philosophy

of punishability is found in the 9th edition of Berner's *Lehrbuch des Deutschen Strafrechtes*, Leipsic, 1877, a work which is one of the most popular and the most authoritative of recent German treatises on criminal law, and which adopts as its basis the Hegelian philosophy in this relation.

Punishment, according to Hegel (so writes Berner, § 21), is to be regarded as an agency to annihilate wrong in its effort to annihilate right. It is, therefore, the negation of a negation. This is tantamount to saying that punishment is retribution (*Vergeltung*).

But the punitive negation must be so applied as to do no more than cancel the prior criminal negation. The punishment must find its measure in the crime. As the right that has been impaired has a specific scope and quality, so the punishment, to be a correspondent negation, must on its side have its quantitative and qualitative limitations.

The identity of crime and punishment, however, which is thus required, does not consist in a specific similarity. It is not requisite that the crime should be retaliated on the criminal. All that is asked is that the evil of the punishment should be proportioned in value (*nach dem Werthe*) to the evil of the crime.

It is not the mission of philosophy, so continues Hegel, to establish a valuation of punishment so as to apportion it duly to each particular crime. Philosophy deals with the principle, and leaves the application to the practical reason. All that philosophy can do is to assign a qualitative and quantitative certainty to an impaired right, to which its punishment is to correspond. Hegel, *Rechtsphilosophie*, 390 *et seq.*

Hegel's views may in this respect be criticized as speculative, but it must be remembered that they have been ac-

cepted and elaborated as the basis of penal law by some of the most practical of contemporary jurists. Bismarck is no idealist, yet we find Bismarck, in a speech in the Prussian Herrenhaus, in 1872, adopting the Hegelian theory of punishment, and illustrating it by the famous maxim which Meyer has taken as the motto of his late valuable treatise on criminal law: "Laws are like medicines; they are usually nothing more than the healing of one disease by another disease less, and more transient, than the first." Certainly Hegelianism, in adopting and sustaining philosophically the theory of a just retribution as the sole primary basis of punishment, exhibits a healthy contrast to the sentimentalism of humanitarian philosophers who ignore the moral and retributive element in punishment, making its primary object to be the reform of the alleged criminal, and example to the community. To such theorists the final answer is, that until a man is proved to be guilty of a crime we have no right either forcibly to reform him or to punish him as an example to others; and that neither reformation nor example will be promoted by assigning to him, after he is convicted, a punishment disproportioned to his offence. At the same time, in the application of such punishment, reform and example are to be kept incidentally in view. Conviction and sentence are to be according to justice; but prison discipline is to be so applied as to make the punishment conduce as far as possible to the moral education of both criminal and community.

The general question of the limits of punishment will be found discussed by Plato, in *Gorgias* (ed. Bipont. 4, pp. 49, 57); and in *de legg.* (lib. 9, 10, 11); and by Aristotle, *Ethics*, book 5, chap. 8.

Bentham, in his treatise on punishments, advocates the absolute theory, subject to the following qualifications:

(1) The evil of the punishment must exceed the advantage of the offence:

(2) The severity must be increased as the certainty is diminished:

(3) The greater the offence, the more severe may be the punishment adopted for the chance of its prevention:

(4) Punishments may be varied with the sensibility of the offender:

(5) "Real" punishments should be "apparent" for the sake of example:

(6) The power of further injuring should be taken away or reduced:

(7) Recompense to the injured party should be kept in view. See summary in Montague on Punishment, i. 211 *et seq.*

According to President Woolsey, the retribution theory which he vindicates "assumes that moral evil has been committed by disobedience to rightful commands; that according to a propriety which commends itself to our moral nature it is fit and right that evil, physical or mental, suffering, or shame should be incurred by the wrong-doer, and that in all forms of government over moral beings there ought to be a power to decide how much evil ought to follow special kinds and instances of transgression.

. . . Its province (that of the State) is confined to such actions as do harm to the State, or to interests which the State exists to protect. . . . Its object in punishing is not, in the first instance, to punish for the sake of punishing, because so much wrong demands so much physical suffering; but to punish—punishment being in the circumstances otherwise right—not directly for the ends of God's moral government, but for ends lying within and far within that sphere." Woolsey's *Political Science*, § 107.

Sir J. Stephen speaks thus to the sanction of that part of morality which same effect: is also sanctioned by the criminal law.

“The infliction of punishment by The criminal law thus proceeds upon law gives definite expression and a the principle that it is morally right solemn ratification and justification of to hate criminals, and it confirms and the hatred which is excited by the justifies that sentiment by inflicting commission of the offence, and which upon criminals punishments which constitutes the moral or popular as express it.” 2 Hist. Crim. Law, 81. distinguished from the conscientious

CHAPTER II.

DEFINITION AND ANALYSIS OF CRIME.

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| Crime is an act made punishable by law, § 14. | An act, when prohibited by statute, is indictable, though indictment is not given by statute, § 24. |
| Immorality and indictability not convertible, § 14 a. | Statutory provisions to be strictly followed, § 25. |
| Distinction between public and private remedies, § 15. | New statutory penalties are cumulative with common law, § 26. |
| English common law in force in the United States, § 15 a. | An offence may be divisible (1) by discharging aggravating incidents, (2) by diversity as to time, (3) by diversity as to place, (4) by diversity as to objects, (5) by diversity as to aspects, and (6) by diversity as to actors, § 27. |
| Want of English common law authorities does not preclude offence from being indictable at common law in the United States, § 16. | Merger is absorption of lesser offence in greater, § 27 a. |
| Disturbances of the public peace indictable at common law, § 17. | Penal statutes to be construed favorably to accused, § 28. |
| So of malicious mischief, § 18. | Retrospective statute inoperative, § 29. |
| So of public scandal and indecency, § 19. | And so as to <i>ex post facto</i> acts imposing severer penalty, § 30. |
| Offences exclusively religious not indictable, § 20. | But procedure and rules of evidence may be retrospectively changed, § 31. |
| Offences at common law are treasons, felonies, and misdemeanors, § 21. | State may relieve from punishability by limitation or pardon, § 31 a. |
| Felonies are crimes subject to forfeiture, § 22. | Civil and criminal remedies may be concurrent, § 31 b. |
| "Infamy" is that which affixes a moral taint, § 22 a. | |
| Misdemeanors include offences lower than felonies, § 23. | |
| Police offences to be distinguished from criminal, § 23 a. | |

§ 14. AN offence which may be the subject of criminal procedure has been defined to be an act committed or omitted in violation of public law, either forbidding or

Crime is an act made punishable by law.

commanding it.¹ This definition, however, though adequate in those States in which there is no common law, fails in States in which there is recognized, as will presently be seen, a common law, which

¹ "A crime or misdemeanor (delict) is an act committed or omitted in violation of a public law, either forbidding or commanding it." Stephen's Com. iv. 3, note (d), adopted in Nasmith's Inst. 63. See Amos on Jurisprudence (London, 1872), 286; 1 Stephen's Hist. Crim. Law, 3. The latter's definition is, however, too comprehensive.

"A criminal act is one which in some way or other subjects the actor to punishment." Broom's Phil. of Law, § 163. To this is added (§ 164) that a "crime is constituted by an overt act done with a guilty intent, or includes a guilty mind, knowledge, or possession, affecting or prejudicing the public." This is defective in not including offences which are criminal from want of intent, *i. e.*, from negligent omission to perform a duty, or in violation of the positive prohibition of a police statute. See, also, Hälschner, System, i. p. 19; Whart. Com. Am. Law, Chaps. I., II., and III.

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The word crime "comprehends such offences as are supposed to be directed against the essential welfare of the State, or the great fundamental basis of society, as regards the protection of person, property, and reputation." 16 Law Mag. & Rev. (4th ser.) 65. See, also, 28 Am. L. Rev. 368.

"A crime may be provisionally defined to be 'an act which the State absolutely prohibits, or a forbearance from an act which the State absolutely commands to be done, the State making use of such a kind and measure of punishment as may seem needed to render such prohibition or command

effectual.'" Amos on Jurisprudence (London, 1872), 286.

Sir J. F. Stephen's definition is as follows: "The criminal law is that part of the law which relates to the definition and punishment of acts or omissions which are punished as being (1) attacks upon public order, internal or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals; or (5) attacks upon the property of individuals or rights connected with, and similar to, rights of property." 1 Hist. Crim. Law, 3. This, however, is too comprehensive. The last head, for instance, would include trespasses as well as larcenies.

"As law is the necessary form in which right is embodied, crime, not indeed in its essence, but in its form, presupposes law, and must, therefore, be called an unlawful act." Hälschner, System, i. p. 19.

Mr. Livingston does not attempt a definition. "All contraventions of penal law," he tells us, "are denominated by the general term offences. Some division was necessary to distinguish between those of a greater and others of a less degree of guilt. No scale could be found for this measure so proper as the injury done to society by any given act." That "offences," however, are not convertible with "injuries done to society" is plain, since there are many "injuries" done to society which are not "offences," so far, at least, as to be subject to indictment. I have discussed this subject in greater detail in my Commentaries on American Law, Chapters I., II., and III.

determines, from the reason of the thing, that a particular act is an indictable offence. In such States the definition before us is a *petitio principii*, it being equivalent to saying that an act is a crime because it is forbidden by law, and that it is forbidden by law because it is a crime. When we seek, however, for a test to determine, in States where the common law obtains, whether a particular offence, as to which there is no statute, or no prior ruling specifically applicable, is indictable, then we must go further than the definition above given, and hold that at common law a wrong which public policy requires to be prosecuted by the State is an indictable offence.¹ The wrong, however, must be one which violates the general sanctions of the law, though it is not necessary that it should be prohibited specifically by prior statute or prior judicial decision.²

§ 14 a. It has been often said that at common law indictability and immorality are convertible terms.³ So far, however, from this being the case, there are indictable acts which are not immoral, and immoral acts which are not indictable. Assaults of all kinds are indictable; but all assaults are not necessarily immoral. An assault in self-defence is the exercise of a right; and waiving this, as presenting a question of contingent indictability, there are many cases in which a man may be convicted of an assault which is in itself not immoral, as when he acts under a mistake of fact or of law. Honest belief, also, as we see elsewhere,⁴ that an action is right, while it purges the action from immorality, does not relieve it from indictability. The morality of an act depends upon its conscientiousness; and unless we recognized the rights of the individual conscience in this respect, even as against the opinion of the majority, no ethical system could be constructed. On the other hand, there are numberless immoralities which the State does not and cannot undertake to punish.⁵ We must, therefore, reject immorality as the condition of indictability, and fall back upon the public sense of right and public

¹ See *Com. v. Chapman*, 13 Metc. 160; 3 Steph. Hist. Crim. Law, 359; 68, 1847; *Smith v. People*, 25 Ill. 17, Whart. Com. Am. Law, § 30. *Infra*, 1860; *Com. v. McHale*, 97 Pa. 397, § 29. 1881.

³ See Lieber on Penal Law, 2 Lieber's Misc. Works, 471 *et seq.*

² Illegal acts may be declared misdemeanors at common law, without precedent. *Millar v. Taylor*, 4 Burr.

⁴ *Infra*, § 88.

⁵ See remarks of Bramwell, J., in 2312, 1769; *Jefferys v. Borse*, 4 H. L. C. 986, 1854; Steph. Cr. Dig. art. 2 Steph. Hist. Crim. Law, 75 *et seq.*

policy as already stated.¹ If we are required to supply a further test, we might say that public policy demands the indictability of all immoral acts of which punishment by law is the proper retribution. From this class are to be excluded immoralities which are not of enough consequence to be prosecuted, and immoralities which the public welfare requires should remain unprosecuted.

§ 15. The common law may be defined to be right reason, applicable to present issues, in analogy with prior rulings of the courts and opinions of authoritative jurists. In accordance with this view, and adopting the principle that crimes at common law, apart from statute, are offences which public policy manifestly requires to be prosecuted by the State, we may be able to give logical expression to the distinction between wrongs which can be redressed only by private suit, and wrongs the perpetrators of which may be proceeded against by public prosecution. That such a distinction exists in practice we have numerous instances. I may have a right to have the air about me pure; but this does not make it an indictable offence for a neighbor to invade this right by opening on his land a drain whose odors reach to no one but myself. I may exclude trespassers from my grounds; I may sue them for damages caused by their trespass; but I cannot, for the mere trespass, if there be no malicious hurt inflicted, prosecute them criminally. On the other hand, if the drain is such as to affect the community injuriously, or the trespass be conducted in such a way as to threaten the public peace, an indictment lies. The reason for this, if the above definition be correct, is that public policy in the first class of cases does not require the State to intervene, while in the second class of cases it does so require. In other words, in all matters in which the peace, order, or health of the community is not concerned, a sound social economy requires that men should settle their differences by themselves, either by compromise or private suit, just as a sound social economy requires that they should conduct their own business and regulate their own families, provided that in so doing they do not threaten public peace, or disturb public comfort, or create public scandal. As to acts, however, threatening public peace, or disturbing public comfort, or creating public scandal, it is the duty of the State to intervene. We have abundant illustrations of this dis-

¹ Meyer, § 4, while concurring in test incompatibility with the well-reasoning of the text, makes the being of the Commonwealth.

inction in other departments of social science; the principle being that it is not within the province of the State to enforce duties purely private. A board of health, for instance, may properly forbid unwholesome food to be sold in a market, but it cannot properly forbid an individual from eating food that will probably make him sick. Public scandalous drunkenness, to take another illustration, is indictable at common law; but common drunkenness, which is not a public scandal, is not indictable. The same distinction applies to remedies. The State is only justified in intervening to protect interests that concern itself directly; and if wrongs be committed strictly private in their character, then these wrongs must be redressed by private suit. It may be said that a distinction of this kind, based on public policy, is one to be laid down, not by the courts, but by the legislature.¹ This is no doubt the case where there is a code which undertakes to cover the whole ground, so that no offence is indictable which is not made indictable by the code. It is otherwise, however, when offences are to be defined by the common law. In the latter case, there is a wide range of offences as to which the judges are obliged to apply the test of public policy. The banks of a canal, for instance, or the embankments of a railroad, are wantonly torn down by a marauder. The case is one of first impression in the courts, as no one has heretofore been prosecuted for doing this particular thing. Is the offence indictable as malicious mischief? It certainly would not be, where nobody but the owner is affected by the trespass, and where no specific malice to such owner is shown. Yet as it is, in consequence of the danger to the public if canals or railroads be subject to depredations of this kind—*i. e.*, on grounds of public policy—such an offence would be held indictable.² I may be standing by a river side, to take another illustration, and see a man drowning. I do not help him out, though I could readily do so; but as omissions to perform acts of charity cannot be made indictable without great disarrangement of industry, I am not indictable for this omission, immoral as it is. I am indictable, however, on the grounds of public policy, if, being charged, as a public officer, with the protection of persons bathing on the spot, or having undertaken specially to protect this particular person, I neglect to perform my duty.³ This, however,

¹ See *infra*, § 29.

² See *infra*, §§ 1065 *et seq.*

³ *Infra*, §§ 130, 133.

Several theories have been proposed in Germany as to the distinction between public and private wrongs. By Stahl a crime assails and defies the dominion and dignity of the State by

concerns the subject-matter of crime. So far as concerns the form, the distinction is that criminal wrongs are punishable by the State, while for civil wrongs redress is obtained at the suit of the party injured.¹ A wrong, however, may be in one aspect civil, in another criminal.²

positive assaults, which are by themselves under all circumstances (in *thesi*) a violation of law; while there is no such defiance in civil wrongs, since here we have exclusively to do with acts which are only unlawful (in *hypothesi*) under the given relations. On the other hand, Berner and Köstlin, representing the Hegelian School, include under crimes exclusively the conscious resistance of the general will by the individual will; under civil wrongs exclusively, acts whose perpetrators are unconscious of wrong. By Hälschner crimes consist of absolute wrongs, that is to say, wrongs as against the objective existing law; while civil wrongs are merely relative, that is to say, wrongs exclusively directed against the privileges of other persons. Geib, ii. 175. That there is any definable distinction is denied by Bekker, *Theorie*, s. 108; Geib, ii. 173; Merkel, *Abt. i.* p. 41; and Binding, *Normen*, s. 172 *et seq.* By the latter writer the view in the text is assailed elaborately.

Blackstone's distinction, that "civil injuries are private wrongs and concern individuals only, while crimes are public wrongs and affect the whole community," is objected to by Austin on the ground that many crimes are private wrongs, and many civil injuries affect the whole community. See *R. v. Trafford*, 1 B. & Ad. 874, 1831; *R. v. Paget*, 3 F. & F. 29, 1862; *Resp. v. Teischer*, 1 Dall. 335, 1788; *Dobbins's Distillery v. U. S.*, 96 U. S. 395, 1877.

Mr. Austin, in his own definition, begs the question. "The difference," he says, "between crimes and civil injuries is not to be sought for in a

supposed difference between their tendencies, but in the difference between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offence which is pursued at the discretion of the injured party or his representative is a civil injury. An offence which is pursued by the sovereign, or by the subordinates of the sovereign, or, as in England, in the name of the sovereign, is a crime." Austin's *Jur.* ed. 1863, ii. 72; ed. 1869, 1092, adopted in *Nasmyth's Inst.* 68. The defects of this distinction are pointed out in *Whart. Com. Am. Law*, §§ 56 *et seq.*

Sir H. Maine's explanation of the origin of the distinction leads to the definition in the text. A crime, he tells us, in the original conception of the term, was an act "involving such high issues that the State, instead of leaving its cognizance to the civil tribunal or the religious court, directed a special law or *privilegium* against the perpetrator." Maine's *Ancient Law*, 1870, 372.

¹ Mere indictability is not the test, since there are cases in which an indictment is prescribed merely as a civil remedy. *R. v. Paget*, 3 F. & F. 29, 1862; *Bancroft v. Mitchell*, L. R. 2 Q. B. 549, 1867. Similarly, a suit for a penalty, though civil in form, is really criminal in its nature; *Boyd v. U. S.*, 116 U. S. 616; s. c. 6 Sup. Ct. Rep. 524, 1886; *Lees v. U. S.*, 14 Sup. Ct. Rep. 163, 1893; provided the action prohibited be an offence either at common law or by statute. *City of Huron v. Carter*, (S. D.) 57 N. W. Rep. 947, 1894.

² *Infra*, § 31 b.

§ 15 a. The common law of England was adopted as a part of their own common law by such of the American colonies as were of English settlement, and is operative in the States embracing or peopled from such colonies.¹ And, as is elsewhere seen, even in States where the common law is by legislation declared not to be in force, it nevertheless remains in force for the purpose of interpreting legislative action.² We have a curious illustration of this in Texas, where it was at one time required that an offence should be "expressly defined" by statute. This was found to be impracticable; and now the common law is resorted to for a definition of statutory terms.³

English
common
law in force
in the
United
States.

¹ See cases cited *infra*, §§ 17 *et seq.*, and see *Com. v. Newell*, 7 Mass. 245, 1810; *State v. Danforth*, 8 Conn. 112, 1819; *State v. Briggs*, 1 Aikens, 226, 1826; *State v. Cawood*, 2 Stewart, 360, 1830; *Grisham v. State*, 2 Yerg. 589, 1831; *State v. Rollins*, 8 N. H. 550, 1837; *Loomis v. Edgerton*, 19 Wend. 419, 1838; *State v. Huntley*, 3 Ired. 418, 1843; *Com. v. Chapman*, 13 Metc. 68, 1847; *State v. Twogood*, 7 Iowa, 252, 1858; *Smith v. People*, 25 Ill. 17, 1860; *State v. Pulle*, 7 Minn. 164, 1866; *Ex parte Blanchard*, 9 Nev. 101, 1874; *Territory v. Ye Wan*, 2 Mont. 478, 1876. State, 107 Ind. 185, 1886; and so to a limited extent in other States. See *Estes v. Carter*, 10 Iowa, 400, 1860; *Ex parte Meyers*, 44 Mo. 279, 1869. As to Pennsylvania, see *infra*, § 26. In Louisiana the English common law has been established by statute. *State v. Davis*, 22 La. An. 77, 1870. The evolution of the common law in America is discussed in Whart. Com. Am. Law, §§ 24 *et seq.* How far the ecclesiastical or canon law of Christendom is here effective will be considered elsewhere. *Infra*, §§ 20, 1717, 1741. See *Grisham v. State*, 2 Yerg. 589, 1831.

It is now settled that the federal courts have no common law criminal jurisdiction. *In re Greene*, 52 Fed. Rep. 104, 1892; *U. S. v. Eaton*, 144 U. S. 677, 1892. See *infra*, § 253. The New York Penal Code of 1882 appears to abolish the common law (§ 2); but see § 675, which but for the insertion of the word wilfully would be a re-enactment of the common law.

In Ohio it has been held that the criminal side of the English common law is not in force. *Vanvalkenburg v. State*, 11 Ohio, 404, 1842; *Smith v. State*, 12 Ohio, 466, 1861. Such is the rule in Indiana, by statute; *Hackney v. State*, 8 Ind. 494, 1856; *Marvin v. State*, 19 Ind. 181, 1862; *Jones v. State*, 59 Ind. 229, 1877; *Stephens v.*

² Whart. Com. Am. Law, §§ 12, 201. See *infra*, §§ 29, 255. So, where an act is made unlawful and no proceeding is specified, it must be prosecuted according to the forms of the common law. *State v. Parker*, 91 N. C. 650, 1884.

³ *Ex parte Bergen*, 14 Tex. App. 52, 1883; *Prindle v. State*, 31 Tex. Cr. 551, 1893. In general, whenever an offence is not defined by the statute prohibiting it, its definition is to be sought at common law. *Wall v. State*, 23 Ind. 150, 1864; *U. S. v. King*, 84 Fed. Rep. 302, 1888. *In re Greene*, 52 Fed. Rep. 104, 1892; *State v. Williams*, 34 La. An. 87, 1883; *State v. Hagan*, (La.) 12 So. Rep. 929, 1893. See *infra*, § 579.

§ 16. Certain points of difference, however, between the penal policy of England¹ and that of the United States must be kept in mind in determining how far the want of common law authority in one country is to weigh upon the courts of the other.² There is a grade of offences, in the first place, comprehending adultery, fornication, and lewdness in general, together with those misdemeanors connected more particularly with the conduct of the rites and observances of religion, which in England is cognizable chiefly in the ecclesiastical courts, but which with us is in many States punished by indictment at common law. In England, in the second place, from the earliest period of judicial history, statutes were from time to time passed which defined the limits and determined the punishment of almost every offence, as it in its turn attracted legislative action. Thus, in the English books, few cases are found of malicious mischief at common law; penalties more summary than the common law afforded being provided for the protection of each species of property as it became the object of investment. No case, for instance, is to be found of an indictment at common law for malicious injury done to locks or other improvements on navigable rivers; because, as soon as locks were introduced into England, and canals built, such offences, by the statute of 1 Geo. II., st. 2, c. 19, were made felonious, and were subject to transportation.³ So, though elementary writers agree that the destruction of an infant *en ventre sa mere* is indictable at common law,⁴ no case is to be found in England where such is adjudged by the courts, the statute of 43 Geo. III. c. 58, making it a felony, being enacted about the time when the offence first required the action of the public authorities. The want of English precedents in such cases does not show that offences of such character were not cognizable at common law; it shows only that at an early period common law remedies gave way to statutes with provisions more specific and penalties more severe. Many offences, accordingly, which have been punished exclusively by statute in England, have been brought in this country within common law sanction, and have been considered misdemeanors. We cannot

¹ Black. Com. 65 w; 1 Hawk. P. C. c. 5, s. 1; 1 East P. C. c. 1, s. 1; 1 Russell, Crimes, 46.

² Grisham v. State, 2 Yerg. 589, 1831.

³ See *infra*, §§ 1066-7.

⁴ Bracton, l. 3, c. 21; 3 Coke's Inst. 50; 1 Hawk. P. C. 94; 1 Vesey, 98; 1 Russell, Crimes, 671. *Infra*, § 592.

infer the non-indictability of such offences at common law because they are indictable in England only under statutes which we have not re-enacted. The want of English common law authority in many cases of this class is attributable not to the non-indictability of the offences at common law,¹ but to the fact that statutes imposing severe penalties on the offence, and absorbing by their terms the common law, were passed before common law affirmations of the indictability of the offence were reported. As said by the Supreme Court of Vermont, in a case adopted afterward in New York, "the English statutes were so ancient, and the punishment so severe, that they were, of course, resorted to, and the common law thus lost sight of, though the statutes were intended as a mere increase of its penalties."²

§ 17. It has been held by us, therefore, in application of the reasoning just stated, that whatever, in the first place, is provocative of public disturbance;³ or, in the second place, consists of malicious injury to another's property in such a way as to provoke violent retaliation;⁴ or, in the third place, constitutes a public scandal or indecency,⁵ is indictable in this country, although in England the offence is punishable now only by statute, or in the ecclesiastical courts.

(1) Acts, therefore, provocative of public disturbance are indictable, though there be no English precedent for the indictment.

¹ There is no public wrong that is felony; *Com. v. Randolph*, 146 Pa. not the subject of criminal action at 83, 1892; *State v. Bowers*, 35 S. C. common law; *e. g.*, it has been held 262, 1892; even though the solicitation is ineffectual and the crime is indictable unlawfully and injuriously to carry a child infected with the smallpox along the public streets; *R. v. Vantandillo*, 4 M. & S. 73, 1815; *R. v. Burnett*, 4 M. & S. 272, 1815; to show a monster for money; *Herring* 1867.

v. Walround, 2 Cha. Ca. 110, 1683; to put combustible materials on board a ship without giving notice of the contents; 1 Russell, Crimes, 441; *William v. East India Co.*, 3 East, 192, 201, 1802; to overwork children in a factory; 2 Twiss's Life of Eldon, 36; to change contents of samples, so as to make a cargo appear of better quality than it is; *R. v. Vreones*, 1 Q. B. 360; *s. c.* 17 Cox C. C. 267, 1891; and to solicit another to commit a

² *State v. Simpson*, 2 Hawks, 460, 1823; *State v. Briggs*, 1 Aikens, 226, 1826; *State v. Cawood*, 2 Stewart, 360, 1830; *Loomis v. Edgerton*, 19 Wend. 419, 1838. See opinion of Shaw, C. J., in *Com. v. Chapman*, 13 Metc. 68, 1847.

³ See §§ 1553-1557.

⁴ See, on this point, 7 Law Rep. N. S. 88, 89, and *infra*, § 1066.

⁵ See *infra*, §§ 1410 *et seq.*, 1432, 1446, 1468.

Hence it has been held indictable to drive a carriage through a crowded street in such a way as to endanger the lives of the passers-by;¹ to disturb a congregation when at religious worship;² to go about armed with dangerous and unusual weapons, to the terror of citizens;³ to raise a liberty-pole in the year 1794, as a notorious and riotous expression of ill-will to the government;⁴ to tear down forcibly and contemptuously an advertisement, set up by the commissioners, of a sale of land for county taxes;⁵ to agree to fight, though no fight takes place;⁶ to break into a house in the day or night time and disturb its inhabitants;⁷ to violently disturb a town meeting, though the parties engaged were not sufficient in number to amount to riot;⁸ to attempt to kidnap another;⁹ and, in short, to do any act which may create a public disturbance, provided that such be the natural consequence of the act.

§ 18. (2) It has also been generally held in this country that acts of malicious mischief, when producing a wanton injury to another's property, so as to provoke violent retaliation, are indictable. Thus it has been held indictable to maliciously destroy a horse,¹⁰ a cow,¹¹ a steer,¹² or other beast, which may be the property of another;¹³ to be guilty of wanton

¹ U. S. v. Hart, 1 Peters C. C. 390, 1817. See *infra*, §§ 1536 *et seq.*

² State v. Jasper, 4 Dev. 823, 1833. *Infra*, §§ 20, 1566 *a.*

³ State v. Huntley, 3 Ired. 418, 1843. See, however, Simpson v. State, 5 Yerg. 356, 1833, Peck, J., dissenting.

⁴ Penns. v. Morrison, Addis. 274, 1795. See Adams's Gallatin, 123 *et seq.* But see, also, Allegheny v. Zimmerman, 95 Pa. 287, 1880, where the court appears to ignore the case in Addison.

⁵ Penns. v. Gillespie, Addis. 267, 1795.

⁶ State v. Hitchens, 2 Harring. 527, 1832. *Infra*, § 1768.

⁷ Com. v. Taylor, 5 Binney, 277, 1812; Hackett v. Com., 15 Pa. 95, 1850.

⁸ Com. v. Hoxey, 16 Mass. 385, 1820. *Infra*, § 1556.

⁹ *Infra*, § 590. State v. Rollins, 8 N. H. 550, 1837.

¹⁰ *Infra*, §§ 1066 *et seq.* Resp. v. Teischer, 1 Dallas, 335, 1788; State v. Council, 1 Overt. 305, 1808; though this case has since been denied; Shell v. State, 6 Humph. 283, 1845; Taylor v. State, 6 Humph. 285, 1845.

¹¹ Com. v. Leach, 1 Mass. 50, 1804; People v. Smith, 5 Cowen, 258, 1825.

¹² State v. Scott, 2 Dev. & Bat. 35, 1836; Whart. Prec. 213.

¹³ The test of indictability is whether or not the offence tends to provoke a breach of the peace. Loomis v. Edgerton, 19 Wend. 419, 1838. See the various decisions in State v. Wheeler, 3 Vt. 344, 1830; Kilpatrick v. People, 5 Denio, 277, 1848; Illies v. Knight, 3 Tex. 312, 1849; Henderson's Case, 8 Gratt. 708, 1852. Destroying harness has been held to be malicious mischief. People v. Moody, 5 Park.

cruelty to animals in general, when the essential ingredient of malice toward the owner is present,¹ or the offence is a public scandal;² to cast the carcase of an animal in a well in daily use;³ to maliciously poison chickens, or maliciously break windows;⁴ to mischievously set fire to a number of barrels of tar;⁵ to girdle or otherwise maliciously injure trees kept either for use or ornament,⁶ to administer deleterious substances;⁷ to discharge a gun with the intention of annoying and injuring a sick person in the immediate vicinity;⁸ to break into a room with violence for the same purpose;⁹ to go armed upon the porch of another man's house and from thence shoot and kill a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of the females in the house;¹⁰ though it is not an indictable offence to remove a stone from the boundary line between the premises of A. and B. with the intent to injure B.;¹¹ nor to shave and crop the hair from a mare's tail in a stable;¹² nor to frequent a neighbor's house, and grossly abuse his family, if there be no assault.¹³

§ 19. (3) On the same reasoning it has been held to be indictable to do an act which is a great scandal or public insult to the

Crim. Rep. 568, 1864; but see *Shell v. State*, 6 Humph. 283, 1845.

¹ *State v. Briggs*, 1 Aikens, 226, 1826. See 7 Law Rep. N. S. 89, 90.

² *U. S. v. Logan*, 2 Cranch C. C. 259, 1821; *U. S. v. Jackson*, 4 Cranch C. C. 483, 1834.

³ *State v. Buckman*, 8 N. H. 203, 1836.

⁴ *Resp. v. Teischer*, 1 Dallas, 335, 1788. The better opinion now is that, to make such an offence indictable, it must be done either secretly and in the night-time; *Kilpatrick v. People*, 5 Denio, 277, 1848; or in such a way as to provoke a breach of peace; *State v. Phipps*, 10 Ired. 17, 1848.

⁵ *State v. Simpson*, 2 Hawks, 460, 1823.

⁶ *Com. v. Eckert*, 2 Browne, (Pa.) 249, 1812; *Loomis v. Edgerton*, 19 Wend. 419, 1838; *per contra*, *Brown's*

Case, 3 Greenleaf, 177, 1824; and see discussion, *infra*, §§ 1067 *et seq.*

⁷ *Infra*, § 610. *Com. v. Stratton*, 114 Mass. 303, 1873; *People v. Blake*, 1 Wheeler C. C. 490, 1823; see, however, at common law, *R. v. Hanson*, 2 C. & K. 912, 1849; s. c. 4 Cox C. C. 138; *R. v. Walkden*, 1 Cox C. C. 282, 1845; *R. v. Dilworth*, 2 M. & Rob. 531, 1843. *Infra*, § 610.

⁸ *Com. v. Wing*, 9 Pick. 1, 1829.

⁹ *Com. v. Taylor*, 5 Binney, 277, 1812.

¹⁰ *Henderson's Case*, 8 Gratt. 708, 1852.

¹¹ *State v. Burroughs*, 2 Halst. 426, 1802. Or to remove B's tree, see *Com. v. Powell*, 8 Leigh, 719, 1857.

¹² *State v. Smith*, 1 Cheves, (S. C.) 157, 1840; *contra*, *Boyd v. State*, 2 Humph. 39, 1840.

¹³ *Com. v. Edwards*, 1 Ashmead, 46, 1823.

community.¹ Under this head it has been held indictable to cast
 And so of a dead body into a river without the rites of Christian
 public sepulture;² to be guilty of eaves-dropping;³ to knowingly
 scandal sell noxious food;⁴ to sell a wife;⁵ to disinter a dead body
 and inde- without proper authority;⁶ to give more than a single
 cency. vote at an election;⁷ to be guilty of individual offensive drunken-
 ness,⁸ or notorious lewdness,⁹ though on this point the better rule
 is that, to make the offence indictable, it must be such as to shock and
 insult, not an individual, but the community;¹⁰ to indulge publicly
 in profane swearing,¹¹ or in loud and obscene language, so as to draw
 together a crowd in a thoroughfare,¹² though the offence be not laid
 as a nuisance;¹³ and, in fine, to commit any act which from its nature
 must scandalously affect the morals and health of the community.¹⁴

§ 20. It has sometimes been said that Christianity is part of the
 common law of the land,¹⁵ and from this it has been
 Offences argued that the State is in some way bound to punish by
 exclu- religious not
 sively re- indictment offences against Christianity. Christianity,
 indictable. undoubtedly, has affected the common law in the United

¹ See *infra* generally, §§ 1410 *et seq.*

⁷ *Com. v. Silsbee*, 9 Mass. 417, 1812.

² *Kanavan's Case*, 1 Greenleaf, 226, 1821. *Infra*, § 1432 *a.* But it is not a misdemeanor to burn a dead body, unless so done as to cause a public nuisance, or in order to prevent the coroner from holding an inquest. *R. v. Price*, 12 Q. B. D. 247; s. c. 15 Cox C. C. 389, 1884; *R. v. Stephenson*, 13 Q. B. D. 331; s. c. 15 Cox C. C. 679, 1884.

⁸ *Smith v. State*, 1 Humph. 396, 1839.

⁹ *State v. Moore*, 1 Swan, 136, 1851; *Brooks v. State*, 2 Yerg. 482, 1831; *State v. Rose*, 32 Mo. 560, 1862. *Infra*, § 1456.

³ *State v. Williams*, 2 Tenn. 108, 1808; *Com. v. Lovett*, 6 Penn. L. J. 226, 1831. See *infra*, § 1446.

¹⁰ *Infra*, § 1446. *State v. Waller*, 3 Murphey, 229, 1819.

⁴ *State v. Smith*, 3 Hawks, 378, 1824; *State v. Norton*, 2 Ired. 40, 1841.

¹¹ *Infra*, §§ 1442-4; *State v. Kirby*, 1 Murphey, 254, 1809; *State v. Ellar*, 1 Dev. 267, 1827; *State v. Graham*, 3 Sneed, 134, 1855; *State v. Pepper*, 68 N. C. 259, 1873. See *State v. Jones*, 9 Ind. 38, 1848.

⁵ Or a girl for prostitution; *R. v. Delaval*, 3 Burr. 1434, 1763.

¹² *Infra*, § 1432; *State v. Appling*, 25 Mo. 315, 1857.

⁶ *R. v. Lynn*, 2 T. R. 733; s. c. 1 Leach, 497, 1788; *R. v. Vaim*, 2 Den. C. C. 325; s. c. 8 Eng. L. & Eq. 596, 1851; *R. v. Sharpe*, 7 Cox C. C. 214; s. c. 40 Eng. L. & Eq. 581, 1857; *Com. v. Cooley*, 10 Pick. 37, 1830. Or

¹³ *Barker v. Com.*, 19 Pa. 412, 1852; *Bell v. State*, 1 Swan, 42, 1851.

to sell the body of a dead convict for dissection. *R. v. Cundick*, D. & R. N. P. C. 13, 1822. See *infra*, § 1432 *a.*

¹⁴ *Resp. v. Teischer*, 1 Dall. 335, 1788; *People v. Smith*, 5 Cow. 258, 1825. *E. g.*, the exhibition of an obscene picture. *Com. v. Sharpless*, 2 S. & R. 91, 1815.

¹⁵ *People v. Ruggles*, 8 Johns. 290, 1811; *Updegraph v. Com.*, 11 S. & R. 394, 1824; *State v. Chandler*, 2 Har-

States, in the following important particulars: (1) In most jurisdictions we have adopted the principles of the canon law in relation to matrimony and to succession. The rules which the English ecclesiastical courts imposed in this connection we have in a large measure accepted as binding us; and in several States we have recognized as indictable certain offences, such as adultery and fornication, which in England can only be prosecuted in the ecclesiastical courts.¹ (2) We have also, adopting the ethical rules of Christianity, as distinguished from those of heathendom, made indictable breaches of domestic duty which were not criminally punishable by the old Roman law. (3) Witnesses, unless they have conscientious scruples, or believe another form of oath more binding, are sworn as a rule on the Christian Bible. But beyond this we have not gone. We make blasphemy of Christianity indictable; but this is because such blasphemy is productive of a breach of the public peace, and not because it is an offence against God. We treat a disturbance of Christian worship as indictable when such disturbance amounts to a private assault or to public disorder;² but we give the same protection to non-Christian assemblies.³ And in no State does the government interfere to prosecute offences consisting of a denial of Christian dogma, or a rejection of Christian sanctions.⁴ Nor in any State is Christianity in such sense part of the common law that the State can determine what are the dogmas of Christianity. That which is part of the common law can be changed by statute; but as the dogmas of Christianity are beyond the reach of statute, we must hold that they are not part of the common law of the land.⁵

ring. 558, 1837; *Vidal v. Girard*, 2 How. Richards, 38 Me. 379, 1854; *Com. v. (U. S.)* 127, 198, 1844; *Pringle v. Nap- Jeandell*, 2 Grant, (Pa.) 506, 1859; anee, 14 Can. L. J. 219, 1878. But see *Lindenmuller v. People*, 33 Barb. (N. Bloom v. Richards, 2 Ohio, 387, 1853. Y.) 548, 1861; *Board of Education v.*

¹ *Grisham v. State*, 2 Yerg. 589, 1831. See *infra*, §§ 1717, 1741. *Minor*, 23 Ohio, 211, 1872; *State v. Pepper*, 68 N. C. 259, 1873. See *R.*

² *State v. Jasper*, 4 Dev. 323, 1833; *Holt v. State*, 1 Baxter, 192, 1873. See *infra*, § 1431, and cases there cited. *v. Carlile*, 3 B. & Ald. 161, 1819; *R. v. Waddington*, 1 B. & C. 26, 1822; *Story's Misc. Writings*, 451; 2 *Life of Story*, 431. *Infra*, § 1431.

³ See *infra*, § 1556.

⁴ *Chapman v. Gillett*, 2 Conn. 40, 1816; *People v. Porter*, 2 Park. Cr. Rep. 14, 1823; *Com. v. Dupuy*, Bright. N. P. 44, 1831; *Bloom v. Richards*, 2 Ohio, 387, 1853; *Donahoe v. Lim.* (6th ed.) 579. See, also, Art. XI. ⁵ *R. v. Foote*, 48 L. T. (N. S.) 733, 1883, cited *infra*, §§ 1605, 1627; 13 Alb. L. J. 366; 20 Alb. L. J. 265, 285; *Sedgwick, Stat. & Const. Law*, 14, and cases cited; *Cooley, Const.*

§ 21. Offences at common law are divided into three heads: treasons, felonies, and misdemeanors. In England, under the head of treason were embraced, first, under the name of high treason, the compassing of the king's death, the comforting of the king's enemies, the counterfeiting of the privy seal, the forging of the king's coin, and the slaying of the chancellor, or either of the king's justices; and secondly, under the name of petit treason, such offences as were imputable in private life to the same principle of treachery and disloyalty as led, in the affairs of State, to the compassing the sovereign's death; comprising the slaying, by a wife, of her lord and husband, and by an ecclesiastic of his ordinary. In this country, however, petit treason as a distinct class of offences is no longer recognized, the crimes composing it having sunk into a place among homicides; and high treason, under the constitutions both of the Federal union and of the several States, is limited to the levying war against the supreme authority, or adhering to its enemies, giving them aid and comfort.¹

§ 22. Felonies, in England, as distinguished from misdemeanors, comprised originally every species of crime which occasioned the forfeiture of lands and goods; but though this distinction, originally based on the supposed heinousness of the crime, is still nominally recognized, its continuance, while conducing to much technical difficulty, is productive of no good, and its abolition is only a question of time.² At

of the treaty with Tripoli of January 3, 1797; U. S. Treaties (ed. of 1873), p. 838; viii. U. S. Stat. at Large (Foreign Treaties, Peters' ed.), 155; vi. Marten's Rec. de Traités, 298.

In *State v. Brooksbank*, 6 Ired. 73, 1845, it was held that Sabbath-breaking is not an offence at common law. But this can only be true as to such "Sabbath-breaking" as does not amount to a nuisance. See *contra*, *State v. Parker*, 91 N. C. 650, 1884.

¹ *Infra*, §§ 1782 et seq.

² See Amos on Jurisprudence (London, 1872), 302; Steph. Crim. Law, 56, 57, 105-110; *Lyford v. Farrar*, 31 N. H. 314, 1855; *Shay v. People*, 22 N. Y. 317, 1860.

"There is no lawyer," says Mr. J. S. Mill, "who would undertake to tell what a felony is, otherwise than by enumerating the various kinds of offences which are so called."

In most, if not all, of the United States the word felony has, either by statute or judicial construction, acquired the meaning of a crime punishable by death or imprisonment in a State prison. *State v. Felch*, 58 N. H. 1, 1876; *State v. Waller*, 43 Ark. 381, 1884; *State v. Lehr*, 16 Mo. App. 491, 1885; *Rafferty v. State*, 91 Tenn. 655, 1891; *In re Stevens*, 52 Kans. 56, 1893, and cases cited; *People v. Hughes*, 137 N. Y. 29, 1893; *Benton v. Com.*, 89 Va. 570, 1893; *State v.*

common law, in addition to the crimes more strictly coming under the head of treason, the chief, if not the only felonies, were murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. By statutes, however, running from the earliest period, new felonies were, from time to time, created; till finally, not only almost every heinous offence against person or property was included within the class, but it was held, that whenever judgment of life or member was affixed by statute the offence to which it was attached became felonious by implication, though the word felony was not used in the statute. In this country, until recently, the common law classification obtained; the principal felonies being received as they originally existed, and their number increased as the exigencies of society prompted;¹ though in the federal courts non-capital offences have been held to be felonies only when made so by statute expressly or by implication.² In several of the States all offences subject to death or imprisonment are made felonies; all others are misdemeanors.³ In some States the distinction is abolished absolutely. In most of the others it exists only so far as to make it requisite, in indictments for felonies, to use the term "feloniously;"⁴ and to give certain privileges as to challenges, as to joinder of counts, and as to seclusion of jury. But it is impossible not to be amazed at a system which made perjury a misdemeanor, and larceny a felony; which, while it made it a felony to steal five shillings, made it only a misdemeanor to conspire to rob a bank.

§ 22 a. The question as to what are "infamous crimes" is now of interest principally because of the clause in the federal constitution which provides that all crimes not infamous may be prose-

Harr, (W. Va.) 17 S. E. Rep. 794, Errors and Appeals, that the term 1893. It is not the actual sentence, felony was not known to the laws of but the possible one, that determines Louisiana, was an unadvised *dictum*, the grade of the offence; *People v.* and not law. *State v. Rohfrischt*, 12 Hughes, *supra*; and accordingly the La. An. 382, 1857.

infliction of a permissible less punishment will not reduce the offence to a ² U. S. v. Coppersmith, 1 Cr. Law Mag. 741; s. c. 2 Flip. 546, 1880.

misdemeanor. *State v. Melton*, 117 ³ See *State v. Smith*, 82 Me. 369, Mo. 618, 1893. No crime is a felony 1851; *People v. Park*, 41 N.Y. 21, 1869; unless it was such at common law, or *Randall v. Com.*, 24 Gratt. 644, 1878; has been declared such by statute. *Weinzorpfli v. State*, 7 Blackf. 186, *State v. Murphy*, 17 R. I. 698, 1892. 1844; *Nichols v. State*, 35 Wis. 308, See U. S. v. Vigil, (N. Mex.) 34 Pac. 1874; *Ingram v. State*, 7 Mo. 298, 1842. Rep. 530, 1898. ⁴ See Whart. Cr. Pl. & Pr. § 260;

¹ In Louisiana it has been held that and see *Bruguier v. U. S.*, 1 Dak. 5, a prior ruling of the late Court of 1867.

cuted by information. At common law, "infamy" was held to attach to all crimes, a conviction of which impressed such a moral taint on the perpetrator as was supposed to require his incapacitation as a witness and the suppression of his political rights.¹ Infamy, in this sense, includes treason, felony, and the *crimen falsi*; and a conspiracy to commit an infamous offence partakes of the character of the offence at which it is aimed. The meaning of the term "infamous offences" under the federal constitution is discussed in another work.²

Misdemeanors comprise offences lower than felonies.

§ 23. Misdemeanors comprise at common law all offences, lower than felonies, which may be the subject of indictment. They are divided into two classes: first, such as are *mala in se*, or penal at common law; and secondly, such as are *mala prohibita*, or penal by statute.

Police offences to be distinguished from criminal.

§ 23 a. In all jurisprudences a distinction more or less marked has been made between police wrongs and criminal wrongs.³ The distinction is made to rest sometimes on the tribunal having jurisdiction of the wrong: wrongs peculiarly cognizable by police courts being called police wrongs; those peculiarly cognizable by criminal courts of record being called criminal wrongs. This line, however, is unsatisfactory, many prosecutions which are eminently of a police character involving large interests, and hence made subjects of prosecution in our highest courts. For similar reasons we must reject the distinction that *little* wrongs are police wrongs, and *great* wrongs are criminal wrongs; since there are many criminal wrongs (*e. g.*, small larcenies) which are little, and many police wrongs (*e. g.*, such as interfere with liberty of trade) which are great. Nor can we accept as entirely adequate the tests sometimes given, that police wrongs consist of threatened, and criminal wrongs of consummated injuries; or that police wrongs consist exclusively in disturbances of order, criminal wrongs in violations of justice. We may more properly hold, enlarging the last distinction, that by criminal wrongs the existence of the State is assailed; by police wrongs, only the administration of its economical structure: the first attack the funda-

¹ See Whart. Cr. Ev. § 363.

see *Oshkosh v. Schwartz*, 55 Wis. 483,

² Whart. Cr. Pl. & Pr. §§ 85 *et seq.* 1882. That a police procedure is no bar to a criminal prosecution for the same offence, see Whart. Cr. Pl. & Pr. See *U. S. v. Field*, 16 Fed. Rep. 778, 1883, with note.

³ As to the distinction in such cases, § 440.

mental institutes of society, the latter only its modes of operation : the first concern principle, the second concern procedure. It is true that the two classes melt undefinably into each other, as is the case with civil and criminal wrongs, and that an offence, which in one aspect is a police wrong, is a criminal wrong in another aspect.¹ But that there is a distinction in ethics there can be no question, the one case involving, the other not involving, a moral taint. Nor can we refuse to admit a distinction in law. Accessories in criminal offences, for instance, are involved in the guilt of principals ; not so accessories in police offences.² It is not indictable, for instance, to buy spirituous liquors illegally sold ;³ nor is it indictable to contract to sell such liquor in the gross to a person who is to sell it illegally at retail ;⁴ nor is it indictable to attempt such offences.⁵ Police offences, we may further notice, have, in common with offences of omission, this characteristic—that they are usually breaches of affirmative and not of negative commands. The police law says : “You must do a particular thing.” The offender, either designedly or negligently, omits to do this thing. A criminal offence, on the other hand, is a breach of negative command : “Thou shalt not steal.” Police offences, also, as we have just seen, are usually not against the material and moral element in the law, but against its formal structure. It becomes, therefore, in most police prosecutions, a matter immaterial whether evil consequences flow from the defendant’s disobedience, and whether, if they do, they are imputable to the defendant. It may be made a police offence, for instance, for a man to permit ice to accumulate before his front door on a city street. If so, it is of no consequence whether an injury occurred thereby to individuals traversing the street, or whether the offender was cognizant of the violation of law. The same remarks are applied by a recent leading German jurist⁶ to a series of acts made penal by the German Code, such as the possession of unstamped and unverified scales and measures ; and the storing of explosive compounds in places forbidden by law. Our own prosecutions of persons concerned in selling intoxicating liquors may be placed in the same category. We do not inquire whether any person was

¹ Whart. Cr. Pl. & Pr. §§ 306, 312, 440.

⁴ *Pulse v. State*, 5 Humph. 108, 1844.

² *Infra*, § 1529 ; *Com. v. Willard*, 22 Pick. 476, 1839. And so as to attempts, *infra*, § 177.

⁵ *Infra*, § 177. *Hill v. State*, 53 Ga. 125, 1874.

³ *Infra*, §§ 177, 1529.

⁶ Merkel, *Kriminalistische Abhandlungen*, i. p. 97.

injured by the sale or exposure of the liquor. We do not inquire whether the person charged knew that the liquor was intoxicating. These questions are irrelevant. Certain acts are dangerous to the community, and these acts are unconditionally and absolutely forbidden, as the best way of preventing their deleterious results. Hence, in such cases we have simply to determine whether the acts in question conflict with the letter of the law.¹ We must at the same time remember that there are other offences beside those exclusively of a police character which are punishable, irrespective of the criminal intention of the offender. It is within the power of the legislature to say of the particular acts that they are to be prohibited irrespective of the intention of the person by whom they are committed.²

§ 24. Misdemeanors which are *mala prohibita*, and which become penal by statute, may consist, not only of acts made specifically indictable, but of acts enjoined or forbidden by statute, though by such statute such omission or commission is not made the subject of indictment. If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding.³ Thus, wherever a duty is imposed on a public officer, the neglect to perform it is a public offence, and as such is indictable.⁴ And the imposition by

An act when prohibited by statute is indictable though indictment is not given by statute.

¹ See *Com. v. Wolf*, 3 S. & R. 47, *Lenoir*, 4 Hawks, 194, 1825; *State v. 1817*. Conscientious religious belief that another day is the Sabbath is no defence to an indictment for Sabbath-breaking. *Specht v. Com.*, 8 Barr, 312, 1848; *Scales v. State*, 47 Ark. 476, 1886; *Parker v. State*, 16 Lea, (Tenn.) 476, 1886; *Com. v. Starr*, 144 Mass. 359, 1887; *Leiberman v. State*, 26 Nebr. 464, 1889. See *infra*, § 1431; and also §§ 88, 89.

² See *infra*, § 88.

³ 2 Hawk. P. C. c. 25, s. 4; *R. v. Davis*, Sayers, 163, 1754; *R. v. Harris*, 4 T. R. 202, 1791; *R. v. Sainsbury*, 4 T. R. 451, 1791; *R. v. Gregory*, 2 N. & M. 478; s. c. 5 B. & Ad. 555, 1833; *R. v. Nott*, 2 C. B. 768, 1791; *State v. 1845*. For proceedings against a corporation see *infra*, § 91; *R. v. Great N. & E. Ry. Co.*, 9 Q. B. 315, 1846; *People v. Corp. of Albany*, 11 Wend. 539, 1834; *Whart. Cr. Pl. & Pr.* §§ 109, 110, 220 *et seq.*; 6 *Crim. Law Mag.* 317.

⁴ *Wilson v. Com.*, 10 S. & R. 373, 1824; *Gearhart v. Dixon*, 1 Barr, 224,

statute of a penalty (unless where it is imposed, as in tax and similar statutes, as a mere alternative) in itself implies a prohibition.¹ It is otherwise, however, when a civil action is made by statute the specific remedy.²

§ 25. Whenever a statute creates an offence, and expressly provides a punishment, the statutory provisions must be followed strictly and exactly, and only the statutory penalty can be imposed.³

Statutory provisions as to punishment to be strictly followed.

§ 26. Where a statute attaches a police penalty to that which was an offence at common law, and where there is nothing in the statute to show that the statutory remedy is to be exclusive, either the remedy by statute or that at common law can be pursued. And if the statute specify a mode of proceeding different from that by indictment, then, if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has the option of proceeding either by indictment at common law or by the mode pointed out by the statute.⁴ Thus, where the charter of a turnpike road provided a particular penalty for not keeping the road in repair, negligence in this respect followed by injury was held indictable at common law.⁵ But where the statute prescribes

New statutory penalties are cumulative with common law.

¹ *Bensley v. Bignold*, 5 B. & Ald. Mo. 631, 1880. See Whart. Cr. Pl. & 335, 1822. But if no penalty is attached to a forbidden act, it cannot be punished as a misdemeanor. *State v. Gaunt*, 13 Oreg. 115, 1885.

Pr. §§ 232-281, and cases cited.

² *Turnpike Road v. People*, 15 Wend. 267, 1836.

³ See *U. S. v. Brown*, Deady, 566, 1869; *Keith v. Tuttle*, 28 Me. 326, 1848; *Woodward v. Squires*, 39 Iowa, 435, 1874.

⁴ *R. v. Wright*, 1 Burr. 543, 1758; *People v. Stevens*, 13 Wend. 341, 1835; *People v. Hislop*, 77 N. Y. 331, 1879. *Infra*, §§ 28, 30.

⁵ 2 Hale, 191; 1 Saund. 195, n. (4); *R. v. Dickenson*, 1 Saund. 135, 1679; *R. v. Wigg*, 2 Ld. Raym. 1163; s. c. 2 Salk. 460, 1706; *R. v. Robinson*, 2 Burr. 799, 1759; *R. v. Balme*, 2 Cowp. 648, 1777; *R. v. Carlile*, 3 B. & Ald. 161, 1819; *State v. Evans*, 7 Gill & J. 290, 1835; *Moore v. State*; 9 Yerg. 353, 1836; *contra*, *State v. Boogher*, 71

Where a statute prohibits an act which was before lawful, and enforces the prohibition with a penalty, and a succeeding statute (*R. v. Boyall*, 2 Burr. 832, 1759), or the same statute, in a subsequent substantive clause, describes a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law; or he may proceed in the manner pointed out by the statute, at his option; 2 Hale, 171; *R. v. Wright*, 1 Burr. 543, 1758; and see *R. v. Jones*, 2 Str. 1146, 1741; *R. v. Harris*, 4 T. R. 202, 1791; Whart. Cr. Pl. & Pr. §§ 232, 281; but if the

a penalty which in its terms is exclusive, then no subsequent penalty can be imposed.¹

§ 27. Questions frequently arise whether a particular offence is divisible; in other words, whether it is susceptible of being divided into two or more offences, each to be open to a separate prosecution.² The first line of cases of this class we have to notice is where one offence is an ingredient in another, an assault in assault and battery, manslaughter in murder, and larceny in burglary. Several of such concentric layers may successively exist. Thus we may take the case of an assault, enveloped by a battery, and this by manslaughter, and this by murder. Add the blow to the assault, and it becomes assault and battery. Add a killing to the assault and battery, and it becomes manslaughter. Add malice aforethought to manslaughter, and it becomes murder. Or, to take the converse, strip from murder the malice aforethought, and it becomes manslaughter. Strip from manslaughter the death of the party as-

manner of proceeding for the penalty the indictment and sentence must pur-
be contained in the same clause which sue the act. It has even been held,
prohibits the act, the mode of pro- that when an act of assembly gave a
ceeding given by the statute must be penalty to the party injured by the
pursued and no other; for the express extorsive and corrupt conduct of a
mention of any other mode of pro- magistrate, to be recovered by a civil
ceeding impliedly excludes that of suit, the offence ceased to be indictable
indictment. *R. v. Buck*, 2 Str. 679, at common law. *Com. v. Evans*, 13 S.
1726; *R. v. Robinson*, 2 Burr. 799, 1759. & R. 426, 1826. But the act in ques-

In Pennsylvania it is provided that tion seems to apply only when a spe-
“in all cases where a remedy is pro- cific mode of procedure is directed by
vided, or a duty enjoined, or anything statute; for when a new penalty is
directed to be done by any act or acts attached to a common law offence, the
of assembly of this commonwealth, indictment may still be at common
the directions of the said acts shall be law, though in case of conviction none
strictly pursued, and no penalty shall but the statutory punishment can be
be inflicted, or anything done agree- inflicted. *White v. Com.*, 6 Binn. 179,
ably to the provisions of the common 1813; *Com. v. Church*, 1 Barr, 105,
law, in such cases, further than shall 1845; *Com. v. Van Sickle*, Bright. N.
be necessary for carrying such act or P. 69, 1845. See Whart. Cr. Pl. & Pr.
acts into effect.” Act of 21st of March, § 232.

1806, sect. xiii.; 4 Smith's Laws, 332; ¹ Whart. Cr. Pl. & Pr. § 455 a.
Whart. Cr. Pl. & Pr. § 232. It has ² Theft committed in connection
been held by the courts, in conformity with a burglary may be treated as a
with this act, that wherever a mode of distinct crime, and a separate prosecu-
procedure is attached to a specific of- tion may be maintained for each of-
fence by any act of assembly, the fence. *Smith v. State*, 22 Tex. App.
common law remedy is abrogated, and 350, 1886.

saulted, and the offence becomes assault and battery. Negative the battery, and the case is one of assault. Now this rejecting of successive aggravations is a function open to juries in all cases where there is presented to them one offence in which another is inclosed. The jury may acquit of murder and convict of manslaughter; or, as the practice is, convict of manslaughter, which operates as an acquittal of murder.¹ Or the jury, on the same prosecution, may convict of the assault, and thereby acquit of the manslaughter and the murder. No question has ever been made as to this right on the part of the jury;² and it is settled by a great preponderance of authority that a conviction of the minor offence, on an indictment which would have sustained a conviction of the major, is an acquittal of the major.³ It has, however, been much contested whether the prosecution, by dropping the major offence, when such offence is a felony, can proceed for the minor offence. At common law it has frequently been held, that if on trial a misdemeanor (*e. g.*, assault) turns out to be a felony (*e. g.*, robbery), then, on the ground that the misdemeanor is extinguished by being merged in the felony, the defendant must be acquitted of the felony.⁴ A more rational doctrine, however, has been established by statutes, and in some jurisdictions by common law, to the effect that the prosecution may in such cases waive the felony, and prosecute only for the constituent misdemeanor, supposing the misdemeanor be proved.⁵

No matter how long a time an offence may take in its perpetration, it continues but one offence. An explosive package, for instance, may be sent from Maine to California, and may take weeks in the transit, but the transmission is a

(2) By diversity as to time.

¹ See Whart. Cr. Pl. & Pr. § 465.

rape, see *infra*, § 576. See *State v.*

² That under an indictment for murder there can be a conviction of manslaughter, see *infra*, § 542; that under burglary, including larceny, there can be a conviction of larceny, see *infra*, § 819; that under robbery there can be a conviction of larceny, see *infra*, § 858; that under felonious assault there can be a conviction of assault, see *infra*, §§ 576, 641 *a*; that under adultery there can be a conviction of fornication, see *infra*, § 1737. Whether there can be a conviction of a minor offence on an indictment for

Burk, 89 Mo. 635, 1886.

³ See Whart. Cr. Pl. & Pr. § 464.

⁴ Ibid. *Infra*, §§ 576, 641 *a*, 1344.

⁵ See Whart. Cr. Pl. & Pr. §§ 468–476. As to merger, see *infra*, § 27 *a*. But the averments of the indictment should include the less offence. *People v. Adams*, 52 Mich. 24, 1883; *State v. Yanta*, 71 Wis. 669, 1888. And if the offence charged is not a crime under the law, there can be no conviction of a less offence, though properly pleaded. *State v. Ryan*, 15 Oreg. 572, 1888.

single act. Difficult questions, indeed, may arise, to be hereafter noticed,¹ when gas or liquor is tapped by a pipe through which there is a continuous passage for days. But whatever may be the conclusion as to such cases, it is settled that nuisances, when distinct impulses are given at intermittent successive times, may be the object of successive prosecutions.² The distinction is this: when the impulse is single but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.³

An offence which is continued through a series of jurisdictions may be prosecuted in any one of them.⁴

(3) By diversity as to place.

(4) By diversity as to object.

An offence, also, is capable of division by being directed to a plurality of objects. It has been said, indeed, that to strike A. and B. at one blow is but one offence.⁵ But though this may be sustained in cases in which there was no intention to strike more than one blow, it is otherwise when two homicides, of distinct grades, are consummated by one act, or when there is an intention to kill two persons.⁶ And so the stealing simultaneously of the goods of two persons is divisible.⁷

An offence may have several aspects: *e. g.*, it may be a larceny, or it may be an official embezzlement. If an offence of this class can be described in its several phases in one indictment, then, as a rule, it is not divisible; if it cannot be so described, then it may be indicted in either aspect. There are cases, however, to be elsewhere discussed,⁸ in which the State, by selecting one of these aspects to prosecute, is precluded from afterward prosecuting the other.

An offence, in the last place, may have several actors, who may be jointly indicted, but as to whom verdict and judgment are to

¹ *Infra*, § 931. Whart. Cr. Pl. & Pr. § 474. 2 Cowp. 640; s. c. 1 Smith L. C. 711, (8th Eng. ed.) 1079, (8th Am. ed.) 1777;

² Whart. Cr. Pl. & Pr. § 475. Frietleborn v. Com., 113 Pa. 242; s. c.

³ The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. *R. v. Scott*, 4 B. & S. 368, 1863; *In re Hartley*, 31 L. J. M. C. 232, 1862; *Ex parte Beal*, L. R. 3 Q. B. 387, 1868. If the latter, there can be but one penalty. *Crepps v. Durden*,

57 Am. Rep. 464, 1886.

⁴ Whart. Cr. Pl. & Pr. § 473; and see, as to conflicting jurisdictions, *infra*, §§ 287-291.

⁵ Whart. Cr. Pl. & Pr. § 469.

⁶ Whart. Cr. Pl. & Pr. §§ 254, 468.

⁷ Whart. Cr. Pl. & Pr. §§ 252, 470.

⁸ Whart. Cr. Pl. & Pr. § 471.

be several.¹ Any one of these, as a rule, may be acquitted or convicted independently of the others; though, in cases of conspiracy and riot, one party alone cannot be convicted unless, in conspiracy, there is at least one co-conspirator to unite in constituting the offence, or, in riot, at least two co-rioters.

(6) By diversity of actors.

§ 27 a. Merger is said to exist when a lesser offence is absorbed in a greater, but in criminal practice the only cases in which such absorption is claimed to be operative is when a misdemeanor is an ingredient of a felony, in which case the older authorities maintain that the trial must be exclusively for the felony, and that the defendant cannot, under an indictment for felony, be convicted of misdemeanor.² The reason alleged for this is that in those days the incidents of a trial for felony were so different from those of a trial for misdemeanor that it was not right to invest the prosecution with the power of interchanging them at its caprice. A party charged with felony, for instance, was not entitled to counsel, and his right of challenge and his right to a copy of the indictment were restricted. If there were no merger—if, on the one side, the defendant, on proof of the felony on an indictment for misdemeanor, could be convicted of the misdemeanor charged; or if, on the other side, on disproof of the felony on an indictment for the felony he could be convicted of the constituent misdemeanor, this would do away with the distinction between felonies and misdemeanors, as above stated. This distinction, however, the courts could not do away with, and the only way to avoid this was to preserve the line of demarcation between felonies and misdemeanors intact. This they did by determining (1) that there could be no conviction of a misdemeanor on an indictment for a felony, for this would be to deprive the defendant of privileges to which he would be entitled if the indictment was for a misdemeanor; and (2) that if the offence charged was a misdemeanor, and the offence proved turned out to be a felony, then there must be an acquittal, which would not bar an indictment for felony, on the trial of which the defendant would be put under due restrictions as to counsel and other privileges. As will be hereafter seen,³ since the abolition of these distinctions between felony and misdemeanor, the doctrine of merger, above stated, has no reasonable basis on which to rest. The consequence is that

Merger is absorption of lesser in greater offence.

¹ Whart. Cr. Pl. & Pr. §§ 306–312.

² See Whart. Cr. Pl. & Pr. § 464.

³ Whart. Cr. Pl. & Pr. §§ 305–312.

Infra, §§ 395, 576, 641 a, 1343.

⁴ *Infra*, §§ 576, 641 a, 1343.

a defendant charged with an assault is no longer, as a rule, held to be entitled to an acquittal because the assault is part of a felony; while by statute, if not by judicial construction, there are now no jurisdictions in which a defendant, on an indictment for felony, cannot be acquitted of the felony, and convicted of the constituent misdemeanor, if duly pleaded. If, however, there is no constituent misdemeanor duly pleaded, then the defendant, if acquitted of the felony, cannot be convicted of a misdemeanor proved on the trial, but not averred in the indictment.

§ 28. The proposition that penal statutes are to be strictly construed is to be applied not to the merely *remedial*, but only to the restrictive and punitive clauses in penal statutes. A statute operates to enlarge or to restrain liberty: when the former, it is to be largely construed; when the latter, cautiously and strictly. This is a maxim of the Roman law, which, though foreign to the notion of the old English common law, that crime is to be avenged in kind and in full measure, was at an early period adopted by English jurists.¹ In construing such statutes, however, we are to look for their reasonable sense, and if this is clearly ascertained it must be applied, though a narrower sense is possible.² The courts are, on the one

¹ L. 42, D. de poen. (48. 19.) Interpretatione legum poenae molliendae sunt potius, quam asperandae. L. 155, § 2. D. de reg. iur. (50. 17.) In poenalibus causis benignius interpretandum est. cap. 49. de reg. iur. in VI. (5. 13.) In poenis benignior est interpretatio facienda. See, also, 1 Bl. Com. 86, 87; Bac. Abr. Stat. i. 7, 9; Andrews v. U. S., 2 Story, 202, 1842; U. S. v. Ragsdale, Hempst. 497, 1847; Com. v. Martin, 17 Mass. 359, 1821; State v. Stephenson, 2 Bailey, 334, 1831; Warner v. Com., 1 Barr. 154, 1845; Carpenter v. People, 8 Barb. 603, 1850; Randolph v. State, 9 Texas, 521, 1853; State v. Jaeger, 63 Mo. 403, 1876; Bucher v. Com., 103 Pa. 528, 1883.

Contra, under New York Penal Code of 1882; under the California Code; *Ex parte Gutierrez*, 45 Cal. 429, 1873; People v. Soto, 49 Cal. 67, 1874; and

in Kentucky; Com. v. Davis, 12 Bush, 240, 1876.

² U. S. v. Jones, 3 Wash. C. C. R. 209, 1813; U. S. v. Staats, 8 How. 41, 1850; Cummings v. Missouri, 4 Wall. 277, 1866; U. S. v. Hartwell, 6 Wall. 385, 1867; Brown v. Com., 8 Mass. 59, 1811; Ream v. Com., 3 S. & R. 207, 1817; Angel v. Com., 2 Va. Cas. 228, 1820; State v. Taylor, 2 McCord, 483, 1823; Com. v. Whitmarsh, 4 Pick. 233, 1826; People v. Mather, 4 Wend. 229, 1830; Thomas v. Com., 2 Leigh, 741, 1830; People v. Hennessey, 15 Wend. 147, 1836; Com. v. King, 1 Whart. 448, 1836; State v. Girkin, 1 Ired. 121, 1840; Stone v. State, Spencer, 401, 1845; Hodgman v. People, 4 Denio, 235, 1847; State v. Smith, 32 Me. 369, 1851; State v. Fearson, 2 Md. 310, 1852; State v. Keith, 63 N. C. 140, 1869. This qualification is

hand, to refuse to "extend the punishment to cases which are not clearly embraced" in the statutes; on the other hand, to refuse "by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope."¹ At the same time, in matters of reasonable doubt, this doubt is to tell in favor of liberty and life.²

§ 29. A law cannot impose a penalty on acts committed before its enactment.³ When a punishment is inflicted at common law, then the case is brought within the principle just stated by the assumption that the case obviously falls within a general category to which the law attaches indictability. It may be said, for instance, "All malicious mischief is indictable. This offence (although enumerated in no statute, and never in the concrete the subject of prior adjudication) is malicious mischief. Therefore this offence is indictable." Strike out "malicious mischief" and insert "nuisance," and the same conclusion is reached. It is no reply to this reasoning that we have, by this process, judge-made law, which is *ex post facto*.⁴ Supposing the

Retrospec-
tive stat-
utes inop-
erative.

common to all systems of jurisprudence. Thus the Roman law:

L. 6, § 1. D. de verb. signif. (50. 16.)
Verbum: ex legibus, sic accipiendum
est, tam ex legum sententia quam ex
verbis. L. 3. D. de L. Pomp. de
parric. (48. 9.) Sed sciendum est,
lege Pompeia de consobrina compre-
hendi, sed non etiam eos pariter com-
plecti, qui pari proprioque gradu sunt.
Sed et novercae et sponsae personae
omissae sunt, sententia tamen legis
continentur. L. 1. § 13. D. ad SC.
Turpill. (48. 16.) . . . verum hunc,
qui hoc ministerio usus est ad man-
dandam accusationem, non ex verbis,
sed ex sententia Senatus-consulti pu-
niri, Papinianus respondit. Quintilian.
Declam. 331.

¹ Sedgwick, Stat. Law, 282, ap-
proved in Atty.-Gen. v. Sillem, 2 H. &
C. 430, 531, 548, 1863.

² U. S. v. Sheldon, 2 Wheat. 119,
1817; U. S. v. Wiltberger, 5 Wheat.
76, 1820; U. S. v. Morris, 14 Pet. 464,
1840; U. S. v. Clayton, 2 Dill. 219,
1871; Hawkins v. People, 106 Ill. 628,

1883; Bradley v. People, 8 Colo. 599,
1885. The main point, as in all statu-
tory construction, is not to defeat the
intention of the legislature.

³ Quoties de delicto queareitur, pla-
cuit, non eam poenam subire quem
debere, quam conditio eius admittit eo
tempore, quo sententia de eo fertur,
sed eam, quam sustineret, si eo tem-
pore esset sententiam passus, quum
deliquisset. L. 7. C. de legg. (1. 14.)
L. 65. C. de decur. (10. 31.) Nov. 22.
c. 1. cap. 2. 13. X. de constitt. (1. 2.)
can. 3. Can. 32. qu. 4. This is pre-
scribed in the constitution of the U.
S., Art. I. § 9, cl. 3. Art. I. § 10, cl. 1.

But a test oath may under cer-
tain circumstances be constitutional.
Wooley v. Watkins, 2 Idaho, 555,
1889; Shepherd v. Grimmett, 2 Idaho,
1123, 1892. But see Cummings v.
Missouri, 4 Wall. 277, 1866; *Ex parte*
Garland, 4 Wall. 333, 1866; Wash-
ington v. State, 75 Ala. 582, 1884.

⁴ See *supra*, §§ 14, 15 *a*; *infra*, §
255.

minor premise be correct, the objection just stated could not prevail without being equally destructive to most prosecutions for offences prohibited by statute under a *nomen generalissimum*. In most of our statutes, for instance, neither murder, burglary, nor assault is so described as to leave nothing remaining to the court by way of explanation or application. At the same time, if the offence charged is not one which by ordinary and natural construction falls within a prohibited class, it is far better that the criminal should escape, than that by a forced and unnatural construction the offence should be held indictable. So far as concerns statutes, the rule is rigorously applied, and is fortified by the constitutional provision that no statute shall have an *ex post facto* operation. And this clause has been interpreted as meaning that no person is to be subjected by statute either to a penalty for an act which at the time of its commission was not the object of prosecution,¹ or to a penalty higher than was attached to such act at the time of its commission.²

§ 30. While acts imposing severer penalties cannot be applied retrospectively, doubtful questions as to what is a severer penalty are to be determined in favor of the accused;³ but, as a general rule, changes in a punishment subsequent to the commission of an

¹ *In re* Murphy, 1 Wool. 141, 1867.

² *State v.* Willis, 66 Mo. 131, 1877 ;

³ Or that in any way alters the position of the defendant to his disadvantage. Const. U. S. art. 1, §§ 9, 10; 2 Story, Const. § 1345; Cooley, Const. Lim. (6th ed.) 318 *et seq.*; *In re* Chin A On, 18 Fed. Rep. 506, 1883; *Com. v.* Lewis, 6 Binn. 266, 1814; *Com. v.* Reigart, 14 S. & R. 216, 1826; *Com. v.* Phillips, 11 Pick. 28, 1831; *Myers v. Com.*, 2 W. & S. 60, 1841; *Rand v. Com.*, 9 Gratt. 738, 1852; *State v.* Hays, 52 Mo. 578, 1873; *Garvey v. People*, 6 Colo. 559; s. c. 45 Am. Rep. 531, 1883. See *Ex parte* Garvey, 7 Colo. 384; s. c. 49 Am. Rep. 350, 1884. And see, as to procedure, *Perry v. Com.*, 3 Gratt. 632, 1846.

People v. McNulty, 93 Cal. 427.

A statute which negatives a matter of defence formerly admissible is *ex post facto*; *Lindzey v. State*, 65 Miss. 542, 1888; so is one that reduces the credit on fine and costs allowed a convict by his daily labor; *In re* Hunt, 28 Tex. App. 361, 1890; one divesting the jury of discretion; *Marion v. State*, 16 Nebr. 349, 1884; and one imposing a penalty for non-payment of taxes then due; *Gager v. Prout*, 48 Ohio, 89, 1891. It has been held that a law changing the place of imprisonment from a county to a State prison was not *ex post facto*; *In re* Tyson, 13 Colo. 482, 1889; but the

authority of the federal courts is against this ruling. *In re* Medley, 134 U. S. 160, 1890; *In re* Savage, 134 U. S. 176, 1890. See *People v.* Fletcher *v.* Peck, 6 Cranch, 167, 1810. *McNulty*, 93 Cal. 427, 1892.

This is adopted in 1 Kent Com. 409.

offence, not consisting in a lessening of the prior penalty or some severable portion thereof, have no application to such offence.¹ It is otherwise with statutes mitigating the prior penalty, which statutes are not unconstitutional in respect to acts committed prior to their passage.²

And so as to acts imposing severer penalty.

Hence, where the punishments are capable of actual measurement, a milder recent statute in force at the time of trial supersedes, so far as concerns the penalty, a prior statute under which the offence was committed.³ Should it happen that between a severer

¹ *Hartung v. People*, 22 N. Y. 95, 1860; *Shepherd v. People*, 25 N. Y. 406, 1862; *Kuckler v. People*, 5 Park. Cr. Rep. 212, 1862; *Ratzky v. People*, 29 N. Y. 124, 1864; *Wilson v. State*, 64 Ill. 542, 1872; *State v. Willis*, 66 Mo. 131, 1877; *Simco v. State*, 8 Tex. App. 406, 1880; *Lindzey v. State*, 65 Miss. 542, 1888; *People v. Dane*, (Mich.) 45 N. W. Rep. 655, 1890. See *Kring v. Missouri*, 107 U. S. 221, 1882.

² *Com. v. Wyman*, 12 Cush. 287, 1853; *State v. Kent*, 65 N. C. 311, 1871; *Perez v. State*, 8 Tex. App. 610, 1880; *Harr v. State*, 16 Nebr. 601, 1884; *McInturf v. State*, 20 Tex. App. 335, 1886; *Ex parte Pells*, 28 Fla. 67, 1891; *People v. Hays*, (N. Y.) 35 N. E. Rep. 951, 1894; aff. s. c. 24 N. Y. sup. 194, 1893; *Cooley*, Const. Lim. (6th ed.) 319 *et seq.*; *Whart. Com. Am. Law*, § 473.

³ *Com. v. Wyman*, 12 Cush. 287, 1853; *State v. Kent*, 65 N. C. 311, 1871; *Perez v. State*, 8 Tex. App. 610, 1880; *Harr v. State*, 16 Nebr. 601, 1884; *McInturf v. State*, 20 Tex. App. 335, 1886; *Ex parte Pells*, 28 Fla. 67, 1891; *People v. Hays*, (N. Y.) 35 N. E. Rep. 951, 1894; aff. s. c. 24 N. Y. sup. 194, 1893; *Cooley*, Const. Lim. (6th ed.) 319 *et seq.*; *Whart. Com. Am. Law*, § 473.

are clearly in mitigation. So is one that renders it impossible to convict the defendant of the degree of crime to which he was liable before its passage. *Ex parte Garvey*, 7 Colo. 384; s. c. 49 Am. Rep. 350, 1884. See 5 *Crim. Law Mag.* 325.

When an offence has ceased to be indictable because of a statute of limitations, indictability will not be revived by a repeal of the statute. *Garrison v. People*, 87 Ill. 96, 1877; *Moore v. State*, 43 N. J. L. 203, 1881; reversing s. c. 42 N. J. L. 208, 1880.

³ In *Veal v. State*, 8 Tex. App. 474, 1880, it was held that in such case the defendant might elect to be punished under the older statute. *State v. Cooler*, 30 S. C. 105, 1889.

It has been held that the defendant will be permitted to elect between the new and old penalty, especially when there is any doubt as to the question of mitigation. *Herber v. State*, 7 Tex. 69, 1851; *Clarke v. State*, 23 Miss. 261, 1852; *Veal v. State*, 8 Tex. App. 474, 1880; *McInturf v. State*, 20 Tex. App. 335, 1886.

After a law has been repealed, there can be no punishment under it. *Yeaton v. U. S.*, 5 Cranch, 281, 1809; *Whitehurst v. State*, 43 Ind. 473, 1873; *Smith v. State*, 45 Md. 49, 1876; *Com. v. Cain*, 14 Bush, 525, 1879; *Hirschburg v. People*, 6 Colo. 145, 1881; *Lindzey v. State*, 65 Miss. 542, 1888. It follows, therefore, that when an act is repealed, and the repealing act is

statute, during whose operation an offence was committed, and a milder statute, which was in operation at the time of the trial, a third statute was intermediately in force, milder than either, the last-named statute is not to be taken into consideration, the dominant statute being that which was in force at the time of the trial.¹ But where after the commission of an offence a statute is passed assigning an increased penalty to second offences of a particular type, and then a second offence of such type is committed, the increased penalty may be inflicted on the second offence.²

Procedure and rules of evidence may be retrospectively changed. § 31. A statute, however, subsequent to an offence, may change the mode by which it is to be prosecuted, provided the punishment attached to the offence is not thereby increased, or the defendant's rights materially impaired.³

The privilege, also, of merely technical objections may be inter-

ex post facto, there can be no prosecution as to crimes committed before its passage. *State v. Daley*, 29 Conn. 272, 1860; *Hartung v. People*, 22 N. Y. 95, 1860; s. c. 26 N. Y. 167, 1863; 28 N. Y. 400, 1863; *Com. v. McDonough*, 13 Allen, 581, 1866; *State v. McDonald*, 20 Minn. 136, 1873; *People v. Tisdale*, 57 Cal. 104, 1880; *State v. Meader*, 62 Vt. 458, 1890.

If judgment is not reached before the passage of the repealing statute, the prosecution will be abated. *People v. Meakim*, 8 N. Y. Crim. Rep. 416, 1892.

When the new statute inflicts a punishment milder in some respects only (*e. g.*, lowering the maximum and raising the minimum), the old statute is to be applied exclusively, as otherwise the judge would be left at liberty to pick out the parts of each statute that suited him, and so virtually make a new law. See *Turner v. State*, 40 Ala. 21, 1866. But see, on the other hand, Hälschner, *System*, i. p. 43; Berner, pp. 53, 54; Geib, ii. 47.

If the new statute merely re-enacts the old, or continues it in force, it is

a continuation, not in any sense a repeal, and applies to crimes previously committed. *State v. Wish*, 15 Nebr. 448, 1884; *Sage v. State*, 127 Ind. 15, 1890; *Ex parte Larkins*, 1 Okl. 53, 1891. This applies to all revisions and codes.

¹ Geib, ii. p. 46.

² *People v. Butler*, 3 Cow. 347, 1824; *Plumbly v. Com.*, 2 Metc. 413, 1841; *Rand's Case*, 9 Gratt. 738, 1852; *Ex parte Gutierrez*, 45 Cal. 429, 1873; *People v. Wood*, 53 N. Y. 511, 1873; *State v. Woods*, 68 Me. 409, 1878; *People v. Raymond*, 96 N. Y. 387, 1884; *In re Wright*, 3 Wyo. 478, 1891; *Com. v. Graves*, 155 Mass. 163, 1891; *In re Kline*, 6 Ohio Cir. Ct. 215, 1892; *Sturtevant v. Com.*, 158 Mass. 598, 1893; *Blackburn v. State*, 50 Ohio, 428, 1893. See, however, *In re Ross*, 2 Pick. 165, 1824.

³ Cooley, *Const. Lim.* (6th ed.) 318 *et seq.*; Whart. *Com. Am. Law*, § 473; *Calder v. Bull*, 3 Dall. 386, 1798; *State v. Manning*, 14 Tex. 402, 1855.

A statute or constitution altering the jurisdiction of crimes is not *ex post facto*. *State v. Cooler*, 30 S. C.

mediately withdrawn.¹ The law as to venue may be, therefore, retrospectively changed,² and so as to the mode of challenging jurors,³ provided no substantial injustice is inflicted.⁴ The rules of evidence, as is elsewhere seen,⁵ may be intermediately changed, provided that the effect is not to materially impair the defendant's rights.⁶ Hence a statute enlarging the competency of witnesses acts retrospectively in criminal cases,⁷ and so of a statute making certain facts *prima facie* proof;⁸ and of a statute making it the duty of the defendant, in liquor cases, to prove a license.⁹ But a statute making certain evidence conclusive proof of guilt is in any

105, 1889; *State v. Welch*, (Vt.) 25 Atl. Rep. 900, 1892; *Duncan v. State*, 14 Sup. Ct. Rep. 570, 1894. Nor is one that affects the mode of procedure only. *Sage v. State*, 127 Ind. 15, 1891. In one case it has been held that a statute giving power to proceed by information, in addition to the former procedure by indictment, was *ex post facto*. *McCarty v. State*, 1 Wash. St. 377, 1890; but this has been tacitly overruled. *Lybarger v. State*, 2 Wash. St. 552, 1891; *State v. Hoyt*, 4 Wash. St. 818, 1892; *In re Wright*, (Wyo.) 27 Pac. Rep. 565, 1891.

An alteration in the constitution of the Supreme Court, pending an appeal or writ of error, is not *ex post facto*. *State v. Jackson*, 105 Mo. 196, 1891; *State v. Bulling*, 105 Mo. 204, 1891; *Duncan v. State*, 14 Sup. Ct. Rep. 570, 1894. But one that takes away the power of the jury to judge of the law of the case is such. *Marion v. State*, 20 Nebr. 233; s. c. 57 Am. Rep. 825, 1886.

An act requiring insanity to be set up by special plea is not *ex post facto*. *Perry v. State*, 87 Ala. 30, 1888. Nor is it to increase costs; *Campbell v. Manderscheid*, (Iowa) 39 N. W. 92, 1888; *Farley v. Gerkeker*, (Iowa) 43 N. W. 279, 1889; unless the costs in criminal law are to be considered part

of the penalty. See *Caldwell v. State*, 55 Ala. 133, 1876.

¹ *Com. v. Hall*, 97 Mass. 570, 1867; but see *Com. v. Holley*, 3 Gray, 458, 1855, *contra*.

² Whart. Cr. Pl. & Pr. § 602; *Gut v. State*, 9 Wall. 35, 1869; *Cook v. U. S.*, 138 U. S. 157, 1890.

³ *South v. State*, 86 Ala. 617, 1889; *Mathis v. State*, (Fla.) 12 So. Rep. 681, 1893. The same is true of a statute reducing the number of grand jurors. *State v. Ah Jim*, 9 Mont. 167, 1890.

⁴ *State v. Doherty*, 60 Me. 501, 1872.

⁵ Whart. Com. Am. Law, §§ 474, 494; *Stokes v. People*, 53 N. Y. 164, 1873; *Mrous v. State*, 31 Tex. Cr. 597, 1893.

⁶ See *Seip v. Storch*, 52 Pa. 210, 1866; *Journey v. Gibson*, 56 Pa. 57, 1867; *Richter v. Cummings*, 60 Pa. 441, 1869. But see *Calder v. Bull*, 3 Dall. 386-390, 1798.

⁷ *Hopt v. Utah*, 110 U. S. 574, 1883; *Sutton v. Fox*, 55 Wis. 531, 1882; Whart. Cr. Ev. § 360 *a*.

⁸ *Com. v. Wallace*, 7 Gray, 222, 1856; *State v. Thomas*, 47 Conn. 546, 1880; though see *State v. Beswick*, 13 R. I. 211, 1881; *People v. Lyon*, 27 Hun, 180, 1882.

⁹ *Com. v. Kelly*, 10 Cush. 69, 1852.

view unconstitutional,¹ and it has so been held, also, so far as concerns antecedent cases, of a statute doing away with the necessity of corroborating an accomplice.²

§ 31 a. On either of the theories of punishability which have been heretofore stated, it is within the prerogative of the State, through its proper organs, to limit, to suspend, or to prohibit prosecutions, and to relieve from the penalties imposed on crime. In exercise of this prerogative, it is ordinarily made essential to the prosecution of an indictment that it should be found by a grand jury, and that the defendant should be entitled to meet the witnesses produced against him face to face. By statutes of limitation and pardons, which are considered more fully in another volume, the State prescribes that prosecutions must be brought within a limited time after the commission of the offence, or that the offender is not for the particular offence to be subject to prosecution.³

§ 31 b. As is elsewhere seen,⁴ the English rule is that the policy of the law precludes a person from seeking civil redress for a felonious injury to himself, if he has failed in his duty in endeavoring to bring the felon to justice. Whether this rule holds in this country has been much doubted;⁵ and neither here nor in England has it been held to apply to misdemeanors.⁶ In any view, the institution of a civil suit for redress for an injury is no bar to a criminal prosecution for the same offence, though in adjusting sentence in the criminal prosecution the courts take into consideration payments made or amends rendered by the defendant in the civil proceedings.⁷ A prosecution for nuisance, for instance, as an offence against the public, may proceed concurrently with a suit by an individual for special damage incurred by the nuisance, supposing such special damage to have been sustained;⁸ and a civil suit and a criminal

¹ Whart. Com. Am. Law, §§ 494, 15 L. T. (N. S.) 390. But see *Keir v. 596*, 1856; see 5 *Crim. Law Mag.* Leeman, 9 Q. B. 371.

² *State v. Bond*, 4 Jones, L. (N. C.) 1835; Whart. Cr. Pl. & Pr. § 454, and cases cited.

³ Whart. Cr. Pl. & Pr. §§ 316, 500. ⁴ *Jones v. Clay*, 1 B. & P. 191, 1798;

⁵ Whart. Cr. Pl. & Pr. § 453. But *Benjamin v. Storr*, 9 L. R. C. P. 400, see *Wells v. Abraham*, L. R. 7 Q. B. 1874; *U. S. v. New Bedford Bridge*, 1 Woodb. & M. 401, 1846; *Abbott v. Mills*, 3 Vt. 521, 1831; *Portland v. Richardson*, 54 Me. 46, 1866; *Francis v. Schoellkopf*, 53 N. Y. 152, 1878.

⁶ See *Nowlan v. Griffin*, 68 Me. 235, 1878, and authorities there cited.

⁷ *Ibid.* *Fissington v. Hutchinson*, 44

prosecution for the same assault and battery may also proceed concurrently.¹ The same distinction has been applied *mutatis mutandis* in cases of perjury.² The courts, however, by granting continuances, and ultimately shaping judgment, will endeavor to prevent an undue cumulation of process from working injustice.³ Nor will a civil suit be permitted to proceed when it is in any way tainted by an understanding that a criminal prosecution shall be compounded or stifled.⁴

¹ *Infra*, § 618; *Jones v. Clay*, 1 B. & v. *Lambright*, 5 Ohio Cir. Ct. 433, P. 191, 1798. 1891; *People v. Walsen*, 17 Colo. 170,

² *Infra*, § 1324. 1892; *Knox Co. v. Hunolt*, 110 Mo.

³ *Infra*, § 618. See *R. v. Willmer*, 67, 1892; *Heller v. Alvarado*, 1 Tex. 15 Q. B. 50, 1850; *Dudley Bank Co. Civ. App.* 409, 1892; *Austin v. Cars-*
v. Spittle, 1 Johns. & H. 14, 1860; *well*, 67 Hun, 579, 1893; *State v.*
Peddell v. Rutter, 8 C. & P. 337, 1837. *Schoonover*, 35 N. E. Rep. 119-121,

⁴ Whart. on Cont. §§ 483 *et seq.* For 1893. In *Higgins v. Minaghan*, 76
instances of the cumulation of civil Wis. 298, 1890, it was tacitly assumed
and criminal actions for the same that such was the rule. See *Mona-*
wrong, see Whart. Cr. Pl. & Pr. § 453; *ghan v. State*, 77 Wis. 643, 1890.

In re Lezynsky, 16 Blatchf. 9, 1879; But if the statute creating the of-
Foster v. Com., 8 W. & S. 77, 1844; fence provides an adequate remedy
State v. Stein, 1 Rich. 189, 1845; by fine as well as imprisonment, a
Drake v. Lowell, 13 Metc. 292, 1847; civil action will not lie. *Wayne Co.*
Thayer v. Boyle, 30 Me. 475, 1849; *v. Bressler*, 32 Nebr. 818, 1891. This,
Gordon v. Hostetter, 37 N. Y. 99, 1867; however, can only be true of actions
Welch v. Jugenheimer, 56 Iowa, 11; for infringement of police statutes,
s. c. 41 Am. Rep. 77, 1881; *Quimby* unattended with any special injury to
v. Blackey, 63 N. H. 77, 1884; *R. R.* private persons.

CHAPTER III.

FITNESS OF OFFENDER TO COMMIT OFFENCE.

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Party incapable of determining as to right and wrong is irresponsible, § 34.

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Delusion excuses act done *bonâ fide* and without malice under its effect, § 37.

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"Irresistible impulse" to be distinguished from "moral insanity" and from passion, § 43.

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Moral insanity is no defence, § 46.

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Mental disturbance admissible to disprove malice, § 47.

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Voluntary intoxication does not exculpate, § 49.

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And so as to other questions of intent, § 53.

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And so as to indictments against husband and wife jointly, § 76.

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For offences distinctively imputable to husband he is primarily indictable, § 80.

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Ignorance or mistake of fact admissible to negative intent, § 87.

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I. PERSONS NON COMPOTES MENTIS.

§ 32. BOTH the legal and the psychological relations of persons of unsound mind are discussed at large in another work,¹ to which the reader is referred as containing on these topics an exposition fuller than is permitted by the limits of the present chapter. At present it is proposed to do no more than to give a brief synopsis of the practical points which the decisions of the courts, as exhibited at large in the fuller treatise to which reference is made, may be considered as establishing.

At the outset, it should be observed that the introduction of compulsory confinement for parties acquitted of guilt on ground of insanity has, to some extent, altered the issue which the older text writers and judges discussed. Under the old practice, if the defendant were convicted, he was punished as if he were a perfect moral agent; and if he were acquitted, he was suffered to run at large, though the acquittal was on the ground of a monomania which would impel him to commit the same act the very next day. Under the present practice both these alternatives may be avoided, and the jury, by acquitting on the specific ground of insanity, may insure the sequestration of the defendant from society until the sanity be cured. This change of policy should always be kept in view when comparing the older with the later cases. Under the old law the dangers ensuing from an acquittal on the ground of insanity made courts reluctant to accept insanity as the ground for an acquittal. Under the present law these dangers are much diminished, as such acquittal no longer involves the setting at large a dangerous lunatic. To this, as well as to the growing force of humane interest in the insane, we may attribute the more lenient attitude toward this defence which judges have lately assumed. The old rulings, so far as they are attributable to the then policy of the law, are no longer binding.

§ 33. It will not be here attempted to lay down any general definition of insanity as constituting a defence in criminal trials. It is proposed simply to enumerate the several cases in which this defence, in any of its phases, has been sustained by the courts, not as conferring irresponsibility for crime, but, according to the present practice, as constituting such a state of facts as to remove the defendant from the category of sane to that of insane transgressors.

Old English rulings on insanity no longer authoritative.

Irresponsibility to be determined by exclusion rather than by inclusion.

¹ Whart. & St. Med. Jur. (4th ed.) vol. i. §§ 108 *et seq.*

To responsibility (imputability) there are, we must remember, two constituents: (1) capacity of intellectual discrimination; and (2) freedom of will. If there be either incapacity to distinguish between right and wrong as to the particular act, or delusion as to the act, or inability to do or refrain from doing the act, then there is no responsibility. The difficulty is practical. No matter what may be our speculative views as to the existence of conscience, or of freedom of action, we are obliged, when we determine responsibility, to affirm both.¹ The practical tests of capacity will be considered in the following sections.

Intellect
and free-
dom of will
necessary
to respon-
sibility.

1. *Incapacity to distinguish between Right and Wrong.*

§ 34. Wherever idiocy or amentia, or general mania, is shown to exist, the court will direct an acquittal; and if a jury should convict in the teeth of such instructions, the court will set the verdict aside. While the earlier cases lean to the position that such depravation of understanding must be general, it is now conceded that it is enough if it is shown to have existed in reference to the particular act.²

Party inca-
pable of
determin-
ing as to
right or
wrong of
act is irre-
sponsible.

¹ The controversy which divides theologians as well as metaphysicians as to the freedom of the will is not involved in the discussion in the text. It may be possible that, from a speculative point of vision, all acts are necessitated. With this, however, jurisprudence, which is a practical science, has nothing to do. There have been indeed leading jurists, such as Feuerbach, who have adopted the principle of necessity as a basis, and have invoked the fear of punishment as a counterweight to the temptation to crime; and Mr. Bain, as is elsewhere shown, has accepted the same view. See Whart. & St. Med. Jur. §§ 188, 540. But this, as is well said by a leading German author (Meyer, § 25), takes not only from jurisprudence, but from life, its moral dignity, making the former a mere marshalling of mechanisms, and the latter a mere mechanism of necessities.

A series of interesting papers on insanity will be found in the proceedings of the New York Med.-Legal Soc., N. Y. 1872.

² 1 Inst. 247; Bac. Abr. Idiot; Co. Litt. 247 a; 1 Russell on Cr., by Greaves, 13; 1 Hawk. c. 1, s. 3; 4 Bla. Com. 24; Collinson on Lunacy, 573, 673 (n); R. v. Oxford, 9 C. & P. 525; Burrow's Case, 1 Lewin, 238; R. v. Goode, 7 Ad. & El. 536; 67 Hans. Par. Deb. 728; Bowler's Case, Hadfield's Case, Ibid. 480; 27 How. St. Tr. 1282; R. v. Barton, 3 Cox C. C. 275; R. v. Offord, 5 C. & P. 168; R. v. Higginson, 1 C. & K. 129; R. v. Stokes, 3 C. & K. 185; R. v. Layton, 4 Cox C. C. 149; R. v. Vaughan, 1 Cox C. C. 80; U. S. v. Shults, 6 McLean, 121, 1852; Com. v. Rogers, 7 Metc. 500, 1843; 7 Law

§ 35. To this effect is the answer of the fifteen judges of England to the questions propounded to them by the House of Lords in June, 1843. "The jury," they said, "ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."¹

In this country, whatever may have been the hesitancy as to the enunciation of other propositions to be hereafter stated, there has been none as to this. There has scarcely been a case where the defence of insanity has been taken, in which the jury have not been told that if the defendant was unable "to distinguish right from wrong," or to discern "that he was doing a wrong act," or was "incapable of knowing what he was about," or was "deprived of his understanding and memory," or was "incompetent mentally to know what is wrong as distinguished from what is right," he is irresponsible.² And it has been further properly held that when idiocy

Rep. 449; *State v. Richards*, 39 Conn. 591, 1872; *Freeman v. People*, 4 Denio, 9, 1847; *Flanagan v. People*, 52 N. Y. 467, 1873; *People v. Sprague*, 2 Park. Cr. Rep. 43, 1855; *People v. O'Connell*, 62 How. N. Y. Pr. 436, 1881; *State v. Spencer*, 1 Zab. (21 N. J. L.) 196, 1847; *Com. v. Mosler*, 4 Barr, 264, 1846; *Com. v. Farkin*, 3 Penn. L. J. 480, 1844, 2 Clark, 208; *Brown v. Com.*, 78 Pa. 122, 1875; *State v. Gardiner*, Wright's Ohio R. 392, 1833; *Vance v. Com.*, 2 Va. Cas. 132, 1818; *Dejarnette v. Com.*, 75 Va. 867, 1819; *McAllister v. State*, 17 Ala. 434, 1849; *People v. Ferris*, 55 Cal. 588, 1879; *Dove v. State*, 3 Heisk. 348, 1872; *Stuart v. People*, 1 Baxter, 178, 1867; *State v. Redemeier*, 8 Mo. App. 1; s. c. 71 Mo. 173, 1880; *Hart v. State*, 14 Nebr. 572, 1883; *Clark v. State*, 8 Tex. App. 350, 1880; *Pettigrew v. State*, 12 Tex. App. 225, 1882; *U. S. v. Ridgeway*, 31 Fed. Rep. 144, 1887.

¹ Car. & Kir. 134, 1845; 8 Scott N. R. 595. See *R. v. Layton*, 4 Cox C. C. 149, 1850; *R. v. Barton*, 3 Cox C. C. 275, 1849; 1 Bennett & Heard Lead. Cases, 942, 1849; *R. v. Davies*, 1 F. & F. 69, 1858; *R. v. Watson*, *R. v. Edmunds*, cited 1 Whart. & St. Med. Jur. § 166; *State v. Huting*, 21 Mo. 464, 1855; *Dunn v. People*, 109 Ill. 635, 1884; *Giebel v. State*, 28 Tex. App. 151, 1889.

² See, more particularly, *U. S. v. Shultz*, 6 McLean C. C. R. 121, 1852; *U. S. v. Clarke*, 2 Cranch C. C. R. 158, 1824; *State v. Lawrence*, 57 Me. 574, 1869; *Com. v. Rogers*, 7 Metc. 500, 1843; *Com. v. Heath*, 11 Gray, 303, 1858; *Freeman v. People*, 4 Denio, 9, 1847; *Willis v. People*, 32 N. Y. 715, 1865; *People v. Sprague*, 2 Park. Cr.

or semi-idiotcy is proved, it is for the prosecution to establish affirmatively a capacity on the part of the defendant to distinguish right from wrong.¹

The New York Penal Code of 1882 provides as follows :

"A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason as either, 1, not to know the nature and quality of the act he was doing; or 2, not to know that the act was wrong." It will be observed that this is an affirmation of the doctrine of the English judges above given.

§ 36. "Wrong," in the sense in which the term is here used,

Rep. 43, 1853; *Com. v. Mosler*, 4 Barr, 264, 1846; *Com. v. Farkin*, 3 Penn. L. J. 480, 1844, 2 Clark, 208; *Vance v. Com.*, 2 Va. Cas. 132, 1818; *Choice v. State*, 31 Ga. 424, 1861; *Anderson v. State*, 42 Ga. 9, 1871; *McAllister v. State*, 17 Ala. 434, 1849; *State v. Huting*, 21 Mo. 464, 1855; *State v. Erb*, 74 Mo. 190, 1881; *State v. Katoosky*, 74 Mo. 247, 1881; *People v. Coffmann*, 24 Cal. 230, 1863.

It is in England that the right and wrong test is applied with the most exclusive rigor; and it is in England that attempts at its formal expansion have been most stoutly resisted. See 1 Whart. & St. Med. Jur. § 119. Yet, in deciding what is the amount of evidence necessary to prove incapacity to determine between right and wrong, the English judges have practically let in constructions almost as indulgent as those which have led American courts to expand the formal definition of insanity. Thus a married woman having killed her husband immediately after an apparent recovery from a disease (the result of childbirth) which caused a great loss of blood, and exhausted the vessels of the brain, and thus weakened its power, and so tended to produce insane delusions of the senses, which, while suffering under such disease, she complained

of, and which, by her own account, had been renewed at the time of the act of homicide (although they were not such as would lead to it); these facts were held by Erle, J., to be evidence from which a jury might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it. *R. v. Law*, 2 F. & F. 836, 1861. So where a married woman, fondly attached to her children, and apparently most happy in her family, had poisoned two of them with some evidence of deliberation and design, it was left to the jury by Wightman, J., as circumstances from which insanity could be inferred, that it appeared that there was insanity in her family; and that her demeanor before and after the act, although not wholly irrational, was strangely erratic and excited; and that from recent antecedents, and the presence of certain exciting causes of insanity, and her own account of her sensations, the medical men were of opinion that she was laboring under actual cerebral disease, and that she was in a paroxysm of insanity at the time of the act. *R. v. Vyse*, 3 F. & F. 247, 1862.

¹ *State v. Richardson*, 39 Conn. 591, 1872.

means moral wrong. A man may want the capacity to distinguish between the various shades of illegality which the law assigns to a particular act. This is no defence. If, however, he was "laboring under such a defect of reason from disease of the mind as *not to know the nature and quality of the act he was doing*, or if he did know it, that he did not know he was doing wrong," he is held to be irresponsible on the ground of insanity.¹ And whatever we may think of the second of these alternatives, the first (that in italics) is broad enough to sustain a verdict of insanity in all cases in which the defendant's mental condition was such as to preclude him from having knowledge of the nature and character of the act.²

"Wrong"
means
moral
wrong.

2. Insane Delusion.

§ 37. The answer of the English judges on the special topic of delusion is as follows: "The answer must of course depend on the nature of the delusion: but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example: if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."³ To the same effect speaks Chief Justice Shaw:⁴ "Monomania may operate as an excuse for a criminal act," when "the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes

Delusion
excuses
act done
bonâ fide
and with-
out malice
under its
effects.

¹ See Sir J. F. Stephen's testimony s. c. 10 Crim. Law Mag. 885, 1888; before House of Commons, quoted in Anderson v. State, 25 Nebr. 550, 1889. Whart. on Hom. § 573; Parsons v. State, 9 Crim. Law Mag. 812, 1887; U. S. v. Faulkner, 35 Fed. Rep. 730; ² See 2 Steph. Hist. Crim. Law, 166. ³ People v. Taylor, 138 N.Y. 398, 1893. ⁴ Com. v. Rogers, 7 Metc. 500, 1844.

that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."¹

§ 38. So far as the law thus stated goes it has been recognized as authoritative in this country.² Even where there is no pretence of insanity, it has been held that if a man, though in no danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defence;³ and though this proposition is too broadly stated, as is remarked by Bronson, J., when commenting on it in a later case in New York,⁴ and should be qualified so as to make it necessary that there should be facts and circumstances existing which would lead the jury to believe that the defendant had reasonable ground (in proportion to his own lights) for his belief, yet with this qualification it is now generally received.⁵ And, indeed, after the general though tardy acquiescence in *Selfridge's Case*, where the same view was taken as early as 1805 by Chief Justice Parker, of Massachusetts, and after the almost literal incorporation of the leading distinctions of this case into the Revised Statutes of New York, as well as into the judicial system of most of the States, the point must be considered as

Rule applies to all *bonâ fide* erroneous non-negligent convictions.

¹ That this covers *Hadfield's Case*, see 2 Steph. Hist. Crim. Law, 160.

² The supposed contradictions of the authorities on this point have arisen from an attempt to reduce into an inflexible code opinions which, while relatively true in their particular connection, were not meant for general application. Thus, for instance, when a defendant in whom there is no pretence of mania or homicidal insanity claims to be exempt from punishment on the ground of incapacity to distinguish right from wrong, the court very properly tells the jury that the question for them to determine is, whether he labors under such incapacity or not. The error has been to seize such an expression as this as an arbitrary elementary dogma, and to insist on its application to all other cases. Or, take

the converse, and suppose the defence is merely homicidal insanity. In such a case it would be proper to tell the jury that unless they believe the homicidal impulse to have been uncontrollable, they must convict; and yet nothing would be more unjust than to make this proposition, true in itself, a general rule to bear on such cases as idiocy. It is by confining the decisions of the courts to the particular state of facts from which they have been elicited that we can extract from the mass of apparently conflicting *dicta* the propositions given in the text.

³ *Infra*, § 489; *Grainger v. State*, 5 Yerg. 459, 1833.

⁴ See citation *infra*, § 489, note.

⁵ See *infra*, §§ 488 *et seq.*; Whart. on Hom. § 490; *Cunningham v. State*, 56 Miss. 269, 1879.

finally at rest. Perhaps the doctrine, as laid down originally in *Selfridge's Case*, would have met with a much earlier acquiescence had not the supposed political bias of the court in that extraordinary trial, and the remarkable laxity shown in the framing of the bill of indictment and in the adjustment of bail, led to a deep-seated professional prejudice, which reached even such parts of the charge as were sound. With these cases may be classed that of *Levet*,¹ who was in bed and asleep in his house when his maid-servant, who had hired A., the deceased, to help her to do the work, thought as she was going to let A. out about midnight, that she heard thieves breaking open the door, upon which she ran up stairs to the defendant, her master, and informed him thereof. Suddenly aroused, he sprang from his bed and ran down stairs with his sword drawn, the deceased hiding herself in the buttery lest she should be discovered. The defendant's wife, observing some person there, and not knowing her, but conceiving her to be a thief, cried out, "Here are they who would undo us;" and the defendant, in the paroxysm of the moment, dashed into the buttery, thrust his sword at the deceased and killed her.² The defendant was acquitted under the express instructions of the court, and the case has remained unquestioned for two hundred years, and in New York and Pennsylvania in particular, after very careful examination, has been solemnly reaffirmed.³ It is true that it has been held inadmissible to prove that the defendant was of weak intellect, particularly nervous, and inclined to fright.⁴ But if such nervous debility amounts to insanity, it is certainly a defence; and whether the proof reaches this point the question is for the jury, under the direction of the court, to decide.⁵

§ 39. In none of the cases which have just been noticed is the *actual* existence of danger an essential ingredient, and Actual danger not necessary. certainly, as the intentions of an assailant are incapable of positive entertainment, such a danger can never be absolutely shown to exist. It is true that in cases to be hereafter noticed,⁶ *dicta* have been thrown out to the effect that the danger must be such as to alarm a reasonable man; but whenever the

¹ *Levet's Case*, Cro. Car. 538; 1 Hale, P. C. 42, 474. *Infra*, § 492.

² See, for a fuller discussion of this case, *infra*, §§ 467, 495.

³ See cases cited *infra*, §§ 488 *et seq.*, note.

⁴ *Patterson v. People*, 46 Barb. 625, 1865; *State v. Shoultz*, 25 Mo. 128, 1857; *Jacobs v. Com.*, 121 Pa. 586, 1888.

⁵ Whart. Cr. Ev. § 68.

⁶ *Infra*, § 488.

requisite state of facts has been presented, courts have not hesitated to say that the danger must be estimated, not by the jury's standard, but by that of the defendant himself. Thus, an enlightened and learned judge in Pennsylvania, one who would be among the last to weaken any of the sanctions of human life, directed the jury to take into consideration "the relative characters, as individuals," of the deceased and the defendant, and, in determining whether the danger really was imminent or not, to inquire "whether the deceased was bold, strong, and of a violent and vindictive character, and the defendant much weaker, and of a timid disposition."¹ And though it may not be admissible to prove, by way of defence, that the deceased was of a barbarous and vindictive nature and character, unless this tend to explain the defendant's conduct under an apparently sudden and deadly attack,² yet threats uttered by the deceased, and expressions of hostile feeling of which the defendant was advised, may always be received as explaining the excited condition of the defendant's mind.³

§ 40. The principle which may be inferred from the cases is, that if by an insane delusion, or *depravation* of the reasoning faculty, the defendant insanely believes, either that an imagined evil is so intolerable as to make life-taking necessary or justifiable in order to avert it, or that while the evil is of a lesser grade, life-taking is an appropriate and just way of getting rid of it, he is entitled to such a verdict as will transfer him from the category of sane to insane criminals.⁴ But the delusion must be *mental* not *moral*.⁵

¹ *Infra*, § 491; Whart. Cr. Ev. §§ 69, 757. See *Com. v. Barnacle*, 134 Mass. 216, 1883, and cases cited *infra*, § 489.

² Whart. Cr. Ev. § 69.

³ *Com. v. Wilson*, 1 Gray, 337, 1854. See *infra*, § 489; Whart. Cr. Ev. § 757.

⁴ See *Wesley v. State*, 37 Miss. 327, 1866, where the position in the text is controverted at large.

⁵ *R. v. Burton*, 3 F. & F. 772, 1862; *R. v. Townley*, 3 F. & F. 839, 1862; *Willis v. People*, 5 Parker, C. R. 621, 1860.

That an insane delusion, as to the value or nature of human life, will have this effect, even though the party himself knows when committing the act that he is doing wrong, and is violating the laws of the land, is illustrated by Lord Erskine in a well-known case: "Let me suppose," he said, "the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being (and such cases have existed), and that upon the trial of such a lunatic for murder, you, being on your oaths, were convinced, upon the uncontradicted evidence of one hundred persons, that he believed the man he had destroyed to have been a potter's vessel; that it was quite impossible to doubt that fact, although to other intents and purposes he was

§ 41. Partial insanity, however, is no defence, when the crime was not its immediate product. If the defendant was sane as to

sane—answering, reasoning, acting as men not in any manner tainted with insanity, converse and reason and conduct themselves. Suppose, further, that he believed the man whom he destroyed, but whom he destroyed as a potter's vessel, to be the property of another, and that he had malice against such supposed person, and that he meant to injure him, knowing the act he was doing to be malicious and injurious; and that, in short, he had full knowledge of all principles of good and evil; yet would it be possible to convict such a person of murder, if, from the influence of the disease, he was ignorant of the relation in which he stood to the man he had destroyed, and was utterly *unconscious* that he had struck at the life of a human being?" Winslow on Plea of Insanity, 6.

Again, in a case which has more than once occurred within the walls of a lunatic asylum, a man fancies himself to be the Grand Lama or Alexander the Great, and supposes that his neighbor is brought before him for an invasion of his sovereignty, and he cuts off his head or throttles him. He knows he is doing wrong; perhaps, from a sense of guilt, he conceals the body; he may have a clear perception of the legal consequences of his act. In such a case, however, criminal responsibility, in the full sense of the term, does not exist. It was in conformity with this view, in a case where it was proved that the defendant had taken the life of another under the notion that he was set about with a conspiracy to subject him to imprisonment and death, that Lord Lyndhurst told the jury that they might "acquit the prisoner on the ground of insanity if he did not know, when he committed the act, what the effect of it

was with reference to the crime of murder." What, therefore, he in fact decided was, that a man who, under an insane delusion, shoots another, is irresponsible when the act is the product of the delusion. Such, indeed, on general reasoning, must be held to be the law in this country, and such will it be held to be when any particular case arises which requires its application. Ibid.

In England this view has been recognized in several cases, notwithstanding the reluctance of the courts in that country to enlarge the boundaries of insane irresponsibility. Thus, on the trial of Hadfield, who could distinguish between right and wrong, but who was under a delusion that it was his duty to offer himself as a sacrifice for his fellow-men, and that his shortest way of doing so was to kill the king, which he knew to be morally wrong, Lord Kenyon, on these facts being made out, advised a withdrawal of the prosecution. The same course was followed by Chief Justice Tindal in *McNaughten's Case*, when, on a trial for shooting at Mr. Drummond, the private secretary of Sir Robert Peel, a similar delusion was proved. See, also, *R. v. Brixey*, and *R. v. Touchett*, cited in 1 Bennett & Heard's *Lead. Cases*, 99. It has also been held that on an indictment for maliciously setting fire to a building, in order to justify a jury in acquitting a prisoner on the ground of insanity, "they must believe that he did not know right from wrong; *but if they find that the prisoner, when he did the act, was in such a state of mind that he was not conscious that the effect of it would be to injure any other person*, this will amount to a general verdict of not guilty." *R. v. Davies*, 1 F. & F. 69, 1858—Crompton.

In the ecclesiastical courts the ex-

the crime, but insane on other topics, the insanity in the latter respect will not save him.¹ The crime must have been the result of a delusion. A delusion, therefore, that arises, not from an irrepressible and absolute chimera, but from imperfect information or imperfect reasoning which care and diligence could correct, does not excuse crime committed under its influence. It is consequently admissible for the prosecution to show that the delusion was the result of logical processes which, though prejudiced, were not abnormal.² But it does not follow from this that an insane delusion on a matter not directly at issue may not be part of a chain of evidence from which general insanity may be inferred.³

Partial insanity no defence as to crime not its product.

§ 42. Nor should it be forgotten that a delusion, to be a defence to an indictment for crime, must be non-negligent. When there is reason sufficient to correct a delusion, then a person continuing to nourish it, when there is opportunity given him for such correction, is responsible for the consequences.⁴

Delusion to exculpate must be non-negligent.

3. Irresistible Impulse.

§ 43. In order to clear the question now before us from ambiguities, it is proper to remark :

istence of delusions or hallucination on material points has frequently been held to so far constitute insanity as to *pro tanto* destroy testamentary capacity. *Dew v. Clark*, 1 Addams Ecl. R. 279; *Frere v. Peacocke*, 1 Robertson, 442; 1 Whart. & St. Med. Jur. §§ 34-60.

In this country the legitimacy of such a defence in criminal cases has been in several instances specifically recognized. *U. S. v. Holmes*, 1 Cliff. 98, 1858; *Com. v. Rogers*, 7 Metc. 500, 1843; *People v. Pine*, 2 Barbour, 566, 1849; *State v. Windsor*, 5 Harr. 512, 1847; *Com. v. Freth*, 3 Phila. 105, 1849; *Roberts v. State*, 3 Ga. 810, 1847; 1 Whart. & St. Med. Jur. § 134.

¹ *State v. Lawrence*, 57 Me. 574, 1869; *Sindram v. People*, 88 N. Y. 196, 1882; *Com. v. Mosler*, 4 Barr, 264, 1846; *State v. Geddis*, 42 Iowa, 264,

1876; *State v. Mewherter*, 46 Iowa, 88, 1877; *Boswell v. State*, 63 Ala. 307, 1879; *State v. Simms*, 71 Mo. 538, 1880; *Bovard v. State*, 30 Miss. 600, 1860; *State v. Gut*, 13 Minn. 341, 1867; *Hawe v. State*, 11 Nebr. 537, 1881. Sir J. F. Stephen, Cr. Law, art. 27, takes the same ground. *U. S. v. Young*, (N. C.) 7 Crim. Law Mag. 729, 1885.

² *State v. Pike*, 49 N. H. 399, 1849.

Hence, when an insane delusion is set up as a defence, it is admissible for the prosecution to offer evidence to prove that the delusion was *sane*, *i. e.*, that it was an opinion that ordinary reasoning might have produced. *State v. Pike*, 49 N. H. 399, 1849. See 1 Whart. & St. Med. Jur. § 144.

³ See 2 Steph. Hist. Crim. Law, 162.

⁴ See this argued at large, 1 Whart. & St. Med. Jur. § 137; and see *infra*,

§ 492.

(a) “Irrepressible impulse” is not “moral insanity,” supposing “moral insanity” to consist of insanity of the moral system, coexisting with mental sanity. “Moral insanity,” as thus defined, has no support, as will hereafter be seen,¹ either in psychology or law.

“Irresistible impulse” to be distinguished from “moral insanity,” and from “passion.”

(b) Nor is “irresistible impulse” convertible with passionate propensity or jealousy, no matter how strong, in persons not insane.²

§ 44. In other words, the “irresistible impulse” of the lunatic, which confers irresponsibility, is essentially distinct from the passion, however violent, of the sane, which does *not* confer irresponsibility.³ And when it is shown that a party charged with crime committed the crime under an insane irresistible impulse, then he is entitled to a verdict of insanity.⁴

Insane irresistible impulse a defence.

¹ See this discussed in Whart. & St. Med. Jur. § 137.

² State v. Pike, 49 N. H. 399, 1849; Freeman v. People, 4 Denio, 5, 1847; Guetig v. State, 66 Ind. 94, 1879; State v. Strickley, 41 Iowa, 232, 1875. See 1 Whart. & St. Med. Jur. 144.

³ Williams v. State, 50 Ark. 511, 1888. See 1 Whart. & St. Med. Jur. § 144; Com. v. Rogers, 7 Metc. 500, 1843; Sir J. F. Stephen’s Eng. Crim. Law, p. 91, and Ibid., Digest, art. 27; opin. of Chief Justice Gibson, of Pennsylvania, 4 Barr, 266, 1846. This was reaffirmed in Coyle v. Com., 100 Pa. 573, 1882. To the same effect, see People v. Sprague, 2 Park. C. R. 43, 1855; and rulings by Judge Ellis Lewis, cited in Lewis Cr. Law, 404; by Judge Edmunds (2 Am. Jour. of Ins.); by Judge Whiting (Freeman’s Trial—Pamph.); and by the Supreme Court of Georgia (Roberts v. State, 3 Ga. 310, 1847).

In 1862, the text with the cases given in it was cited with approval by the Supreme Court of Kentucky; and while irresistible impulse, as a distinct line of defence, was recognized, it was held that, to sustain it, “it must be known to exist in such violence as to render it impossible for the party to do otherwise than yield to its prompt-

ings.” Scott v. Com., 4 Metc. 227, 1842. See, also, Smith v. Com., 1 Duv. 224, 1864; Kriel v. Com., 5 Bush, 362, 1869; Hopps v. People, 31 Ill. 385, 1862. To the same effect is the judgment of the Court of Common Pleas of Philadelphia, in 1868; Com. v. Haskell, 2 Brewster, 491, 1868 (see, also, Com. v. Freeth, 5 Clark, Pa. L. J. R. 455, 1855; of the Supreme Court of Indiana, in 1869; Stevens v. State, 31 Ind. 485, 1869 (see Bradley v. State, 31 Ind. 492); of Iowa, in 1868; State v. Felter, 25 Iowa, 67, 1868; of Illinois, in 1866; Hopps v. People, 31 Ill. 385, 1862; and of the Supreme Court of the United States, in 1872; Life Ins. Co. v. Terry, 15 Wall. 580, 1872. The doctrine, however, was emphatically repudiated in North Carolina, in 1861. State v. Brandon, 8 Jones, 463, 1860.

In conformity with the text may be cited a case in which Judge Story decided that a young woman, who in a violent impulse in puerperal fever threw her child overboard, though at the time perfectly conscious of the enormity of the act, was entitled to an acquittal. U. S. v. Hewson, 7 Law Rep. 361, 1844.

⁴ R. v. Oxford, 9 C. & P. 523, at pp. 545–6, 1840; Plake v. State, 121 Ind. 433, 1890.

§ 45. In the enunciation of this conclusion there should be the strictest caution, and in the application of it the most jealous scrutiny. And in connection with it, it is always ^{Caution requisite as to this defence.} important to keep in mind the impressive language of Lord Brougham, when discussing the question before the House of Lords: "With respect to the point of a person being an accountable being, that was an accountable being to the law of the land, a great confusion had pervaded the minds of some persons whom he was indisposed to call reasoners, who considered accountability in its moral sense as mixing itself up with the only kind of accountableness with which they, as human legislators, had to do, or of which they could take cognizance. He could conceive of the case of a human being of a weakly constituted mind, who might by long brooding over real or fancied wrongs work up so perverted a feeling of hatred against an individual that danger might occur. He might not be deluded as to the actual existence of injuries he had received, but he might grievously and grossly exaggerate them, and they might so operate upon a weakly framed mind and intellect as to produce crime. He could conceive that the Maker of that man, in His infinite mercy, having regard to the object of His creation, might deem him not an object for punishment. But that man was accountable to human tribunals in a totally different sense. . . . He could conceive a person whom the Deity might not deem accountable, but who might be perfectly accountable to human laws."¹

The conclusion we must reach, therefore, is, that an irresistible homicidal impulse in an insane person is a good defence, though such insane person was able to distinguish between right and wrong. With a sane person, however, it is not a defence, as the law makes all sane persons responsible for their impulses.² But mere intellec-

¹ Hans. Par. Deb. lxvii. 728. In Pa. 593, 1882; *Dejarnette v. Com.*, 75 the speech as reported by Hansard, Va. 869, 1880; *State v. Stickley*, 41 Lord Brougham bases the distinction Iowa, 232, 1875; *State v. Mewherter*, 46 Iowa, 85, 1877; *Wright v. People*, 4 Nebr. 407, 1875; *Hart v. State*, 14 This, however, is not essential to the Nebr. 572, 1883; *Cunningham v. State*, 56 Miss. 269, 1879; *People v. M'Donnell*, 47 Cal. 134, 1869; *People v. Horn*, 62 Cal. 120, 1882; and authorities cited of punishability, heretofore discussed. 4 Nebr. 407, 1875; *Hart v. State*, 14 Nebr. 572, 1883; *Cunningham v. State*, 56 Miss. 269, 1879; *People v. M'Donnell*, 47 Cal. 134, 1869; *People v. Horn*, 62 Cal. 120, 1882; and authorities cited under next section. *Cf. Com. v. Taylor*, 41 Leg. Int. 488, 1884.

² See, as substantiating this conclusion, *Flanagan v. People*, 52 N. Y. 467, 1873; *Walker v. People*, 88 N. Y. 81, 1882; *State v. Spencer*, (1 Zab.) 21 N. J. L. 196, 1847; *Coyle v. Com.*, 100 In *Blackburn v. State*, 23 Ohio, 165

tual power to plan and premeditate does not constitute sanity.¹ There may be such power, and yet, from an incapacity to form a right view of the relations of the act, the party may be insane.²

As insane persons, in the sense just stated, may be mentioned, persons afflicted with idiocy or amentia, the former being congenital, the latter consisting of a loss of mental power;³ and mania.⁴

4. "*Moral Insanity.*"

§ 46. "Moral insanity," in its distinctive technical sense, is a supposed insanity of the moral system coexisting with mental sanity.⁵ It is therefore to be distinguished from "insane irresistible impulse," which has just been noticed, in two respects: (1) "Irresistible impulse" is only a valid defence when the party offering it is mentally deranged, while in "moral insanity," by its very terms, the patient is always mentally sane; and (2) "Irresistible impulse" is a special propensity impelling to a particular bad act, while in "moral insanity" he is impelled to all sorts of badness. It is enough for the present to say that, as is abundantly shown elsewhere,⁶ the position that "moral insanity," as thus defined, exists, is now almost without a defender among specialists in mental diseases. That it is repudiated by the courts of England and of the United States there is

(decided in 1872), the proper questions to be submitted to the jury were declared to be: "Was the accused a free agent in forming the purpose to kill? Was he at the time capable of judging whether *that act* was right or wrong? And did he know at the time that it was an offence against the laws of God and man?"

See the statement on this point by Cockburn, C. J., given in the Appendix to the Report of the Committee of the House of Commons on the Homicide Amendment Bill. See, also, *Willis v. People*, 5 Parker C. R. 620, 1860; and also *Andrew's Case*, 1 Whart. & St. Med. Jur. § 162.

"No act is a crime if the person who does it is, at the time when it is done, prevented either by defective mental power, or by any disease affect-

ing his mind, from controlling his own conduct, unless the absence of the power of control has been caused by his own default." 1 Steph. Hist. Crim. Law 168; *Williams v. State*, 50 Ark. 511, 1888; *People v. Foy*, 138 N. Y. 664, 1893.

¹ *Bennett v. State*, (Wis.) 4 Crim. Law Mag. 378.

² 1 Whart. & St. Med. J. §§ 531-537.

³ *R. v. Shaw*, L. R. 1 C. C. 145, 1866; *R. v. Southey*, 4 F. & F. 864, 1864; *Vance v. Com.*, 2 Va. Cas. 132, 1819; *McAllister v. State*, 17 Ala. 434, 1849.

⁴ *U. S. v. Hewson*, 7 Law Rep. 361, 1844.

⁵ See 28 Alb. L. J. 40. I have discussed this question in a note to *Guiteau's Case*, 10 Fed. Rep. 161 *et seq.*, 1882.

⁶ 1 Whart. & St. Med. J. §§ 531-537.

an almost unbroken current of authority to show. Carefully and conscientiously has the defence, by a vast number of independent courts, been scanned; and in almost every instance the conclusion is that the theory on which it rests is without support either in jurisprudence or psychology.¹

5. *Mental Disturbance as lowering Grade of Guilt.*

§ 47. The old common law authorities took the ground that sanity and insanity are states as clearly and absolutely distinguishable as are coverture and non-coverture; and that men are either wholly sane, so as to be wholly responsible, or wholly insane, so as to be wholly irresponsible. This principle, however, is now abandoned as based on a psychological untruth. There are many degrees both of sanity and insanity; and the two states approach each other in

Mental disturbance admissible to disprove malice.

¹ R. v. Oxford, 9 C. & P. 525, 1840; cited U. S. v. Schults, 6 McLean, 121, R. v. Barton, 3 Cox C. C. 275, 1850; 1852; U. S. v. Holmes, 1 Clifford, 98, R. v. Higginson, 1 C. & K. 129, 1845; 1858; U. S. v. Guiteau, 1 Mackey, 498, R. v. Layton, 4 Cox C. C. 149, 1851; 10 Fed. Rep. 161, 1882; State v. Lawrence, 57 Me. 574, 1869; Com. v. Rogers, 7 Metc. 500, 1843; Com. v. Heath, 11 Gray, 303, 1857; State v. Richards, 39 Conn. 591, 1872; Freeman v. People, 4 Denio, 9, 1847; Flanagan v. People, 52 N. Y. 467, 1873; State v. Spencer, 21 N. J. L. (1 Zab.) 196, 1847; State v. Windsor, 5 Harring. 512, 1847; Vance v. Com., 2 Va. Cas. 132, 1818; State v. Brandon, 8 Jones, 463, 1860; Boswell v. State, 63 Ala. 307, 1879; Farrer v. State, 2 Ohio St. 54, 1853; Finley v. State, 38 Mich. 482, 1878; People v. Coffman, 24 Cal. 230, 1864; People v. M'Donell, 47 Cal. 134, 1874; State v. Coleman, 20 S. C. 392, 1882; Choice v. State, 31 Ga. 424, 1861; Spann v. State, 47 Ga. 553, 1873.

Shortly after Townley's Case, on a trial for murder, before Erle, J., the defence relied on evidence showing a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance, causing fits of *delirium tremens*, the prisoner, however, not laboring under the effects of such a fit at the time of the act, and the circumstances showing sense and deliberation, and a perfect understanding of the nature of the act; it was held, that the evidence was not sufficient to support the defence, as it rather tended to show wilful excesses and extreme folly than mental incapacity. R. v. Leigh, 4 F. & F. 915, 1864. And see R. v. Southey, 4 F. & F. 864, 1864; R. v. Watson, reported in 1 Whart. & St. Med. Jur. § 166; R. v. Edmunds, Ibid. § 167.

As American authorities may be united substantially in declaring, as the proposition is stated by an able jurist, Judge Thurman (Farrer v. State, 2 Ohio St. 54, 1853), "that there is no authority for holding that mere moral insanity, as it is sometimes called, exonerates from responsibility."

imperceptible gradation, melting into each other, to adopt an illustration borrowed by Lord Penzance from Burke, as day melts into night.¹ There may, therefore, be phases of mind which cannot be positively spoken of as either sane or insane. Are persons in one of these phases to be acquitted of crime? If so, they would constitute a class not only dangerous but uncontrollable; for they would not be sane enough to be convicted as felons, and yet would not be insane enough to be confined as lunatics. Are they to be convicted, when charged with offences involving malice and premeditation? At this justice would revolt, for at the time of the commission of the guilty act the defendant, as it could readily be shown, was not in a condition of mind coolly to premeditate, or accurately to contemplate, a malicious design. Under such circumstances the better course is to find the defendant guilty of the offence in a diminished grade, when the law establishes such grade; or when it does not, to inflict on him modified punishment.² Nor is this view inconsistent with the analogies of the law. Such considerations (*i. e.*, those of the defendant's mental constitution) are

See, also, *Flanagan v. People*, 52 N. Y. 467, 1873, where it was said by Andrews, J.: "The argument proceeds upon the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts the consequences of which he anticipates but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law." *S. P.*, *People v. M'Donnell*, 47 Cal. 134, 1874; *Cf. R. v. Haynes*, 1 F. & F. 666, 1859.

A partial exception is to be found in some eccentric opinions delivered in the Court of Appeals of Kentucky; opinions, however, which do not appear to have been sustained by a majority of the court in which they were pronounced. *Smith v. Com.*, 1 Duv. 224, 1864; *St. Louis Mut. Ins. Co. v. Graves*, 6 Bush, 268, 1870. See 1 Whart. & St. Med. Jur. §§ 175-8, where these cases

are discussed. As exhibiting a view diverging from the text, see *Anderson v. State*, 43 Conn. 514, 1876.

In vindication and fuller elaboration of the remarks in the text on "moral insanity," see 1 Whart. & St. Med. Jur. §§ 186 *et seq.*

¹ "We use no mere metaphor when we say that the intellect passes through innumerable gradations from the full glow of noonday to the depth of midnight. He who attempts to place a limit to the twilight on either side, attempting to fix a limit at which reason either suddenly ceases or suddenly begins, is in the quandary of those who put to the stoical philosophers the question what constitutes a heap of corn, and what a bald head, and who were brought at last to confess that a single grain made a heap of corn, and pulling out a single hair made a bald head." Ideler, *Gericht. Psychol.* pp. 45-51.

² See 1 Whart. & St. Med. Jur. §§ 126, 181, 200.

invoked whenever we have to determine whether a party assailed acted *bonâ fide* when resorting to violent measures of self-defence. So do we gauge responsibility in cases of sleep-drunkenness; so do we estimate the conduct of persons when roused by any great political or religious excitement;¹ and so do we hold in cases of intoxication, when called upon to measure deliberation and intent.² If, in cases where homicide has been committed during an excitement which the defendant's peculiar psychical state has abnormally protracted and intensified, a verdict of murder in the second degree, or of manslaughter, be given in accordance with these views, a result is reached which not only harmonizes with sound principle, but it is far more consistent with the public idea of justice than would be a verdict either of not guilty or of murder in the first degree.³ Sir J. F. Stephen lends his authority to the same view. "Partial insanity," he says, "may be evidence *to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused*. A man is tried for wounding with intent to murder. It is proved that he inflicted the wound under a delusion that he was breaking a jar. The intent to murder is disproved, and the prisoner must be acquitted; but if he would have had no right to break the supposed jar, he might be convicted of an unlawful and malicious wounding,"⁴ or, in case of the death of the party so wounded, the defendant might be found guilty of manslaughter,⁵ on the ground of negligent homicide.

¹ *Infra*, §§ 388, 389, 491; 1 Whart. & St. Med. Jur. § 181.

² See *Roberts v. People*. 19 Mich. 401, 1869. *Infra*, §§ 388-9, 491.

³ See, as illustrating this, *McGregor's Case*, 23 Am. Jour. Ins. 549.

⁴ Stephen's Cr. Law (1863), p. 92.

⁵ In *Jones v. Com.*, 75 Pa. 403, 1874, Agnew, C. J., said: "Want of intelligence is not the only defect to moderate the degree of offence; but with intelligence there may be an absence of power to determine properly the true nature and character of the act, its effects upon the subject, and the true responsibility of the actor: a power necessary to control the impulse of the mind, and prevent the execution of the thought which possesses it. In

other words, it is the absence of that self-determining power which in a sane mind renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses. When this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influences, it cannot be said truthfully that the mind is fully conscious of its own purposes, and deliberates or premeditates in the sense of the act describing murder in the first degree. We must, however, distinguish this defective frame of mind from that wickedness of heart which drives the murderer on to the commission of his crime, reckless of consequences. Evil passions often

It is true, that whether a man is responsible can be answered only by yes or no. But while on the general question of amenability for crime there can be no grades of responsibility, it is otherwise when we view the question objectively, as involving responsibility for crimes of which there are several grades. A man may have capacity, for instance, to be responsible for manslaughter, but not to be responsible for murder; for he may have capacity enough for a blind, passionate killing, but not for a killing that is deliberate and intelligent. In this sense we may hold that there may be modified guilt. Responsibility itself is capable of no modifications. But certain phases of guilt require higher capacity than do other phases of guilt.¹ And there may be properly a verdict of murder in the second degree in cases where there was an intent to kill, and yet, from mental disturbance, this intent was not specific.²

6. Intoxication.

§ 48. *Settled insanity, produced by intoxication, affects responsibility in the same way as insanity produced by any other cause.*³ If a man who, laboring under *delirium tremens*, kills another, be made responsible, there is scarcely any species of insanity which on like principles would not be subjected to the severest penalties of criminal law. A man laboring under this species of delirium may be as utterly insane as a man laboring under any other kind of delirium. The only ground for assigning a higher degree of responsibility in cases of *delirium tremens* is the fact that in the latter case the delirious person has subjected himself voluntarily to this calamity. But to this the answer is threefold: (1) That *delirium tremens* is not the *intended* result of drink in the same way that

Persons under insanity produced by intoxication may be irresponsible.

seem to tear up reason by the root, and urge on to murder with heedless rage. But they are the outpourings of a wicked nature, not of an unsound or disabled mind." 1879. In Indiana the doctrine of the text is not accepted; but the same result is reached by authorizing the defendant to put "his mental condition" in evidence for the purpose of explaining his intent. *Sage v. State*, 89 Ind. 141.

¹ See Meyer, § 25. Berner, § 125, says, "die Verfechter der verminderten Zurechnungsfähigkeit wollen Richtiges in unrichtigerform."

² *Jones v. Com.*, *ut sup.*; *Green v. Com.*, 83 Pa. 75, 1876 (*infra*, §§ 380, 455); *Pistorius v. Com.*, 84 Pa. 158, 1877; *Willis v. Com.*, 32 Gratt. 928,

³ See, on this topic, Whart. & St. Med. Jur. (4th ed.) § 204; article by Mr. Lawson in Am. Law Reg. Ap. 1884, pp. 217 *et seq.*; *Territory v. Davis* (Ariz.) 22 Rep. 76, 1886.

drunkenness is; (2) That there is no possibility that *delirium tremens* will be voluntarily generated in order to afford a cloak for a particular crime; (3) That so far as original cause is concerned, *delirium tremens* is not peculiar in being the offspring of indiscretion or guilt, for such is the case with many other kinds of insanity. These points scarcely need to be expanded. The fact is, *delirium tremens* runs the same course with almost every other species of insanity known in the criminal courts. It is the result, like many other manias, of prior vicious indulgences; but it differs from intoxication in being shunned rather than courted by the patient, and in being incapable of voluntary assumption for the purpose of covering guilt. Hence the conclusion above given has been repeatedly affirmed.¹ And expressly to this point is a case where Judge Curtis, of the United States Supreme Court, told the jury "that if the defendant was so far insane as not to know the nature of the act, nor whether it was wrong or not, he is not punishable, although such *delirium tremens* is produced by the voluntary use of intoxicating liquors."² Drunkenness, also, when so complete as to

¹ 1 Hale, 32; 4 Black. Com. 26; R. applied. Cf. *People v. Cummins*, 47 v. Thomas, 7 C. & P. 817, 1837; R. v. Mich. 334, 1882.

Meakin, 7 C. & P. 297, 1837; *Rennie's Case*, 1 Lew. C. C. 76, 1828; R. v. 1855.

Davis, 14 Cox C. C. 563, 1879; U. S. v. Drew, 5 Mason, 28, 1828; U. S. v. Forbes, Crabbe R. 558, 1845; U. S. v. Clarke, 2 Cranch C. C. 158, 1824; *Flanigan v. People*, 86 N. Y. 554, 1881; *Com. v. Green*, 1 Ashm. 289, 1826; *State v. Dillahun*, 3 Harring. 551, 1844; *Roberts v. People*, 19 Mich. 401, 1869; *Maconnehey v. State*, 5 Ohio St. 77, 1855; *Boswell v. Com.*, 20 Gratt. 860, 1871; *Smith v. Com.*, 1 Duv. 224, 1864; *Bales v. State*, 3 W. Va. 685, 1864; *Bailey v. State*, 26 Ind. 422, 1867; *Fisher v. State*, 64 Ind. 435, 1878; *Bennett v. State*, Mart. & Yerg. 133, 1839; *Cornwell v. State*, Ibid. 147, 1827; *Beasley v. State*, 50 Ala. 149, 1873; *Carter v. State*, 12 Tex. 500, 1854; *Erwin v. State*, 10 Tex. App. 700, 1881; *Schlencker v. State*, 9 Nebr. 241, 1880; and see *Stuart v. State*, 1 Baxt. 178, 1873, where the right and wrong test was applied. Cf. *People v. Cummins*, 47 v. Thomas, 7 C. & P. 817, 1837; R. v. Mich. 334, 1882.

² U. S. v. McGlue, 1 Curtis C. C. 1, 1855. When *delirium tremens* is set up as a defence, the prisoner must show that he was under a delirium at the time the act was perpetrated, there being no presumption of its existence from antecedent fits from which he has recovered. *State v. Sewell*, 3 Jones Law, (N. C.) 245, 1855. See, as to presumption of continuance of insanity, Whart. Cr. Ev. § 730. Where it is shown that the defendant's mind has been so far destroyed by long-continued habits of drunkenness as to render him mentally incompetent for the intelligent commission of crime, this mental incapacity is held a sufficient defence. *Bailey v. State*, 26 Ind. 422, 1867; *Cluck v. State*, 40 Ind. 263, 1871. As to "dipsomania," see Whart. & St. Med. Jur. § 639; *State v. Pike*, 49 N. H. 399, 1869; *People v. Blake*, cited *infra*, § 53.

stupefy, may be a defence to a prosecution for any offence with the commission of which stupefaction is inconsistent.¹ And permanent insanity produced by drunkenness stands on the same footing as permanent insanity of any other type.²

§ 49. *Temporary insanity, produced immediately by intoxication, does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated.*³ It may, as we will presently see, lower the grade of guilt in cases in which the defendant did not previously make himself drunk with 'the crime in view. But it does not, when voluntary, and when not amounting to insanity as above stated, destroy responsibility.⁴ This conclusion is sustained not only by reason but by policy. There could rarely be a conviction for homicide if drunkenness avoided responsibility.⁵ Few violent crimes would probably be attempted without resorting to liquor both as a stimulant and as a shield:⁶ and the very fact, therefore, which shows peculiar malignant deliberation, would be interposed as an excuse. The authorities, however, concur in rejecting this position. Sir E. Coke tells us: "As for a drunkard who is *voluntarius daemon*, he hath, as has been said, no privilege thereby, but what hurt or ill soever he doth his drunkenness doth aggravate it. *Omne crimen ebrietas et incendit et detegit.*"⁷ And though casual drunkenness cannot now be said to aggravate a crime in a judicial sense,⁸ yet it is settled that it forms no defence to the fact of guilt. Thus Judge Story, in a case already cited, after noticing that insanity, as a general rule, produces irresponsibility, went on to say: "An exception is, when the crime is committed by a party while in a fit of intoxication, the law allowing not a man to avail

¹ *Infra*, § 54.

109 Ill. 169, 1883; *Gunter v. State*,

² *State v. Robinson*, 20 W. Va. 713, 83 Ala. 96, 1887.

1882. ⁴ *State v. Wilson*, 104 N. C. 868, 1889.

³ That when the defendant was made drunk by the artifice of another he is to be treated as if *pro tanto* insane, see *Bartholomew v. People*, 104 Ill. 605, 1882. In *Smith v. Com.*, 1 Duv. 224, 1864; Judge Robertson held that temporary drunkenness may in respect to responsibility be treated as temporary insanity; but this was repudiated in *Shannahan v. Com.*, 8 Bush, 463, 1871; *Upstone v. People*,

⁵ See 1 Whart. & St. Med. Jur. §§ 207-10.

⁶ See *Nevling v. Com.*, 98 Pa. 323, 1881; *State v. Robinson*, 20 W. Va. 713, 1882.

⁷ Co. Litt. 247 a.

⁸ See *McIntyre v. People*, 38 Ill. 515, 1864; *Ferrell v. State*, 43 Tex. 503, 1875.

Bush, 463, 1871; *Upstone v. People*,

himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime." Lord Hale said: "The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perfect but temporary frenzy; but by the laws of England such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses."¹ And so Parke, B., said to a jury in 1837: "I must also tell you, that if a man makes himself voluntarily drunk it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go unpunished."² And Alderson, B., said in 1836: "If a man chooses to get drunk, it is his own voluntary act; it is very different from madness, which is not caused by any act of the person. The voluntary species of madness which is in a party's power to abstain from he must answer for."³ In harmony with this is the unbroken current of English authority.⁴

§ 50. In this country the same position has been taken with marked uniformity, it being held that voluntary drunkenness not amounting to settled insanity is no defence to the *factum* of guilt;⁵

¹ 1 Hale, 7; 4 Black. Com. 26; 1 1877; Smurr v. State, 88 Ind. 504, Gabbett C. L. 9; and see a learned article in 6 Law Rep. (N. S.) 554. 1882; Upstone v. People, 109 Ill. 169, 1883; State v. White, 14 Kans. 538,

² R. v. Thomas, 7 C. & P. 817, 1837. 1874; State v. Welch, 21 Minn. 22,

³ R. v. Meakin, 7 C. & P. 297, 1836. 1875; State v. John, 8 Ired. 330, 1848;

⁴ Burrow's Case, 1 Lewin, 75, 1823; State v. Stark, 1 Strobb. 479, 1846; Rennie's Case, 1 Lewin, 76, 1823; R. State v. Paulk, 18 S. C. 514, 1881; v. Ayes, R. & R. 165, 1810; R. v. Gam- Mercer v. State, 17 Ga. 146, 1854; len, 1 F. & F. 60, 1859; 1 Russell Choice v. State, 31 Ga. 424, 1860; on Crimes, 8. Estes v. State, 55 Ga. 30, 1875; Han-

⁵ U. S. v. Clarke, 2 Cranch C. C. vey v. State, 68 Ga. 612, 1881; State 158, 1824; U. S. v. McGlue, 1 Curtis v. Bullock, 13 Ala. 413, 1848; Ford v. C. C. 1, 1855; U. S. v. Cornell, 2 State, 71 Ala. 385, 1881; Tidwell v. Mason, 91, 1825; U. S. v. Drew, 5 State, 70 Ala. 33, 1881; State v. Cole- man, 27 La. An. 691, 1875; Kelly v. Mason, 28, 1823; Com. v. Hawkins, State, 3 Sm. & Mar. 518, 1844; Schal- 3 Gray, 463, 1855; Com. v. Malone, ler v. State, 14 Mo. 502, 1851; State 114 Mass. 295, 1873; Kenney v. Peo- v. Harlow, 21 Mo. 446, 1855; State v. ple, 31 N. Y. 330, 1864; People v. Robinson, 1 Parker C. R. 649, 1854; Dearing, 65 Mo. 530, 1877; Smith v. People v. Hammill, 2 Parker C. R. Com., 1 Duv. 224, 1864; Golliher v. 223, 1855; Resp. v. Weidle, 2 Dall. 88, Com., 2 Duv. 163, 1865; Cornwell v. 1781; McGinnis v. Com., 102 Pa. 66, State, Mart. & Yerg. 147, 1827; Swan v. 1883; Boswell v. Com., 20 Gratt. 860, State, 4 Humph. 136, 1873; Pirtle v. 1871; Gillooley v. State, 58 Ind. 182, State, 9 Humph. 663, 1848; Casat v.

the only point about which there has been any fluctuation being the extent to which evidence of drunkenness is receivable to determine the exactness of the intent, or the degree of deliberation.¹

§ 51. When a particular condition of mind is requisite to constitute an offence, intoxication may be proved to explain such condition. Great caution is necessary in the application of this doctrine to prosecutions for homicides and other violent crimes, for, as has already been remarked, there are few cases of premeditated violence in which the defendant does not previously nerve himself for the encounter by liquor, and there would in future be none at all, if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, is, not that the fact of liquor having been taken affects the issue when the offence is shown to have been premeditated,² but that when there is no evidence of premeditation *aliunde*, and the defendant is proved at the time of the occurrence to have been in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show that the defendant was at the time in hot blood, making him peculiarly susceptible to supposed insult, which would reduce the offence at common law to manslaughter,³ or that he was

Intoxica-
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condition
of mind.

State, 41 Ark. 511, 1882; Carter v. State, 49 Ga. 210, 1873; Moon v. State, 12 Tex. 509, 1854; Scott v. State, 68 Ga. 687, 1881; Haile v. State, 11 State, 12 Tex. App. 81, 1881; People v. Lewis, 36 Cal. 531, 1869; Houston v. State, 26 Tex. App. 657, 1883; State v. Lowe, 93 Mo. 547, 1887; Rather v. State, 25 Tex. App. 623, 1888; Engelhardt v. State, 88 Ala. 100, 1889.

¹ Scott v. State, 12 Tex. App. 31, 1882; Buckhannon v. Com., 86 Ky. 110, 1887; King v. State, 81 Ala. 92, 1886; Chrisman v. State, 54 Ark. 283, 1891; State v. Zorn, 22 Oreg. 591, 1892.

² See *infra*, §§ 54, 389.

³ See cases discussed *infra*, §§ 54, 389; and see R. v. Gamlen, 1 F. & F. 1858; People v. Rogers, 18 N. Y. 9, 1859; People v. Cassiano, 30 Hun, 388, 1882; Jones v. Com., 75 Pa. 403, 1874; Keenan v. Com., 44 Pa. 55, 1862; State v. Garvey, 11 Minn. 154, 1866; Jones v. State, 29 Ga. 594, 1860; Malone

v. State, 49 Ga. 210, 1873; Moon v. State, 68 Ga. 687, 1881; Haile v. State, 11 Humph. 154, 1851; Tidwell v. State, 70 Ala. 33, 1881; Dawson v. State, 16 Ind. 428, 1861; Cluck v. State, 40 Ind. 263, 1872; McIntyre v. People, 38 Ill. 514, 1864; Cartwright v. State, 8 Lea, 376, 1881; People v. Williams, 43 Cal. 344, 1872; State v. Trivas, 32 La. An. 1086, 1880; Ferrell v. State, 43 Tex. 503, 1875; Wenz v. State, 1 Tex. App. 36, 1876; Jeffries v. State, 9 Tex. App. 598, 1880.

In New York, on a trial of an indictment for murder with a club in a sudden affray, it was held admissible to prove that the prisoner was intoxicated at the time; and where a witness, then present, well knowing the prisoner, after describing his appearance and conduct, was asked to give his opinion whether the prisoner was intoxicated, and the court excluded

not at the time capable of forming a deliberate or specific intent, which, as will be seen in the next section, affects the question of statutory degree.¹ "If the existence of a specific intention," says Sir J. F. Stephen,² "is essential to the commission of a crime, the fact that an offender was drunk when he did the act which, if coupled with that intention, would constitute such crime, should be taken into account by the jury in deciding whether he had that intention."³

§ 52. Hence drunkenness is material under the statutes resolving murder into two degrees, in which the distinguishing test is a specific intent to take life.⁴ In the Philadelphia riot cases of 1844, where it was shown that bodies of men were inflamed by sectarian and local prejudices, and blinded by a wild apprehension of danger to such an extent as to make them incapable of discrimination, or of precise or specific pur-

*Epecially
as to in-
tent to
take life.*

such evidence, this was held ground for a new trial. *Eastwood v. People*, 3 Parker C. R. (N. Y.) 25, 1855. But see *Kenny v. People*, 4 Tiffany, (31 N. Y.) 330, 1868.

So on a trial for murder, the defendant's counsel requested the court to charge "that if it appeared from the evidence that the condition of the prisoner from intoxication was such as to show that there was no motive or intention to commit the crime of murder, that the jury should find a verdict of manslaughter." The court refused, and it was held that the charge should have been given, as the question of intent was material to the degree of the crime. *Rogers v. People*, 3 Parker C. R. (N. Y.) 632, 1855; s. c., in error, 18 N. Y. 9. For advanced doctrine as to same point, see *Smith v. Com.*, 1 Duv. 224, 1864; *Blimm v. Com.*, 7 Bush, (Ky.) 320, 1871; which, however, are greatly qualified in *Shannahan v. Com.*, 8 Bush, 463, 1871. See *State v. Edwards*, 71 Mo. 312, 1880. That this excuse is to be received with "great caution," see *People v. Ferris*, 55 Cal. 588, 1880.

¹ *R. v. Moore*, 3 C. & K. 319, 1850; *R. v. Monkhouse*, 4 Cox C. C. 55, 1849;

U. S. v. Bowen, 4 Cranch C. C. 604, 1835; *State v. Maxwell*, 42 Iowa, 208, 1875; *State v. Donovan*, 61 Iowa, 369, 1883; *State v. Trivas*, 32 La. An. 1086, 1880; *Houston v. State*, 26 Tex. App. 657, 1883; *People v. Langton*, (Cal.) 7 W. Coast Rep. 413, 1885; *Cleveland v. State*, 86 Ala. 1, 1889; *Carpenter v. Com.*, 92 Ky. 452, 1892.

² Dig. Crim. Law, art. 28.

³ To this is cited *R. v. Cruse*, 8 C. & P. 541, 1838. This view is affirmed in *Hopt v. People*, 104 U. S. 631, 1881; *Rather v. State*, 25 Tex. App. 623, 1888; *U. S. v. King*, 34 Fed. Rep. 302, 1888; *U. S. v. Meagher*, 37 Fed. Rep. 875, 1888; *King v. State*, 81 Ala. 92, 1886; *Engelhardt v. State*, 88 Ala. 100, 1889.

⁴ *Com. v. Dorsey*, 103 Mass. 412, 1869.

"When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."—Gray, J., *Hopt v. People*, 104 U. S. 631, 1881.

pose, it was held that they could not be considered as guilty of that species of "wilful and deliberate" murder which constitutes murder in the first degree.¹ Analogous to this is the case of the drunkard, who in a fight slays an antagonist without any prior premeditation. In his intoxication he may be incapable of such mental action as the term "premeditated" describes, or of forming a "specific intent" to take life. And yet, at the same time, at common law, the offence might, strictly speaking, fall under the head of murder, for it would possess the incident of malice, would be independent of that of provocation, and would be prompted by a determination to inflict great bodily hurt. Under such circumstances the offence may be ranked as murder in the second degree, and this has repeatedly been decided by the courts.² And if no malice be shown, the offence would be manslaughter, at common law.³

§ 53. The same considerations apply to the question of specific intent in other relations.⁴ Thus in an Ohio case it was properly held, that when the charge was knowingly passing counterfeit money with intent to cheat, the drunkenness of the defendant at the time of the offence was a fit subject for the consideration of the jury, there being no

And so as
to other
questions
of intent.

¹ Whart. on Hom. § 191. -

Kans. 538, 1874; *People v. Belencia*,

² *Hopt v. People*, 104 U. S. 631, 1881; *State v. Johnson*, 41 Conn. 584, 1874; s. c. 40 Conn. 136; *People v. Batting*, 49 How. Pr. 392, 1874; *Penns. v. M'Fall*, Add. 255, 1794; *Com. v. Haggerty*, Lewis, C. L. 403; *Kelly v. Com.*, 1 Grant, 484, 1858; *Jones v. Com.*, 75 Pa. 403, 1874; *Com. v. Hart*, 2 Brewst. 546, 1868; *Com. v. Platt*, 11 Phila. 421, 1876; *Com. v. Jones*, 1 Leigh, 598, 1829; *Boswell v. Com.*, 20 Gratt. 860, 1871; *Rafferty v. People*, 66 Ill. 118, 1872; *Smith v. State*, 4 Nebr. 277, 1875; *Jones v. State*, 29 Ga. 594, 1859; *Curry v. Com.*, 2 Bush, 67, 1867; *Swan v. State*, 4 Humph. 136, 1843; *Pirtle v. State*, 9 Humph. 663, 1848; *Lancaster v. State*, 2 Lea, 575, 1879; *Haile v. State*, 11 Humph. 154, 1851; *State v. Bullock*, 13 Ala. 413, 1847; *Kelly v. State*, 3 Sm. & M. 518, 1844; *State v. Harlow*, 21 Mo. 446, 1855; *State v. White*, 14

21 Cal. 544, 1862; *People v. Williams*, 43 Cal. 344, 1872; *State v. Trivas*, 32 La. An. 1086, 1880. See *infra*, § 389. See, however, *Estes v. State*, 55 Ga. 30, 1875.

The question left to the jury in such cases is, whether the defendant's mental condition was such that he was capable of a specific intent to take life. In Missouri, the rule in the text is not accepted; *State v. Edwards*, 71 Mo. 324, 1880; *State v. Dearing*, 65 Mo. 530, 1877; nor in Vermont; *State v. Tatro*, 50 Vt. 483, 1877.

³ *Hopt v. People*, 104 U. S. 631, 1881.

⁴ See *R. v. Monkhouse*, 4 Cox C. C. 55, 1849; *R. v. Stopford*, 11 Cox C. C. 643, 1869; *Com. v. Atkins*, 136 Mass. 160, 1884 (a case of fraud); *People v. Walker*, 38 Mich. 156, 1878; *Ingalls v. State*, 48 Wis. 647, 1880; *U. S. v. Meagher*, 37 Fed. Rep. 875, 1888; *Keeton v. Com.*, 92 Ky. 522, 1892.

ground to suppose that the defendant knew the money to be counterfeit *before* he was drunk.¹ To perjury, also, drunkenness may be a defence,² though not when the false oath was intelligently taken.³ Larceny, also, is not imputable to a person so drunk as to be incapable of a fraudulent intent.⁴ And when the defendant was indicted for an attempt to commit suicide by drowning, and it was alleged that she was at the time unconscious of the nature of her act from drunkenness, Jervis, C. J., said to the jury: "If the prisoner was so drunk as not to know what she was about, how can you find that she *intended* to destroy herself?"⁵ So, again, when the charge was assault with intent to murder, Patterson, J., said: "A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering the child, you may find them guilty of an assault."⁶ The same distinction applies to attempts.⁷ Whenever, however, the offence is not dependent on intent, *e. g.*, in double voting, then drunkenness is no defence.⁸

§ 54. In an English case, decided in 1819,⁹ where Holroyd, J., is reported by Sir W. Russell, who adopts his opinion as text law, to have said that the fact of drunkenness might be taken into consideration to determine the question whether an act was premeditated or done only with sudden heat and impulse. Although this has been doubted,¹⁰ yet it may now be considered as settled in England that where

But not so as to reduce responsibility when malice is shown.

¹ *Pigman v. State*, 15 Ohio, 555, Finn, 108 Mass. 466, 1871; *Rogers v. State*, 33 Ind. 543, 1870; *State v. Schingen*, 20 Wis. 74, 1866.

² *Nichols v. State*, 8 Ohio St. 435, 1858. ³ *R. v. Moore*, 3 C. & K. 319, 1850; See, to the same point, *U.S. v. Roudenbush*, 1 Bald. 514, 1833. But see *State v. Avery*, 44 N. H. 392, 1862. That in a forgery case evidence of "dipsomania" is admissible for the defence, see *People v. Blake*, Sup. Ct. Cal. 1884, 5 Crim. Law Mag. 723. *Supra*, § 48.

⁴ *Lytle v. State*, 31 Ohio St. 196, 1875.

⁵ *People v. Willey*, 2 Park. C. R. 19, 1855.

⁶ *Wood v. State*, 34 Ark. 341, 1879. *Infra*, § 885; *S. P. State v. Bell*, 29 Iowa, 316, 1869; *Scott v. State*, 12 Tex. App. 31, 1882. See *Com. v.*

⁷ *R. v. Moore*, 3 C. & K. 319, 1850; 6 Law Rep. (N. S.) 581.

⁸ *R. v. Cruse*, 8 C. & P. 541, 1838. See *Roberts v. People*, 19 Mich. 401, 1869; *Mooney v. State*, 33 Ala. 419, 1860; *Jeffries v. State*, 9 Tex. App. 598, 1880; *State v. Garvey*, 11 Minn. 154, 1866.

⁹ *R. v. Doody*, 6 Cox C. C. 463; *R. v. Stopford*, 11 Cox C. C. 643, 1869.

¹⁰ *Infra*, §§ 88, 1835; *People v. Harris*, 29 Cal. 678, 1865; *contra*, *State v. Welch*, 21 Minn. 22, 1875.

¹¹ *R. v. Grindley*, 1 Russ. on Cr. 12, note *t*.

¹² *R. v. Carroll*, 7 C. & P. 145, 1835.

no prior intention to kill is shown, drunkenness is a condition from which hot blood may be inferred, and therefore deliberateness negatived.¹ In this country we have repeated rulings to the effect that where the encounter was sudden, and the defendant, prior to such encounter, had no intention to kill, intoxication at the time of the encounter can be taken into consideration, to ascertain whether the defendant, when under a legal provocation, acted from malice or from sudden passion,² and whether there was deliberation, or a specific intention to take life.³ But when an intention to kill, formed when the defendant was in possession of his faculties, is shown, the court will tell the jury that voluntary intoxication does not lower the offence to manslaughter.⁴ And, under any circumstances, the intoxication must be coupled with the act. Thus evidence that the defendant was in the habit at times of drinking to excess, and of the effect of this habit upon his mind, is incompetent unless confined to a period within a few days of the homicide.⁵

§ 55. Interesting questions may arise as to what "voluntary" is. There may be persons who from constitutional peculiarities are so susceptible to stimulants that on even slight indulgence they

¹ *R. v. Meakin*, 7 C. & P. 297, 1836; *Bell*, 29 Iowa, 316, 1869; and see cases and see *R. v. Gamlen*, 1 F. & F. 90, *infra*, § 389.

1858; *R. v. Thomas*, 7 C. & P. 817, 1837. ² *Supra*, § 52.

³ *U. S. v. Roudenbush*, 1 Bald. 514, 1833; *Com. v. Hawkins*, 3 Gray, 463, 1855; *People v. Hammill*, 2 Parker C. R. (N. Y.) 223, 1855; *People v. Robinson*, *Ibid.* 235, 1855; *Keenan v. Com.*, 44 Pa. 55, 1862; *Penns. v. M'Fall*, Add. 255, 1794; *McIntyre v. People*, 38 Ill. 514, 1864; *State v. Bell*, 29 Iowa, 316, 1869; *Ingalls v. State*, 48 Wis. 647, 1860; *Kelly v. State*, 5 Sm. & Mars. 518, 1845; *Pirtle v. State*, 9 Humph. 663, 1848; *Swan v. State*, 4 Humph. 136, 1843; *Haile v. State*, 11 Humph. 154, 1851; *State v. Harlow*, 21 Mo. (6 Bennett) 446, 1851; *Jones v. State*, 29 Ga. 594, 1859; *Golden v. State*, 25 Ga. 527, 1858; *State v. Bullock*, 13 Ala. 413, 1847; *Mooney v. State*, 33 Ala. 419, 1860; *People v. Balencia*, 21 Cal. 544, 1861; *People v. King*, 27 Cal. 507, 1865; *People v. Williams*, 43 Cal. 344, 1872; *State v.* ⁴ *R. v. Carroll*, 7 C. & P. 145, 1835; *R. v. Meakin*, 7 C. & P. 297, 1836; *R. v. Ayes*, R. & R. 166, 1810; *U. S. v. Cornell*, 2 Mason, 91, 1825; *Com. v. Hawkins*, 3 Gray, 463, 1851; *State v. Johnson*, 41 Conn. 584, 1874; *Penns. v. M'Fall*, Add. 255, 1794; *People v. Robinson*, 1 Park. C. R. 649, 1854; *People v. Hammill*, 2 Park. C. R. 223, 1855; *Boswell v. State*, 20 Gratt. 860, 1871; *Nichols v. State*, 8 Ohio St. 435, 1858; *Smurr v. State*, 88 Ind. 504, 1882; *Mercer v. State*, 17 Ga. 146, 1855; *State v. Bullock*, 13 Ala. 413, 1845; *Tidwell v. State*, 70 Ala. 83, 1881; *State v. Dearing*, 65 Mo. 530, 1877; *State v. Mullen*, 14 La. An. 570, 1859; *Shannahan v. Com.*, 8 Bush, 463, 1873, qualifying prior cases cited, § 51; *State v. Thompson*, 12 Nev. 140, and cases cited *supra*, § 50.

⁵ *Real v. People*, 3 Hand, (42 N. Y.) 270, 1869; and see *supra*, § 48.

become virtually insane. If such persons are aware of this infirmity, and nevertheless voluntarily take the stimulant, their subsequent insane condition, if it be only special and temporary, is no defence. But what if they are not aware of this peculiarity of their constitution? Or how is it if such susceptibility, instead of being constitutional, so that they can have notice of it, is exceptional, induced by some peculiar temporary debility or disease? Is a man, who, under such abnormal conditions, is maddened by a quantity of wine, which on former occasions he wisely and soberly used as a mere tonic, to be regarded as making himself voluntarily mad?¹ This question is elsewhere fully discussed.² It is enough now to say that the tendency both of argument and authority is to answer the question in the negative.³ And *a fortiori* in this case where the stimulant is given through the mistake or misconduct of others.⁴

“Voluntary” is conditioned by temperament.

7. Practice in Cases of Insanity.

§ 56. The mode of examining witnesses called to testify as to sanity is examined in detail in another work.⁵

At present it may be sufficient to recapitulate the following conclusions :

Witness may give opinion based on observation.

(1) Non-experts as well as experts may be asked whether in their opinion a party whom they had the opportunity to observe was at the time drunk.

(2) Such being the case, we must also hold that as to conditions equally patent to the lay mind—*e. g.*, stupor, dementia, amentia, paralysis—a non-expert as well as an expert may give his opinion.⁶

(3) When acts of doubtful signification are put in evidence by a non-expert, he is not entitled to give his opinion as to their effect, since this is a matter of which the jury are as qualified to judge as he is.

¹ See *State v. Johnson*, 40 Conn. 143-4, 216, 1826, remarks by Parke, J., and see *infra*, § 373.

² 1 Whart. & St. Med. Jur. § 211.

³ Whart. Cr. Ev. § 417. See Com.

⁴ *Roberts v. People*, 19 Mich. 401, 1869; *Rogers v. State*, 33 Ind. 543, 1870; but see *Choice v. State*, 31 Ga. 424, 1861.

⁵ *Upstone v. People*, 109 Ill. 169, 1883; *State v. Lewis*, 20 Nev. 338, 1889; *State v. Leehman*, 2 S. Dak. 171, 1891; *Armstrong v. State*, 30 Fla. C. R. 235, 1884; *Choice v. State*, *ut supra*, *cf.* *Pearson's Case*, 2 Lew. 757, 1892; *People v. Taylor*, 138 N. Y. 398, 1893.

⁶ See *People v. Robinson*, 2 Parker 171, 1891; *Armstrong v. State*, 30 Fla. C. R. 235, 1884; *Choice v. State*, *ut supra*, *cf.* *Pearson's Case*, 2 Lew. 757, 1892; *People v. Taylor*, 138 N. Y. 398, 1893.

(4) As to hypothetical cases an expert¹ may be examined,² but not a non-expert.

(5) The weight of authority is that intelligent attendants, who have lived continuously with a party, may give an opinion as to his sanity, though they are³ not specialists in psychological disease.

§ 57. Whatever may once have been thought, it is now settled that the defence of insanity may be taken by the friends and counsel of a prisoner, even though this course be objected to by himself.⁴ Thus in an English case, a man was indicted for shooting at his wife with intent to murder her, and was defended by counsel who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane, and was allowed to suggest questions, to be put by the judge to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed to show that the defence was an unfounded one; but, on the contrary, their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity.⁵ To refuse this right to the guardian or friends of the accused would be to assume his sanity, which is the question at issue.

§ 57 *a*. In some jurisdictions the defence of insanity must be set up on a special plea.⁶

§ 58. By the common law, if it be doubtful whether a criminal who, at his trial, in appearance is a lunatic, be such in truth or not, the issue is to be tried by the jury who are charged to try the indictment,⁷ or, being a collateral issue, the fact may be pleaded and replied to *ore tenus* and a venire awarded, returnable instant, in the nature of an inquest of office.⁸ If it were found by the jury that the party only feigned

¹ Taylor v. State, 83 Ga. 647, 1889; Montgomery v. Com., 88 Ky. 509, 1889.

² State v. Coleman, 20 S. C. 441, 1883; Gunter v. State, 83 Ala. 96, 1888; Kearney v. State, 68 Miss. 233, 1890.

³ People v. Lee Fook, 85 Cal. 300, 1890.

⁴ State v. Patten, 10 La. An. 299, 1855. See R. v. Pearce, 9 C. & P. 667, 1840.

⁵ R. v. Pearce, 9 C. & P. 667, 1840.

⁶ Whart. Cr. Pl. & Pr. § 429 *a*.

⁷ Bac. Ab. "Idiot" (B); R. v. Ley, 1 Lewin, 239, 1823; 1 Russ. C. & M. 14. See 1 Hawk. c. 1, s. 4; R. v. Haswell, R. & R. 458, 1818.

An article on this topic by Prof. Ordonaux will be found in 1 Crim. Law Mag. 431 *et seq*.

⁸ Fost. 46; 1 Lev. 61; Russ. C. & M., by Greaves, 14.

himself lunatic, and he refused to answer, he was, before the 7 & 8 Geo. IV. c. 28, s. 2, dealt with as one who stood mute, and as if he had confessed the indictment; but now, by virtue of that enactment, a plea of not guilty may be pleaded. The principal point to be considered by the jury under that statute is, whether the defendant is of sufficient intellect to comprehend the course of the proceedings on the trial, so as to be able to make a proper defence.¹ The question whether the defendant was insane at the commission of the offence is considered at common law under the plea of guilty. As has been already seen, the defendant who sets up this defence is required, in some jurisdictions, to present it in a special plea to be tried before the plea of not guilty.²

§ 59. If a party under sentence of death becomes insane after conviction, execution is to be deferred,³ and in some jurisdictions

¹ See *R. v. Prichard*, 7 C. & P. 303, 305, 1836; s. c. 1 Lewin, 84

quired to take order on the premises. Ibid. c. 136, s. 15. See Gen. Stat. c. 171, § 15.

In Massachusetts, where one, having committed a homicide, was sent to the house of correction, pursuant to Stat. 1797, c. 61, s. 3, as a person dangerous to go at large, and was then tried for murder and acquitted on the ground of insanity, the court remanded him to the house of correction till he should be duly discharged. *Com. v. Meriam*, 7 Mass. 168, 1810. See *Com. v. Braley*, 1 Mass. 103, 1806; 13 Mass. 299, 1816; *Com. v. Battis*, 1 Mass. 95, 1806. But by the General Statutes it is provided that "when any person indicted for an offence is, on trial, acquitted by the jury, by reason of insanity, the jury, in giving their verdict of not guilty, shall state it was given for such cause; and thereupon, if his discharge or going at large is deemed manifestly dangerous to the peace and safety of the community, the court may order him to be committed to one of the state lunatic hospitals; otherwise he shall be discharged." Gen. Stat. c. 173, § 17. See 7 Gray, 584, 1856; Rev. Stat. Mass. c. 138, s. 13. In the same State, in case of insanity, "the grand jury shall certify that fact to the court," and thereupon the court is re-

In New York, it has been judicially held that the test of insanity, when set up to bar a trial, is, whether the prisoner is mentally competent to make a rational defence. *Freeman v. People*, 4 Denio, 9, 1847. On a preliminary trial to determine whether the defendant is sane enough to make a rational defence, the defendant is not entitled to peremptory challenges; but challenges for cause may be made. Ibid. See as to statute, 1 Crim. Law Mag. 435.

In Pennsylvania, the revised act (1860) provides for a special verdict in case of insanity on a preliminary issue.

In Tennessee, under the statute, an analogous practice exists. *Coldwell v. State*, 3 Baxt. 418, 1869.

² See Whart. Cr. Pl. & Pr. § 429 *a* (9th ed.); *Bennett v. State*, (57 Wis.) 4 Crim. Law Mag. 378; *Coldwell v. State*, 3 Baxt. 418, 1869.

It has been held not error to require a defendant to plead "not guilty," in addition to his special plea of insanity. *Long v. State*, 38 Ga. 491, 1869.

³ Hale's Sum. 10; 1 Hawk. c. 1. § 3; 4 Black. Com. 24.

the issue in such case is referred to a jury for determination.¹

Insanity
after con-
viction de-
fers execu-
tion.

It has been ruled in such case that evidence of the convict's mental condition at the time of the commission of the crime is admissible to illustrate his present condition, provided there be other evidence of present insanity, or provided permanent insanity be thereby shown.²

§ 60. By the common law, every man is presumed to be sane until the contrary be proved,³ and the better opinion is, that when insanity is set up by the defendant, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof.⁴ The finding of an inquisition of lunacy, which is admissible, shifts the burden.⁵

Burden is
on party
disputing
sanity.

§ 61. Three distinct theories have been propounded as to the degree of evidence requisite to justify a conviction on the issue of insanity.

The first is that insanity, as a defence of confession and avoidance, must be proved beyond reasonable doubt; and that unless this be done, the jury, the case of the prosecution being otherwise proved, are to convict. This is expressed by Hornblower, C. J., as follows: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be to find a

Conflicting
theories as
to amount
of evi-
dence
requisite
to prove
insanity.

¹ See *State v. Lane*, 4 Ired. 431, Zab.) 202, 1849; *State v. Brandon*, 8 1843; *State v. Hinson*, 82 N. C. 540, Jones, (N.C.) 463, 1860; *State v. Starke*, 1880; *State v. Vann*, 84 N. C. 722, 1881.

² *Spann v. State*, 47 Ga. 553, 1872. *Strob.* 479, 1846; *State v. Brin-*
In Pennsylvania, when insanity is set up as a bar to sentence, the ques-
tion of a jury trial is at the discretion of the court. *Laros v. Com.*, 84 Pa.
200, 1877.

³ *Dacey v. People*, 116 Ill. 555, 1886; *Montag v. People*, 141 Ill. 75, 1892.

⁴ Whart. Cr. Ev. § 336; *R. v. Stokes*, 8 C. & K. 188, 1850; *R. v. Taylor*, 4 Cox C. C. 155, 1850; *R. v. Haswell*, R. & R. 458, 1818; *Atty.-Gen. v. Parnther*, 4 Brown C. C. 409; *R. v. Layton*, 4 Cox C. C. 149, 1850; *U. S. v. Lawrence*, 4 Cranch C. C. 514, 1835; *U. S. v. McGlue*, 1 Curtis, 1, 1855; *Com. v. Eddy*, 7 Gray, 583, 1856; *State v. Spencer*, 21 N. J. L. (1

⁵ *McGinnis v. Com.*, 74 Pa. 245, 1878; *Wheeler v. State*, 84 Ohio St. 394, 1877; Whart. Cr. Ev. § 336.

sane man guilty.¹ Several English authorities are cited to the same effect.²

The second is that the jury are to be governed by the *preponderance* of evidence,³ and are not to require insanity to be made out beyond reasonable doubt.⁴ This view is now generally accepted in England;⁵ and is maintained in Maine;⁶ in Massachusetts;⁷ in Pennsylvania;⁸ in Virginia;⁹ in West Virginia;¹⁰ in Ohio;¹¹ in Michigan;¹² in Minnesota;¹³ in North Carolina;¹⁴ in South Carolina;¹⁵ in Alabama;¹⁶ in Georgia;¹⁷ in Louisiana;¹⁸ in Texas;¹⁹ in California;²⁰ in Iowa;²¹ in Idaho;²² and in Arkansas.²³

¹ *State v. Spencer*, 21 N. J. L. (1 Zab.) 202, 1849. In *Graves v. State*, 45 N. J. L. (16 Vroom) 203, 1883, however, the court held that preponderance was to determine. See Whart Cr. Ev. § 729.

² 1 Whart. & St. Med. Jur. §§ 225, 226.

³ *Parsons v. State*, 9 Crim. Law Mag. 812, 1887; *Coates v. State*, 50 Ark. 330, 1887; *State v. Lewis*, 20 Nev. 333, 1889; *Lovegrove v. State*, 31 Tex. Cr. 491, 1893.

⁴ See *Com. v. Eddy*, 7 Gray, 583, 1857; *Com. v. Rogers*, 7 Metc. 500, 1843; *Loeffner v. State*, 10 Ohio St. 598, 1860; *Gunter v. State*, 83 Ala. 96, 1887; *Plake v. State*, 121 Ind. 433, 1889; *Maxwell v. State*, 89 Ala. 150, 1889; *Armstrong v. State*, 30 Fla. 170, 1892; *McLeod v. State*, 31 Tex. Cr. 331, 1892; *Com. v. Gerade*, 145 Pa. 289, 1891.

⁵ See *R. v. Layton*, 4 Cox C. C. 149, 1849; *R. v. Higginson*, 1 C. & K. 130.

⁶ *State v. Lawrence*, 57 Me. 574, 1868.

⁷ *Com. v. Eddy*, 7 Gray, 583, 1857; *Com. v. Rogers*, 7 Metc. 500, 1843; *Com. v. Heath*, 11 Gray, 303, 1857.

⁸ *Com. v. Ortwein*, 76 Pa. 414, 1874. See *Com. v. Winnemore*, 1 Brewst. 356, 1867; *Com. v. Haggerty*, Lewis Cr. L. 402; *Myers v. Com.*, 83 Pa. 131, 1876; *Laros v. Com.*, 84 Pa. 200, 1877; *Sayres v. Com.*, 88 Pa. 290, 1879; *Nevling v. Com.*, 98 Pa. 322, 1881; *Coyle v. Com.*, 100 Pa. 573, 1882. To exact "clearly preponderating evidence" is error. Ibid.

⁹ *Baccigalupo v. Com.*, 33 Gratt. 807, 1879.

¹⁰ *State v. Strauder*, 11 W. Va. 747.

¹¹ *Loeffner v. State*, 10 Ohio St. 598, 1860; *Bond v. State*, 23 Ohio St. 349, 1872; *Bergin v. State*, 31 Ohio St. 111, 1875.

¹² *People v. Finley*, 38 Mich. 482, 1878.

¹³ *State v. Gut*, 13 Minn. 341, 1867; *State v. Grear*, 28 Minn. 426, 1881.

¹⁴ *State v. Starling*, 6 Jones, (N. C.) 366, 1858; *State v. Brandon*, 8 Jones (N. C.) 463, 1860. See *State v. Payne*, 86 N. C. 609, 1882.

¹⁵ *State v. Stark*, 1 Strob. L. 479, 1846.

¹⁶ *Boswell v. State*, 63 Ala. 307, 1879; *Ford v. State*, 71 Ala. 385, 1882.

¹⁷ *Carter v. State*, 56 Ga. 463, 1876.

¹⁸ *State v. Coleman*, 27 La. An. 691, 1875.

¹⁹ *Jones v. State*, 13 Tex. App. 1, 1883. See *Webb v. State*, 9 Tex. App. 496, 1880; *King v. State*, 9 Tex. App. 515, 1880.

²⁰ *People v. Coffmann*, 24 Cal. 230, 1863; *People v. Hamilton*, 62 Cal. 377, 1882, modifying *People v. Wredon*, 62 Cal. 377, 1882. See *People v. Bell*, 49 Cal. 486, 1875; *People v. Messersmith*, 61 Cal. 246, 1882.

²¹ *State v. Felter*, 32 Iowa, 49, 1869.

²² *People v. Walter*, 1 Idaho, N. S. 386, 1875.

²³ *McKenzie v. State*, 26 Ark. 384, 1872.

As to Indiana, see *Mitchell v. State*, 63 Ind. 276, 1878.

A third view is that in such an issue the *prosecution* must prove *sanity* beyond reasonable doubt. Thus, in a case in Michigan, in 1869, while it was admitted that sanity was the normal condition of the mind, and that the prosecution might rest upon the presumption that the accused was sane when he committed the act, until it was overcome by the opposite case, it was nevertheless determined that when any evidence which tends to overthrow that presumption is given, the jury are to examine, weigh, and pass upon it, with the understanding that, although the initiative in presenting the evidence is taken by the defence, the prosecution is bound to establish this part of the case as fully as it is bound to establish other essential incidents of guilt.¹

Similar views have been maintained by other American courts; and it has been not infrequently ruled that where there is reasonable doubt as to sanity, the jury must acquit.²

¹ *People v. Garbutt*, 17 Mich. 9, 1868. Mo. 173, 1880; and so in Indiana;

In New York the tendency in the main is to sustain the distinctions of the text, and to hold that while a reasonable doubt as to sanity is sufficient to require an acquittal in all cases in which sanity is part of the case of the prosecution, yet, when insanity is set up by the defence for the purpose of establishing general non-accountability, and of placing the defendant under permanent sequestration as a dangerous lunatic, such insanity must be established by a preponderance of proof. See *People v. McCann*, 16 N. Y. 58, 1858; *Walter v. People*, 32 N. Y. 147, 1865; *Flanagan v. People*, 52 N. Y. 467, 1873; *Brotherton v. People*, 75 N. Y. 154, 1874; *O'Connell v. People*, 87 N. Y. 377, 1882; *Walker v. People*, 88 N. Y. 81, 1882. These cases are considered in detail in Whart. Cr. Ev. 9th ed. § 338.

In Missouri the cases may be harmonized by the application of the above distinction. See *State v. Hundley*, 46 Mo. 414, 1871; *State v. Klingler*, 43 Mo. 127, 1869; *State v. Smith*, 53 Mo. 267, 1873; *State v. Simms*, 68 Mo. 305, 1878; *State v. Redemeier*, 71 Mo. 173, 1880; and so in Indiana; *McDougal v. State*, 87 Ind. 24, 1882.

² As taking this position may be cited; *U. S. v. Lancaster*, 7 Biss. 440, 1875; *State v. Bartlett*, 43 N. H. 224, 1861; *State v. Jones*, 50 N. H. 369, 1870; *State v. Patterson*, 45 Vt. 308, 1873; *State v. Johnson*, 40 Conn. 139, 1873; *Polk v. State*, 19 Ind. 170, 1862; *Bradley v. State*, 31 Ind. 492, 1869; *McDougall v. State*, 88 Ind. 24, 1882; *Fisher v. People*, 23 Ill. 283, 1859; *Hopps v. People*, 31 Ill. 385, 1862; *Chase v. People*, 40 Ill. 352, 1865; *Smith v. Com.*, 1 Duv. 224, 1864; *Kriel v. Com.*, 5 Bush, 362, 1869; *Ball v. Com.*, (Ky. 1884); *Lawless v. State*, 4 Ala. 179, 1880; *State v. Marler*, 2 Ala. 43, 1841; *Cunningham v. State*, 56 Miss. 269, 1878; *State v. De Rance*, 34 La. An. 186, 1882; *Wright v. People*, 4 Nev. 407, 1868; *State v. Crawford*, 11 Kans. 32, 1873; *People v. Waterman*, 1 Nebr. 343, 1871; *Webb v. State*, 9 Tex. App. 490, 1880. See *State v. Graves*, 45 N. J. L. 203, 1883; *Armstrong v. State*, 30 Fla. 170, 1892; *Revoir v. State*, 82 Wis. 295, 1892; *Hornish v. People*, 142 Ill. 620, 1892; *State v. McIntosh*, 39 S. C. 97, 1892.

§ 62. It may be said that the position, that unless there be a preponderance of proof of insanity there can be no acquittal on the ground of insanity, is inconsistent with the principle that if there is reasonable doubt of guilt there can be no conviction. But there is no such inconsistency. Insanity, as a defence in criminal prosecution, has two distinct aspects, subject to very different rules. When the question, as in a charge of murder in the first degree, is whether there was a particular intention in the defendant's mind at a particular time, then, if such intention cannot be proved beyond reasonable doubt, there must be an acquittal of this grade of murder. An indictment, for instance, is found in Pennsylvania for murder in the first degree. By the law of that State there can be no conviction of murder in the first degree, unless it be proved that the defendant at the time of the homicide specifically intended to take the deceased's life. We will assume a case, however, in which the defendant's mind, at the time of the litigated event, was so affected by disease that it is questionable whether he was then capable of forming a specific intent to take life. Now, in such a case, if there be reasonable doubt whether the defendant was capable of forming a specific intent to take life, the jury should be instructed (and this has been so done in several cases in Pennsylvania) to acquit of murder in the first degree, and convict of murder in the second degree, or of manslaughter.¹ The same rule applies to all other cases in which it is incumbent on the prosecution to prove a sane intent on the part of the defendant; in which cases such intent must be proved beyond reasonable doubt. It is otherwise, however, where insanity is set up, not to qualify the proof of intent, but as a bar to criminal procedure. In the former case it goes to the question of guilt or innocence; in the latter case it goes to the amenability or non-amenability of the defendant to criminal jurisdiction. In the former case the defence says, "not guilty of specific act charged;" in the latter case it says, "not the subject of penal discipline." The plea of insanity, when thus offered in bar of the prosecution, stands, as do analogous pleas of non-amenability.

In South Carolina it is held, following the distinction of the text, that where the issue is at common law, that the burden is on the defendant whether there is capacity to commit crime, this capacity must be proved beyond reasonable doubt by the prosecution. *Coleman v. State*, 20 S. C. 441, 1882. In Arkansas it is ruled by a majority of the court (Eaken, J., diss.) to "clearly prove" insanity. *Casat v. State*, 40 Ark. 511, 1881.

¹ *Supra*, § 52.

bility, on the ground of want of jurisdiction.¹ This brings us to the rightful solution of this vexed issue. The test of "reasonable doubt" only applies to questions of "guilt" or "innocence." The defence of insanity, as a bar, like other defences based on non-amenability to penal discipline, is not one of "guilt" or "innocence." It is not one, therefore, when offered in bar of an indictment, to which the test of "reasonable doubt" applies. The errors into which judges have been led in this respect have been errors arising from the defective way in which the plea is presented. If it were offered specially in bar, as a preliminary issue, as it is in some jurisdictions, then no one would question that the case would go to the jury to be decided according to the preponderance of proof. Supposing that the plea, being special (as is the plea, for instance, of *autrefois acquit*), should be determined against the defendant, then he would be compelled to plead over, and then, to the questions of facts arising under a plea of not guilty, the test of "reasonable doubt" would be applicable. And it would be easy to conceive of cases in which, after a verdict against the defendant on the special plea of insanity, a verdict acquitting him of the

¹ We may cite, as an illustration, the case of McLeod, 1 Hill, (N. Y.) 377, 1841; 25 Wend. 483; where, in order to sustain non-amenability to the New York tribunals, the defendant's counsel maintained that the defendant, in the transaction which was the subject of the indictment, was acting as a servant of the British government, under the direct order of that government. If this had been sustained as a matter of fact, then the conclusion would have been, as a matter of law, that our quarrel was with the British government, and not with McLeod. But if the question of fact in such a case should be disputed, no one would claim that if there be reasonable doubt as to whether the defendant acted as the servant of a foreign government, he should be acquitted. What the jury would be told would be, "Here is a question of fact; if the proof satisfies you that a defendant was a British subject, and acted under British orders, then he is to be remanded to his own government for discipline." Another illustration, already noticed in the text, is to be found in those cases in which, on a plea of *autrefois acquit*, a question of fact, to be determined by a jury, arises, whether the offence of which the defendant was acquitted was the same as that on trial. In such a case the jury would not be told, "If you have a reasonable doubt you must find for defendant." What they would be told is, "If you decide that there is a preponderance of proof to the effect that the cases are the same, then you must so find; otherwise you must find that the cases are not the same." See Whart. Cr. Pl. & Pr. § 483. In neither of the cases last mentioned does the question of guilt or innocence arise, and in neither case, if the defence be properly pleaded, would evidence to show either guilt or innocence be relevant.

highest grade of the offence might be had on the ground of the very insanity which was held not to be sufficient to sustain a verdict of non-amenability on the first plea. Suppose, for instance, that, in a case of homicide, the proof of insanity on the first trial was not sufficiently strong to transfer the defendant from the category of the sane to that of the insane, and yet that such evidence was strong enough on the second trial to raise a reasonable doubt as to whether the defendant had specifically intended to kill the deceased. In such case, though the issue of insanity had been determined on the first trial against the defendant, he should be convicted only of murder in the second degree, or of manslaughter, on the second trial, which would involve his acquittal of murder in the first degree. By maintaining this distinction we avoid the danger (incident to the application of the test of "reasonable doubt" to all issues of insanity raised in a criminal court) of committing a defendant as to whose sanity there is "reasonable doubt" to perpetual sequestration in an insane asylum.¹

§ 63. When insanity of a permanent type is shown to have existed prior to the commission of an act, it will be inferred to

¹ Walker v. People, 88 N.Y. 82, 1876, above cited, is an illustration of this danger. Walker was tried for abduction. Suppose he had been indicted for an assault, and suppose, as it has frequently been decided to be permissible, his relatives or friends, against his protest, had interposed the plea of insanity. We can imagine, in fact, many cases in which this might be a convenient way of disposing of an uncomfortable relative or neighbor. A defendant of this class finds himself, when tried for some minor offence, confronted by a plea of insanity interposed in his behalf. If the view here contested be the law, the judge would have in such case but one course open to him. He would be obliged to hear the evidence, no matter what might be the defendant's protestations; and, what is more, he would be obliged to tell the jury that if they have a reasonable doubt of the defendant's sanity, they must find him in- sane. The only way to avoid this absurdity is to put the determination of the issue of insanity, when set up to bar amenability, on the same basis in criminal as that adopted in civil courts. In both courts the presumption is that persons coming into courts of justice are sane, and that the burden of proof is on the parties contesting such sanity. In criminal courts, as well as in civil, the rule should be that to take a particular person out of the category of reasonable and responsible beings, and to subject him to the sequestration and restrictions imposed by the law on adjudicated lunatics, at least a preponderance of proof of insanity should be required.

The above argument is expanded by me in the Central Law Journal for May 23, 1884. The subject is discussed more fully in Whart. Cr. Ev. §§ 338 et seq. See, also, 1 Crim. Law Mag. 445.

have continued, unless the contrary be proved, down to the time of the act.¹ It is otherwise, however, when the proof is of temporary or spasmodic mania,² or of *delirium tremens*.³

Insanity to be inferred from conduct. Evidence, therefore, of prior insane conduct and declarations may be received on a trial for an act alleged to have been insane;⁴ and so may that of subsequent attacks of derangement,⁵ if connected in system with the defendant's condition at the time of the offence.⁶ Attempt at suicide is one of the incidents from which insanity may be inferred.⁷

§ 64. As facts from which insanity may be inferred, it is admissible to prove epilepsy,⁸ cerebral peculiarities, and anomalies

¹ Whart. Cr. Ev. § 730; 1 Jarm. on v. Com., 2 Va. Cas. 132, 1820; U. S. Wills, (2d Am. ed.) 65; 1 Whart. & v. Sharp, 1 Pet. C. C. 118, 1815; McAl-
St. Med. Jur. §§ 61-4; R. v. Stokes, lister v. State, 17 Ala. 434, 1849;
3 C. & K. 185, 1850; R. v. Layton, 4 McLean v. State, 16 Ala. 672, 1848;
Cox C. C. 149, 1850; Cartwright v. Lake v. People, 1 Parker C. R. 495,
Cartwright, 1 Phil. Eccl. R. 100; Hoge 1854; State v. Mewherter, 46 Iowa,
v. Fisher, 1 Pet. C. C. 163; Hix v. 88, 1877. Insanity of the prisoner, at
Whittemore, 4 Metc. 545, 1842; State the instant of the commission of the
v. Spencer, 21 N. J. L. (1 Zab.) 196, offence, can only be established by
1849; State v. Huting, 21 Mo. 464, evidence tending to prove that he
1855; State v. Brinyea, 5 Ala. 241, was insane at some period before
1843; State v. Stark, 1 Strobb. 479, or afterward. People v. March, 6
1846; State v. Wilner, 40 Wis. 304, Cal. 543, 1856; State v. Davis, 27 S.
1876; State v. Reddick, 7 Kans. 143, C. 609, 1888.

1871. See Webb v. State, 5 Tex. App. 596, 1878, where it was held that
stronger proof of insanity would be

required as a ground of irresponsibil-
ity than would be required to relieve

from a contract. State v. Lowe, 93
Mo. 547, 1887; Montgomery v. Com.,
88 Ky. 509, 1888; Langdon v. People,
133 Ill. 382, 1890; Armstrong v. State,
30 Fla. 170, 1892.

² Ibid.; State v. Reddick, 7 Kans.
143, 1871; Lewis v. Baird, 3 McLean,
56, 1849; People v. Francis, 38 Cal.
183, 1870. See U. S. v. Guiteau, 1
Mackey, 498, 1882.

³ State v. Sewell, 3 Jones Law, (N.
C.) 245, 1855. People v. Francis,
supra; State v. Reddick, *supra*.

⁴ Whart. on Cr. Ev. § 731; R. v.
Haswell, R. & R. 458, 1818; Com. v.
Brayman, 136 Mass. 438, 1883; Vance

⁵ See 1 Whart. & St. Med. Jur. §
378; People v. March, 6 Cal. 543, 1856.

⁶ Com. v. Pomeroy, 117 Mass. 143,
1875.

⁷ An attempt to commit suicide is
not, of itself, evidence of the fact of in-
sanity, and raises no legal presump-
tion thereof, but may be considered
by the jury with all the other facts
and circumstances bearing on the
question of insanity. Mercur, J., in
Coyle v. Com., 100 Pa. 573, 1882.

⁸ 1 Whart. & St. Med. Jur. §§ 422,
470. See Laros v. Com., 84 Pa.
200, 1877; State v. George, 62 Iowa,
682, 1883, citing 1 Whart. & St. Med.
Jur. § 470; Fogarty v. State, 80 Ga.
450, 1888; People v. Smiler, 125 N.
Y. 717, 1891; Lovegrove v. State, 31
Tex. Cr. 491, 1893.

of sensibility, pulse, secretion;¹ and to put in evidence the history, conversation, writings, and deportment of the patient, so far as they bear on the issue.²

It is admissible, in order to show mental incapacity when the defendant, under trial for larceny, has been shown to be an opium-eater, and to have been deprived of his accustomed supply of the drug, to prove by competent testimony the effect of such deprivation on his mental condition.³

And from
physical
peculiarities.

§ 65. As a rule, it is competent to prove insanity in the family of the party whose sanity is under examination.⁴

It has been said that where hereditary insanity is offered as an excuse for crime, it must appear that the kind of insanity proposed to be proven is no temporary malady, and that it is notorious, and of the same species as that with which other members of the family have been afflicted.⁵ But this qualification cannot be sustained, as insanity rarely descends in the same common type, but varies with individuals.⁶

And from
hereditary
tendency.

Proof of hereditary insanity can only be admitted as cumulative evidence. By itself, the insanity of ancestors is no defence.⁷

Evidence that certain causes might induce insanity is not admissible without laying or offering to lay a basis of proof to show that insanity actually existed.⁸

7. Other Forms of Unconsciousness.

§ 66. Other forms of unconsciousness may be noticed as constituting a defence to a criminal charge. A man may commit an

¹ Ibid. § 347. But it has been ruled that family and neighborhood reputation is not admissible to prove that the prisoner was permanently injured in his mind, by reason of a wound which he had received. *Choice v. State*, 31 Ga. 424, 1861. Abbott, 7 Gray, 71, 1856; and even of collateral descendants from a common ancestor three generations back. *Com. v. Andrews*, cited 1 Whart. & St. Med. Jur. § 375; *Edmund's Case*, Ibid.; and see *Com. v. Rogers*, 7 Metc. 500, 1843.

⁵ *State v. Christmas*, 6 Jones, (N. C.)

² 1 Whart. & St. Med. Jur. §§ 471, 1858. 378-88. See Whart. Cr. Ev. § 731.

⁶ 1 Whart. & St. Med. Jur. § 376; Whart. Cr. Ev. § 731.

³ *Rogers v. State*, 33 Ind. 543, 1870.

⁴ 1 Whart. & St. Med. Jur. § 372; *R. v. Tucket*, 1 Cox C. C. 103, 1845; *R. v. Oxford*, 9 C. & P. 525, 1840; *Smith v. Kramer*, 1 Amer. Law Reg. 353; *Bradley v. State*, 31 Ind. 492, 1869; *State v. Felter*, 25 Iowa, 67, 1867; *People v. Garbutt*, 17 Mich. 9, 1867. Thus insanity of uncles has been received in evidence; *Baxter v.* ⁷ *Snow v. Benton*, 28 Ill. 306, 1862. In *Laros v. Com.*, 84 Pa. 200, 1877, it is ruled that such evidence is not competent until evidence of the defendant's own insanity is given. *People v. Pine*, 2 Barb. 566, 1848; *State v. Christmas*, 6 Jones, (N. C.) 471, 1858. ⁸ *Sawyer v. State*, 35 Ind. 80, 1871; *Bradley v. State*, 31 Ind. 492, 1869.

injury when asleep, as when in a state of sleep-walking or somnambulism.¹ Or he may be under the influence of opium, or of ether, or other anodynes.² The question then arises, Was the defendant at the time of the act a free agent? If not, the act is not criminally imputable to him. But we have to keep in mind two possible conditions which may greatly vary the case. If the abnormal state was artificially induced in order to facilitate the commission of the crime, then the offence is malicious. If such state was negligently induced, then the defendant may be chargeable with a negligent offence.

Other forms of unconsciousness may be a defence.

II. INFANTS.

§ 67. Until an infant arrives at the age of seven, he cannot be convicted of a criminal offence. Under that age the infant may be chastised by his parents or tutors, but cannot be judicially punished, for he cannot be guilty in such a way as involves the ordinary penalty of crime.³

Infants under seven not penally responsible.

§ 68. Between the age of seven and fourteen responsibility is conditioned on capacity. If it appear that a child within these limits is *capax doli*, which is to be determined by the circumstances of the case, he may be convicted and condemned.⁴

Between seven and fourteen an infant *capax doli* may be convicted.

The presumption that an infant is not *capax doli*, as to a child under seven, is irrebuttable.⁵ As to a child between seven and fourteen the presumption is rebuttable, the burden of overthrowing it being on the prosecution; the intensity of proof varying with age and other circumstances.⁶ It has been held in North

¹ See these cases discussed in 1 163, 1828; *State v. Goin*, 9 Humph. Whart. & St. Med. Jur. §§ 482-4. 175, 1848.

² *Rogers v. State*, 33 Ind. 548, 1870. ⁴ *R. v. Groombridge*, 7 C. & P. 582, 1836; *R. v. Vanplew*, 3 Fost. & F. 520; *State v. Doherty*, 2 Tenn. 80, 1806; *State v. Guild*, 5 Halst. 163, 1828; *Willet v. Com.*, 13 Bush, 230, 1877; *Godfrey v. State*, 31 Ala. 323, 1852. As to special provision in Massachusetts for trial of infants, see *Com. v. Donahue*, 126 Mass. 51, 1879. *Infra*, § 72.

³ 1 Inst. 2; Burn's Justice (29th ed.), tit. Children; 1 Hale, 19, 20; 4 Bla. Com. 23; 2 Steph. Hist. Crim. Law, 98; *R. v. Giles*, 1 Moody, 166, 1834; *Marsh v. Loader*, 14 C. B. N. S. 535, 1863; *Com. v. Mead*, 10 Allen, 323, 1865; *People v. Townsend*, 3 Hill, (N. Y.) 479, 1842; *State v. Guild*, 5 Halst. L. & C. 607, 1863; *R. v. Owen*, 4 C. & P. 582, 1836.

⁵ Whart. Cr. Ev. § 801. ⁶ *Ibid.*; Hale's Sum. 43; 1 Hawk. c. 1, s. 8; 4 Bla. Com. 24; *R. v. Wild*, 1 Mood. C. C. 452, 1834; *R. v. Smith*, L. & C. 607, 1863; *R. v. Owen*, 4 C. & P. 582, 1836.

Carolina that "as the reputed age of every one is peculiarly within his own knowledge," a defendant setting up infancy has the burden on him to establish it.¹

An exceptional case is reported in New Jersey, where a boy of twelve years was convicted, on his own confession, imperfectly sustained by circumstantial corroboration, of murder, and was sentenced and executed.²

When the age of fourteen arrives, full criminal responsibility, at common law, attaches.³

P. 236, 1830; *R. v. Smith*, 1 Cox C. C. 260, 1846; *Com. v. Elliot*, 4 Law Rep. 329; *State v. Learnard*, 41 Vt. 585, 1869; *Com. v. Mead*, 10 Allen, 398, 1865; *Angelo v. People*, 96 Ill. 132, 1880; *State v. Pugh*, 7 Jones, (N. C.) 61, 1859; *Willet v. Com.*, 13 Bush, 230, 1877; *State v. Toney*, 15 S. C. 409, 1881; *Hill v. State*, 53 Ga. 578, 1876; *State v. Adams*, 76 Mo. 355, 1882; *State v. Goin*, 9 Humph. 175, 1848; *State v. Fowler*, 52 Iowa, 103, 1879. See note in 1 Green's Cr. R. 402. In Illinois the age of irresponsibility is extended to ten. *Angelo v. People*, 96 Ill. 209, 1880. In Texas the periods are nine and thirteen. *McDaniel v. State*, 5 Tex. App. 475, 1879. Under the N. Y. Penal Code of 1884 the limit is placed at twelve.

According to an enlightened German jurist and statesman, the age of criminal responsibility is postponed in proportion to the extent to which the State assumes the responsibility of the education of its children. "The better the school discipline, the more confidently can the State defer to riper years the application of penal justice. Thus, while in the Roman and canon law responsibility began at seven years, in modern Germany it does not begin till twelve." Schaper, in Holtz. Straf. ii. 161.

See *State v. Bostick*, 4 Harring. 563, 1847. ³ *State v. Goin*, 9 Humph. 175, 1848; *State v. Bostick*, 4 Harring. 563, 1847; *State v. Handy*, Ibid. 566, 1847; *Irby v. State*, 32 Ga. 496, 1861. "The presumption of law in favor of infants under fourteen, and the necessity of satisfying the jury that the child, when committing the act, must have known that he was doing wrong, is well illustrated by the case of *R. v. Owen*, 4 Carrington & Payne, 236, 1830, where a girl ten years of age was indicted for stealing coals. It was proved that she was standing by a large heap of coals belonging to the prosecutor, and that she had a basket upon her head containing a few coals which the girl herself said she had taken from the heap. Littledale, J., in summing up to the jury, remarked: 'In this case there are two questions: First, did the prisoner take the coals? and second, if she did, had she at the time a guilty knowledge that she was doing wrong? The prisoner is only ten years of age, and unless you are satisfied by the evidence that, in committing this offence, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is, that he or she has not sufficient capacity to know that it is wrong; and such person ought not to be convicted unless there be evi-

¹ *State v. Arnold*, 13 Ired. 184, 1853; *infra*, § 73.

² *State v. Guild*, 5 Halst. 163, 1828.

Parental influence, not amounting to coercion, however much it may affect a jury's conclusion on the merits, is not a technical defence.¹

§ 69. A boy under fourteen is presumed by law unable to commit a rape, and therefore, it seems, cannot be guilty of it; and though in other felonies *malitia supplet aetatem* in some cases, yet it seems that as to rape the law presumes him impotent as well as wanting discretion.² Nor at common law is any evidence admissible to show that in fact he had arrived at the full state of puberty, and could commit the offence.³ But he may be a principal in the second degree, if he aid and assist in the commission of this offence, as with other felonies, and if intelligent evil purpose on his part be shown by the prosecution,⁴ which must, however, be plainly established. And though an infant under fourteen cannot be convicted of an assault with an intent to commit a rape;⁵ he may be convicted of an indecent assault under the 7 Will. IV. s. 1; 10 Vict. c. 85, s. 11.⁶ After he passes fourteen the presumption vanishes; and in Delaware a boy just arrived at that age has been held in law capable of the offence.⁷

§ 70. An infant, under the limitations which have been above expressed, may be guilty of forcible entry, if concerned in actual

dence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong.' The jury returned a verdict of 'Not guilty;' adding, 'We do not think the prisoner had any guilty knowledge.' R. v. Smith, 1 Cox C. C. 260, 1846; People v. Davis, 1 Wheeler C. C. 280, 1823; Walker's Case, 5 City Hall Recorder, 137; Stage's Case, 5 City Hall Recorder, 177, cited 5 Bost. L. Rep. N. S. 364; State v. Doherty, 2 Tenn. 80, 1806.

¹ *Infra*, § 94 a.

² 1 Hale, 360. And see R. v. Eldershaw, 3 C. & P. 396, 1828; R. v. Groombridge, 7 C. & P. 582, 1836.

³ R. v. Philips, 8 C. & P. 736, 1839; R. v. Jordan, 9 C. & P. 118, 1839; Lewis C. L. 558. But see *contra*, People v. Randolph, 2 Parker C. R. 174, 1855; Williams v. State, 14 Ohio, 222, 1845; Moore v. State, 17 Ohio, 521, 1867, where the presumption is held rebuttable; and see more fully *infra*, § 551. See State v. Pugh, 7 Jones, (N. C.) 61, 1859.

⁴ Law v. Com., 75 Va. 885, 1880.

⁵ R. v. Eldershaw, 3 C. & P. 396, 1828; R. v. Groombridge, 7 C. & P. 582, 1836; R. v. Philips, 8 C. & P. 736, 1839; R. v. Jordan, 9 C. & P. 118, 1839; R. v. Brimilow, 2 Mood. C. C. 122; s. c. 9 C. & P. 366, 1840; State v. Sam, Winston, (N. C.) 300, 1864; State v. Pugh, 7 Jones, (N. C.) 61, 1859. See *contra*, Com. v. Green, 2 Pick. 380, 1823; People v. Randolph, 2 Parker C. R. 174, 1854; Williams v. State, 14 Ohio, 222, 1845.

⁶ R. v. Brimilow, 2 Mood. C. C. 122; s. c. 9 C. & P. 366, 1840.

⁷ State v. Handy, 4 Harring. 566, 1847. *Infra*, § 551.

personal violence,¹ and the justices may fine him therefor; though it is doubtful whether under the old English statutes he could be imprisoned for this offence.² As to other misdemeanors attended with a notorious breach of the peace, such as riot, battery, or the like, an infant is liable under the above limitations,³ and he is indictable for perjury or cheating.⁴ But it is otherwise as to *quasi* civil suits. Thus, an infant under twenty-one is not responsible for not repairing a bridge or highway, or other such acts of omission of civil duty,⁵ though he may be convicted on a penal statute. An infant under seven cannot be punished criminally for a nuisance on his land.⁶

Infant's liability in special cases.

§ 71. As will hereafter be seen, an infant over fourteen, who falsely claims to be of age, and thus obtains money, is indictable for obtaining money by false pretences.⁷ But this can only be done when there is nothing in the infant's appearance to put parties dealing with him on inquiry as to the true facts.

Infant liable for false representations as to age.

§ 72. Upon a presentment against an infant for a misdemeanor, he has a right to appear and defend himself in person or by attorney, and it is an error to assign him a guardian, and to try the case on a plea pleaded for him by the guardian.⁸

When infant may appear by attorney.

§ 73. When age can be ascertained by inspection, the court and jury must decide.⁹ But ordinarily opinion of medical experts is admissible to prove age.¹⁰ And age is generally inferable from circumstances.

Age is inferable from circumstances.

§ 74. We have elsewhere seen¹¹ that no conviction should be permitted to rest on a confession without proof of the *corpus delicti*, and that a confession is dependent for credibility on the character and circumstances of the declarant. To children these cautions are peculiarly

Confessions of infants admissible.

¹ 1 Hawk. c. 24, s. 35.

² 1 Hawk. c. 64, s. 35.

³ 1 Hale, 20, 21; 4 Bla. Com. 220; Bullock v. Babcock, 3 Wend. 391, 1829. See, as to Massachusetts, Com. v. Don-

⁴ 3 Bac. Abr. Infancy (H). *Infra*, §§ 1148-9.

⁵ R. v. Sutton, 5 N. & M. 354, 1826; Bla. Com. 22; Co. Lit. 257.

⁶ See People v. Townsend, 3 Hill, (N. Y.) 479, 1842.

⁷ *Infra*, § 1149. See People v.

Kendall, 25 Wend. 399, 1841; *infra*, § 1135.

⁸ Word v. Com., 3 Leigh, 743, 1831.

ahue, 126 Mass. 51, 1879.

⁹ State v. Arnold, 13 Ired. 184, 1853.

¹⁰ State v. Smith, Phill. (N. C.) L.

302, 1867. As to burden of proof, see *supra*, § 68.

¹¹ Whart. Cr. Ev. § 532.

applicable, as from their immaturity and inexperience they are likely to indulge in loose talk. But a child's confessions, if not elicited by threats or promises, are technically admissible against him.¹

III. FEME COVERTS.

§ 75. There is no technical objection to an indictment naming the wife singly. It is not necessary that the husband should be included as a joint defendant, even though he was living with her at the time,² or was jointly participant with her in the offence, which is a matter of defence.³

But it is right and proper, in the latter case, that there should be a joinder, and though a nonjoinder is no defence, and is not demurrable, the court may on motion compel it.⁴ The husband may be singly indicted for his wife's acts done under his command,⁵ or in case of misdemeanors, in his presence with his knowledge and apparent assent,⁶ or, in cases where the business of the house is at issue, for her acts in their common home.⁷ The indictment need not negative coercion.⁸

§ 76. Indictments against wife jointly with husband are good on their face, and will be sustained on demurrer, on arrest of judgment, or in error.⁹ And this rule has been specifically applied to indictments for assault and battery;¹⁰ for keeping a bawdy house;¹¹ for keeping a

¹ R. v. Wild, 1 Mood. C. C. 452, 1834; R. v. Upchurch, Ibid. 465, 1854; Mather v. Clark, 2 Aik. 209, 1828; State v. Guild, 5 Halst. 163, 1828; State v. Bostick, 4 Harring. 563, 1846.

² R. v. Fenner, 1 Siderfin R. 410; 2 Keble, 468; R. v. Jordan, 2 Keb. 634; R. v. Foxby, 6 Mod. 178; R. v. Serjeant, 1 Ry. & Mood. 352; Com. v. Lewis, 1 Metc. 151, 1841; State v. Collins, 1 McCord, 355, 1821.

³ Somerset's Case, 2 St. Trials, 966, 1616; R. v. Crofts, 2 Strange, 1120. ⁴ Rather v. State, 1 Porter, 132, 1833. ⁵ See Com. v. Barry, 115 Mass. 146, 1873; Mulvey v. State, 43 Ala. 316, 1870.

⁶ *Infra*, § 1509; Hensley v. State, 52 Ala. 16, 1874. ⁷ *Infra*, § 1509.

⁸ *Infra*, § 1509. ⁹ R. v. Cruse, 8 C. & P. 541, 1838; State v. Parkerson, 1 Strobh. 169, 1846.

¹⁰ R. v. Cruse, 8 C. & P. 541, 1838; State v. Parkerson, 1 Strobh. 169, 1846.

¹¹ R. v. Williams, 10 Mod. 63; 1 Hawk. c. 1, s. 12; State v. Bentz 11 Mo. 27, 1847.

gaming house;¹ for keeping a tippling house;² for forcible entry and detainer;³ for stealing and receiving;⁴ for murder;⁵ and for treason.⁶

After a conviction of husband and wife jointly, of a severable offence, the court may affirm the judgment as to the husband, and reverse as to the wife.⁷ But where the offence is joint, the wife cannot be convicted without the husband.⁸

§ 77. If a *feme covert* be indicted as a *feme sole*, her proper course is to plead the misnomer in abatement, for if she pleads over, she cannot take advantage of it.⁹ She must aver her marriage in her plea, and prove it affirmatively.¹⁰ The practice on such a plea is elsewhere discussed.¹¹ But notwithstanding she is thus precluded from setting up misnomer as a bar, she may, so it has been held, make the defence of marital coercion, though she has pleaded not guilty in an indictment charging her as a *feme sole*.¹²

Wife's misnomer must be pleaded in abatement.

§ 78. By the English common law, if a wife is party to a crime under her husband's direct command and constraint she is entitled to acquittal; and though by some of the old writers an exception is made in cases of treason, murder, and robbery,¹³ the weight of authority is against this exception.¹⁴ It is also a doctrine of the same law that if a crime of minor grade be committed by a wife in company with or in the presence of her husband, it is a rebuttable presumption of law that she acted under his immediate coercion.¹⁵ It

Wife presumed to be acting under her husband's coercion when co-operating in crime.

¹ *R. v. Dixon*, 10 Mod. 335.

¹¹ Whart. Cr. Pl. & Pr. § 423; Com.

² *Com. v. Murphy*, 2 Gray, 510, 1854. *Infra*, § 1509.

v. Neal, 10 Mass. 152, 1813; *Com. v. Eagan*, 103 Mass. 71, 1869.

³ *State v. Harvey*, 3 N. H. 65, 1826.

¹² *U. S. v. DeQuilfeldt*, 2 Crim. Law Mag. 214; 11 Rep. 455.

⁴ *R. v. M'Athey*, 9 Cox C. C. 251, 1863.

⁵ *R. v. Cruse*, 8 C. & P. 541, 1838; *Com. v. Chapman*, Phil. Pamph. 1831.

¹³ *Infra*, § 94; Russ. on Cr. 19-22; *R. v. Stapleton*, Jebb. 93; 1 Cr. & D. 163, 1841; *R. v. Knight*, 1 C. & P. 116 n, 1823.

⁶ *Sommerville's Case*, 1 Anderson R. 104.

⁷ *R. v. Mathews*, 1 Eng. L. & E. 549; 1 Den. C. C. 596, 1847.

¹⁴ Greaves's Notes to 1 Russ. on Cr. 19-24.

⁸ *Rather v. State*, 1 Porter, 132, 1833.

⁹ *R. v. Jones*, J. Kel. 37, 1841; Whart. Cr. Pl. & Pr. §§ 96, 423 *et seq.*

¹⁵ *Infra*, § 210; 1 Hawk. c. 1; *R. v. Smith*, 8 Cox C. C. 27, 1859; *R. v. Cohen*, 11 Cox C. C. 99, 1869; *Com.*

¹⁰ *R. v. Atkinson*, 1 Russ. on Cr. 35; *R. v. Hassall*, 2 C. & P. 434, 1826; *R. v. Woodward*, 8 C. & P. 561, 1838; *R. v. McGinnes*, 11 Cox C. C. 391, 1871;

v. Eagan, 103 Mass. 71, 1869; *State v. Williams*, 65 N. C. 398, 1871; *Davis v. State*, 15 Ohio, 72, 1846; *Miller v. State*, 25 Wis. 384, 1870.

R. v. Torpey, 12 Cox C. C. 45, 1872.

is, however, conceded, that if she commit a crime of her own voluntary act, or by the bare command of her husband in his absence,¹ or, as it is held by the old writers, if she be guilty of treason, murder, or robbery, or any other crime, *malum in se*, and prohibited by the law of nature, or which is heinous in its character, or dangerous in its consequences, even in company with or by command of her husband, then she is punishable as much as if she were sole.² It may be questioned, however, whether the coercive presence of the husband, if a defence at all, is not a good defence in all cases, and whether the exception taken as to the higher grades of felonies can be maintained.³ The difficulty, however, is in finding, in the present state of society, when the husband is as likely to support the wife if she is engaged in doing wrong, as the wife is to support the husband, any reason on which the presumption is to rest.⁴ And the presumption of coercion is rebutted by proof of independent criminal action on the part of the wife.⁵

§ 79. In any view, while proximity of the husband at the time of the commission of the crime is necessary to enable this presumption to apply,⁶ such proximity by itself starts the presumption.⁷ It is sufficient if the proximity is near enough to put the wife under the husband's supervision, though

Presump-
tion is re-
buttable.

¹ Com. v. Feeney, 13 Allen, 560, 1866; Sailer v. People, 77 N. Y. 411, 1879; State v. Camp, 41 N. J. L. 306, 1879. See State v. Haines, 35 N. H. 207, 1859; State v. Potter, 42 Vt. 495, 1869.

² 1 Hale P. C. 45; Hawk. bk. i. c. 1; 1 Black. Com. 444; R. v. Knight, 1 C. & P. 116, 1823; Com. v. Neal, 10 Mass. 154, 1813.

³ 1 Russ. on Cr., by Greaves, 18, 25, note; R. v. Manning, 2 C. & K. 887, 1849; R. v. Smith, 8 Cox C. C. 27, 1858; R. v. Wardroper, 8 Cox C. C. 284, 1860; Miller v. State, 25 Wis. 384, 1870.

⁴ By the N. Y. Penal Code of 1882, §§ 17, 24, the presumption is abolished. Sir J. F. Stephen, Dig. C. L. (note to article 30), writes: "Surely, as matters now stand, and have stood for a great length of time, married women ought, as regards the commission of

crimes, to be exactly on the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on almost every occasion where it ought to be applied."

⁵ R. v. Torpey, 12 Cox C. C. 45, 1872; State v. Cleaves, 59 Me. 298, 1871; State v. Harvey, 3 N. H. 65, 1826; Com. v. Eagan, 103 Mass. 71, 1869; Com. v. Pratt, 126 Mass. 462, 1879; Goldstein v. People, 82 N. Y. 231, 1880; Uhl v. Com., 6 Gratt. 706, 1849; People v. Wright, 38 Mich. 744, 1878, and other cases cited, Whart. Cr. Ev. § 733.

⁶ Whether proximity is near enough to imply control, see State v. Shee, 13 R. I. 535, 1882.

⁷ 1 Hawk. c. 1, s. 9; 1 Hale, 47;

the parties are not at the time in the same room.¹ The presumption is, however, *primâ facie* only, and may be rebutted, either by showing that the wife was the instigator or more active party, or that the husband, though present, was incapable of coercing, as that he was a cripple and bedridden, or that the wife was the stronger of the two, or that she was exercising a free volition,² or that the hus-

Dalt. c. 157; 4 Bl. Com. 29; R. v. Cox C. C. 99, 1869; 18 L. T. 489; Cruse, 8 C. & P. 541; s. c. 2 Mood. Com. v. Trimmer, 1 Mass. 476, 1806; C. C. 53, 1838; R. v. Dixon, 10 Mod. Com. v. Eagan, 103 Mass. 71, 1869; 335; R. v. Fenner, 1 Sid. R. 410; R. Uhl's Case, 6 Gratt. 706, 1849; State v. Jordan, 2 Keble, 634; R. v. Crofts, v. Williams, 65 N. C. 398, 1871; People v. Wright, 38 Mich. 344, 1878; 2 Strange, 1120; R. v. Taylor, 3 Burr. 1679; R. v. Price, 8 C. & P. 19, 1837; Miller v. State, 25 Wis. 384, 1870. R. v. Brady, 3 Cox C. C. 425, 1850; R. Under Arkansas statute, see Edwards v. Hill, 1 Den. C. C. 453, 1847; R. v. v. State, 27 Ark. 493, 1872.

Cohen, 11 Cox C. C. 99, 1869; R. v. Where a wife, by the incitement of Hughes, 2 Lewin, 229, 1826; State v. her husband, but in his absence, knowingly uttered a forged order and certificate for the receiving of prize money, Nelson, 29 Me. 329, 1849; State v. it was held that they might be indicted together, the wife as principal on the Harvey, 3 N. H. 65, 1826; State v. 49 Geo. III. c. 123, and the husband as Potter, 42 Vt. 495, 1869; Com. v. Martin, 1 Mass. 348, 1806; Com. v. Trimmer, 1 Mass. 476, 1806; Com. v. Neal, accessory before the fact, at common law. Morris's Case, 2 Leach, 1096, 1823; 10 Mass. 152, 1813; Com. v. Lewis, 1 1 Russ. 18; R. & R. C. C. 270. And Metc. 151, 1841; Com. v. Butler, 1 see R. v. Atkinson, cited 1 Russ. on Cr. Allen, 4, 1860; Eagan v. Com., 103 35; R. v. Hill, 3 New Sess. Cas. 648; Mass. 71, 1869; Uhl's Case, 6 Gratt. 1 Den. C. C. 453, 1846; 1 Temp. & M. 706, 1849; Davis v. State, 15 Ohio, 72, 150. See 1 Russ. on Cr. 21; R. v. 1846; Jones v. State, 5 Blackf. 141, Hughes, 2 Lewin, 228, 1826; cf. 1 1841; State v. Williams, 65 N. C. 399, Russell, 21; R. v. Hill, 3 New Sess. 1871; State v. Collins, 1 McCord, 355, Cas. 648; 1 Den. C. C. 453, 1846. In 1821; State v. Parkerson, 1 Strobb. a later case, however, the common 169, 1846; State v. Bentz, 11 Mo. 27, 1847.

¹ R. v. Conolly, 2 Lewin, 229, 1846; Com. v. Welch, 97 Mass. 593, 1867; Com. v. Munsey, 112 Mass. 289, 1872.

² State v. Cleaves, 79 Me. 298, 1881; Quinlan v. People, 6 Parker C. R. 9, 1861; Cassin v. Delaney, 38 N. Y. 178, 1868; Sellers v. People, 77 N. Y. 411, 1879; Tabler v. State, 34 Ohio St. 127, 1877; State v. Parkerson, 1 Strobb. 169, 1846; see 1 Russ. on Cr. 21; R. v. Stapleton, 1 Cr. & Dix, 163, 1841; Jebb, 193; R. v. Price, 8 C. & P. 19, 1837; R. v. Cruse, 8 C. & P. 541, 1838; R. v. Torpey, 12 Cox C. C. 45, 1872; 2 Mood. C. C. 53; R. v. Matthews, 1 Den. C. C. 596, 1847; R. v. Cohen, 11 Case, 2 Lewin, 229, 1826.

band was not so near at the time as to sustain the presumption.¹ So, if a woman receive stolen goods into her house, knowing them to be such, or lock them up in her chest or chamber, her husband not knowing thereof; if her husband, so soon as he knows the fact, forsake his house and her company, and make his abode elsewhere, he is not to be charged for her offence; though the law otherwise will impute the fault to him, and not to her.² And ordinarily the

¹ *People v. Sellers*, 77 N. Y. 411, 5th ed. See, too, *R. v. Torpey*, 12 Cox 1879, citing *R. v. Buncombe*, 1 Cox C. C. 45, 1872. As to uttering, see *R. v. Price*, 8 C. & P. 19, 1837. As to false swearing, *R. v. Dicks*, 1 Russ. Cr. 34, 4th ed."

² Dalt. c. 157.

Sir. J. F. Stephen (Dig. Crim. Law, art. 30) summarizes the law as follows:

"If a married woman commits a theft, or receives stolen goods, knowing them to be stolen, in the presence of her husband, she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case show that, in point of fact, she was not coerced.

"It is uncertain how far this principle applies to felonies in general.

"It does not apply to high treason or murder.

"It probably does not apply to robbery.

"It applies to uttering counterfeit coin.

"It seems to apply to misdemeanors generally."

In a note it is said: "As to high treason, murder, and robbery, see 1 Hale P. C. 45; Dalton. c. 157; 1 Hawk. P. C. 4; *R. v. Buncombe*, 1 Cox C. C. 183, 1845; but as to robbery, see Mr. Carrington's argument in *R. v. Cruse*, 8 C. & P. 556, 1838. In *R. v. Torpey*, the present recorder of London, held that the doctrine applied to robbery. 12 Cox C. C. 45, 1872. As to misdemeanors in general, see note to *R. v. Price*, 8 C. & P. 20, 1837; and 1 Russ. Cr. p. 145, note (b)

In *People v. Sellers*, 77 N. Y. 411, 1879, it is held that if a wife steals of her own will, or by the bare command or procurement of her husband, she is not excused, citing *R. v. Buncombe*, 1 Cox C. C. 183, 1845; *R. v. Hughes*, 1 Russ. on Cr. *22 (41). And that, as in the case before the Court, the alleged husband was two hundred feet or more away from the prisoner at the time of the larceny, it was not error for the trial court to call the attention of the jury to the fact, and to charge that it was for them to say whether it did not rebut the presumption of coercion, and whether she was in his presence.

Where a husband and wife were convicted jointly of receiving stolen goods, it was holden that the conviction of the wife could not be supported, though she had been more active than her husband, because it had not been left to the jury to say whether she received the goods in the absence of her husband. *R. v. Archer*, 1 Mood. 148, 1854. A married woman who swore falsely that she was next of kin to a person dying intestate, and so procured administration to the effects, was held responsible for the offence, though her husband was with her when she took the oath. *R. v. Dicks*, 1 Russ. Cr. 34 (4th ed.). So, where a husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was

presumption works as much against the husband as it does in favor of the wife.¹

§ 80. When the offence is one which, from the nature of things, is imputable to the husband, the presumption of his exclusive agency is peculiarly strong. Hence, a *feme covert*, on whose premises her husband has erected a nuisance, cannot be punished criminally for its existence.² But the husband and wife together may be indicted for forcible entry and detainer, though in such case the wife's punishment will be nominal;³ and it is said that a married woman, by her own act (but not in respect to what is done by others at her command, because all such commands of hers are void), may commit and hence be indictable for the same offence. In such case the fine, set upon the wife, shall not be levied upon the husband; for the husband is to be charged for the act or default of the wife only when he is made a party to the action, and judgment is rendered against him and his wife.⁴

For offences distinctively imputable to husband, he is primarily indictable.

When the injury comes from a breach of duty exclusively imposed on a husband, *e. g.*, providing food to an apprentice, the wife, being merely the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct.⁵

§ 81. A wife living apart from her husband may be indicted alone, and punished for keeping a disorderly house, or house of ill-fame;⁶ nor is it any defence that the husband was business manager of the house.⁷ So she may be indicted together with her

held to be punishable. *R. v. Hammond*, 1 Leach, 499, (3d ed.) 1810.

³ *State v. Harvey*, 3 N. H. 65, 1826.

A married woman who, in the absence of her husband, sells liquor illegally, is responsible, unless she prove that she did so under his command or influence. *Com. v. Murphy*, 2 Gray, 510, 1854; *Com. v. Butler*, 1 Allen, 4, 1860. See *Com. v. Welch*, 97 Mass. 593, 1867. *Infra*, §§ 81, 1509. The husband's declarations to a third party, that the wife acted under coercion, are inadmissible, being hearsay. *Edwards v. State*, 27 Ark. 493, 1878.

⁴ Dalt. c. 126; *Hussey's Case*, 5 Co. Rep. 129; *Foster's Case*, 11 Co. Rep. 107; *Burn's Justice*, (29th ed.) tit. Wife.

⁵ *R. v. Squire*, *infra*, § 83, Stafford Lent Assizes, 1799; *Burn's Justice*, (29th ed.) tit. Wife. See 1 Russ. on Cr. 490-1.

⁶ *R. v. Dixon*, 10 Mod. 335; *Com. v. Lewis*, 1 Metc. 151, 1841; *State v. Collins*, 1 McC. 355, 1821; *State v. Bentz*, 11 Mo. 27, 1847. *Infra*, §§ 1455, 1509.

¹ *State v. Boyle*, 13 R. I. 537, 1882.

² *Infra*, §§ 1422 *et seq.*; see *People v. Townsend*, 8 Hill, (N. Y.) 479, 1842.

⁷ *Com. v. Cheney*, 114 Mass. 281, 1875.

husband, and punished with him, for the same offence; for the malfeasance relates to the government of the house, in which the wife has a principal share, and constitutes an offence which may generally be presumed to be managed by the intrigues of her sex.¹ She may be indicted for keeping a gaming-house,² and when, in the absence of her husband, though in the house where they live and trade together, she sells intoxicating liquors under such circumstances as would, but for her coverture, prove her to be a common seller, she may be indicted as such, unless it appears that she acted by his command or under his coercion or influence.³

As has been already incidentally noticed, the "married women's" acts, conferring particular business privileges on married women, do not change the common law rules of marital criminal responsibility.⁴ Hence the husband is indictable for the wife's act in the illegal sale of liquor in their common domicil.⁵

§ 82. It has been held that in cases of conspiracy and riot it will not suffice to join the husband and wife alone; and if all the parties named, except the husband and wife, be acquitted, judgment against the latter will be arrested.⁶ But if an overt act be performed by the wife apart from her husband, in execution of a conspiracy concerted by her, or concerning matters distinctively belonging to her sex, it may be questioned whether in such case she is not an independent person.

§ 83. The better opinion is, that in cases where a married woman incites her husband to a felony, she is an accessory before the fact;⁷ but she cannot be treated as an accessory after the fact for receiving her husband, knowing that he has committed a felony;⁸ nor for receiving goods feloniously stolen by him;⁹ nor for concealing a felony jointly with her husband.¹⁰ As

¹ 1 Hawk. c. 1, s. 12; *State v. Bentz*, 11 Mo. 27, 1847. *Supra*, § 76.

² *R. v. Dixon*, 10 Mod. 335.

³ *Com. v. Murphy*, 2 Gray, 510, 1854. *Supra*, § 79.

⁴ *Com. v. Wood*, 97 Mass. 225, 1867; *Com. v. Gannon*, 97 Ibid. 547, 1867; *Com. v. Welch*, Ibid. 593, 1867; *Com. v. Barry*, 115 Ibid. 146, 1874. See *Nolan v. Traber*, 49 Md. 460, 1878. *Supra*, § 78; *infra*, § 1509.

⁵ *Infra*, § 1509.

⁶ 1 Hawk. c. 72, s. 8; disapproved, however, in *Casper v. State*, 47 Wis. 535, 1879. *Infra*, § 1392; Whart. Pl. & Pr. §§ 305, 755.

⁷ 1 Hale, 516; 2 Hawk. c. 29, s. 34.

⁸ 1 Hale, 47; *R. v. Manning*, 2 C. & K. 887, 888, 1849.

⁹ *R. v. Brooks*, 14 Eng. Law & Eq. 530; *Dears. C. C.* 184; 6 Cox C. C. 148, 1854.

¹⁰ Ibid.; 1 Hawk. c. 1, s. 10.

we have seen, she will not be answerable for her husband's breach of duty, however fatal, though she may be privy to his misconduct, if no duty be cast upon her, and she be merely passive.¹ A husband can be convicted of knowingly receiving goods stolen by his wife,² but not of receiving goods which she had previously received without his cognizance, and passed to him.³

IV. IGNORANT PERSONS.

§ 84. If ignorance of a law were a defence to a prosecution for breaking such law, there is no law of which a villain would not be scrupulously ignorant. The more brutal, in this view, a man becomes, the more irresponsible would he be in the eye of the law, and the worst classes of society would be the most privileged. No penal law could be enforced, because there is no penal law a knowledge of which, by a due degree of self-stupefaction, could not be precluded. As, however, it is a postulate of penal laws that they should be obeyed, it is a condition of those laws that ignorance of them should be no defence to an indictment for their violation.⁴

¹ *R. v. Squire*, 1 Russ. 80, 678 (3d ed.); *Jerv. Arch.* (9th ed.) 17. *Supra*, § 80.

² See *infra*, § 992; *R. v. M'Athey*, L. & C. 250; 9 Cox C. C. 251, 1863.

³ *R. v. Dring*, 7 Cox C. C. 382; *Dears. & B.* 329, 1857. *Infra*, § 992.

⁴ See Whart. on Neg. § 411, where this question is fully discussed; Whart. Cr. Ev. § 717, as to presumption of knowledge of law. For rulings to this effect in criminal cases, see *R. v. Price*, 3 Per. & D. 421; 11 Ad. & E. 727, 1840; *R. v. Esop*, 7 C. & P. 456, 1836; *R. v. Good*, 1 C. & K. 185, 1813; *R. v. Hoatson*, 2 C. & K. 777, 1847; *The Ann*, 1 Gallis. 62, 1814; *U. S. v. Anthony*, 11 Blatch. 200, 1873; *U. S. v. Learned*, 11 Int. Rev. 149; *State v. Goodenow*, 65 Me. 30, 1875; *Com. v. Bagley*, 7 Pick. 279, 1828; *Com. v. Elwell*, 2 Metc. 190, 1841; *Com. v. Goodman*, 97 Mass. 117, 1867; *Com. v. Emmons*, 98 Mass. 6, 1868; *People v. Powell*, 63 N. Y. 88, 1875; *Cutter*

v. State, 36 N. J. L. 125, 1875; *Grumbine v. State*, 60 Md. 355, 1882; *Winehart v. State*, 6 Ind. 30, 1855; *State v. Boyett*, 10 Ired. 336, 1850; *State v. Bryson*, 81 N. C. 595, 1879; *Schuster v. State*, 48 Ala. 199, 1872; *Hoover v. State*, 59 Ala. 57, 1878; *Walker v. State*, 2 Swan, 287, 1852; *Whitton v. State*, 37 Miss. 379, 1863. See *Brent v. State*, 43 Ala. 297, 1870, to the effect that the presumption of knowledge of law does not extend to future contingent interpretations of statutes. That ignorance of law is no defence to an indictment for misconduct in office, or usurpation of office, see *infra*, § 1582. *Wayman v. Com.*, 14 Bush, 467, 1877; and as to illegal voting, *infra*, § 1835. As to conscientiousness as a defence, see *infra*, §§ 336, 1715; that a foreigner cannot set up this defence, see *R. v. Barronet*, *Dears.* 51; *R. v. Esop*, 7 C. & P. 456, 1836; *Cambioso v. Maffett*, 2 Wash. C. C. 98, 1809. But that such defence may be set up in mitigation

It is no defence to an indictment for a crime that it was the custom of the country to do the act that constituted the crime.¹

of punishment, see *R. v. Lynn*, 2 T. R. 733; 2 Leach, 560.

Belief in the unconstitutionality of a law; belief in its violation of higher law; belief in its conflict with conscientious duty, will be no defence to an indictment for disobedience to such law. *U. S. v. Reynolds*, 98 U. S. 145, 1878. And even a conscientious belief that an act is right (*e. g.*, labor by a Jew on Sunday in contravention of the Sunday laws) will not prevent such act from being indictable when made so by the State. *Com. v. Has*, 122 Mass. 40, 1877; *Specht v. Com.*, 8 Pa. 312, 1848; though see *contra*, *Cincinnati v. Rice*, 15 Ohio, 225, 1846. *Infra*, § 1431.

In this respect the Roman common law is more tender than the English. When an offence is such *jure gentium*, then all persons are expected to have notice that it is prohibited, and are liable to punishment for its commission. But it is otherwise, by the Roman law, when a government makes an act, in itself innocent, penal. In this case *ignorantia et error juris* is a defence, unless there be notice either express or implied. See Savigny, *System*, iii. pp. 111, 326. Indeed, there were certain conditions in which *ignorantia legis* is charitably assumed. Thus, for instance, the female sex:

“D. de L. Corn. de fals. (48. 10.) L. 38. § 2. D. ad L. Iul. de adulter. (48. 5.) So of infancy: L. 38. § 4. D. eod. So of rusticity: L. 7. § 4. D. de iurisdic. (2. 1.) L. 3. § 22. D. de SC. Silan. (29. 5.) So of military service: L. 5. C. de his qui sibi adscrib. (9. 23.)”

The later doctrine is thus stated by Boehmer, as cited by Geib (*Lehrbuch*, etc., § 71):

“*Iuris ignorantia contra delicta legibus communibus comprehensa vix allegari potest, tum quod talia ex recta ratione iam innotescant. . . . Facilius eius ratio habetur circa delicta solis legibus positivis particularibus determinata, quia harum ignorantia excusatio, nec tantopere culposa est, praeterea his saepe prohibetur, de quo ne somniando quidem quis cogitavit.*”

Of the rule in the text a marked illustration is to be found in a case decided by Judge Hunt, of the United States Supreme Court, at Canandaigua, New York, in June, 1873. The defendant, Susan B. Anthony, was indicted for illegally voting for representative to Congress, in November, 1872. In defence she put in evidence the opinion given to her by learned counsel to the effect that she was so entitled to vote. Judge Hunt, however, in his charge to the jury, after discussing the question on its general relations, said: “The principle is the same in the case before us, and in all criminal cases. The precise question has been several times decided, viz.: that one illegally voting was bound and was assumed to know the law. (To this is cited *Hamilton v. People*, 57 Barbour, 625, 1867; *State v. Boyett*, 10 Ired. 336, 1850; *State v. Hart*, 6 Jones, (N. C.) 389, 1858; *McGuire v. State*, 7 Humph. 54, 1846. And see *Com. v. Bradford*, 9 Metc. 268, 1844.) No system of criminal jurisprudence can be sustained upon any other principle. Assuming that Miss Anthony

¹ *Bankers v. State*, 4 Ind. 114, 1853; *Penn. v. Lewis*, Add. 279, 1796; *U. S. v. Reynolds*, *ut supra*, 1878. See *State v. Burnham*, 56 Vt. 445, 1882.

§ 85. A distinction, however, is to be noticed in respect to cases in which the *gravamen* is negligent ignorance of law. A public officer, or a lawyer, for instance, is charged with such negligent ignorance, producing injury to another. In such case he is bound to show that he had the knowledge of the law usual with good specialists of his class. On the other hand, if I throw business into the hands of an agent not confessing to be a specialist in the law, he is not liable to me for negligence in not possessing knowledge that he did not pretend to; in other words, he is not chargeable with *culpa levis*. I may prove that he entered into the agency without such knowledge; yet this will not be enough to sustain a verdict against him. He will be only liable

But on indictments for negligence in application of law, non-specialist not chargeable with ignorance of specialty.

believed she had a right to vote, that fact constitutes no defence if in truth she had not the right. She voluntarily gave a vote which was illegal, and thus is subject to the penalty of the law." The defendant was convicted, and shortly afterward the inspectors of election, who registered the name and received the votes of Miss Anthony and her co-defendants, were placed on trial. The proof on the part of the prosecution was similar to that in the case of Miss Anthony. The defence proved the good faith of the parties accused in receiving the votes, and rested. The defendants' counsel asked the court to charge the jury, that if the jury believed that the defendants acted honestly and according to their best judgment, and had only erred in judgment, they should be acquitted. This the court refused. Judge Hunt then announced his decision, overruling the defence, and stated that instead of ordering a verdict of guilty, as he did in the case of Miss Anthony, he would submit the case to the jury, with the instructions that there was no justification for the act of the defendants, and that in effect they were all guilty. A verdict of guilty was subsequently rendered, which was sustained by the court. U. S. v. Anthony, 11 Blatch. 200, 1873; U. S. v. Taintor, 11 Blatch. 374, 1873. See this case criticised, 2 Green's C. R. 218, 244, 275, 589; U. S. v. Taylor, 3 McCreary, 505, 1881. In State v. Goodenow, 65 Me. 30, 1874, it was held no defence to an indictment for adultery that the defendants believed that the female defendant, her husband having married again, could lawfully marry, and that they were so advised by the magistrate who married them, they relying upon the opinion of the magistrate in good faith. See R. v. Lucy, C. & M. 511, 1842; State v. Welsh, 21 Minn. 22, 1875; Minor v. Happersett, 53 Mo. 58, 1873. *Infra*, § 1835. In Hoover v. State, 59 Ala. 57, 1878, it was held that it was not admissible for the defendant, on an indictment for miscegenation, to prove that he was advised that the act was lawful, there being at the time an express decision of the Supreme Court to that effect. In The Ann, 1 Gall. 62, 1814, it was held that ignorance of an embargo law was no defence to an indictment for violation of its prohibition, though it was impossible for the defendant to have known of the law.

in this respect for gross negligence, or *culpa lata*, which consists in not knowing what every one ought to know. But if I employ him as an expert in law, then he is negligent if he enters upon the employment without due knowledge, and consequently is chargeable not only with *culpa lata*, but, in addition to this, with *culpa levis*, or with negligence as a specialist.¹ At the same time it is essential to remember that *the knowledge required of a specialist is not perfect knowledge*—for if this were exacted no specialist could escape the imputation of negligence—but *such knowledge as specialists of the class in question are, under the particular circumstances, accustomed to possess.*²

A magistrate may set up *bonâ fide* non-negligent mistake of the law to an indictment for negligence;³ though it is otherwise when such mistake is negligent.⁴

§ 85 a. Cases, also, may occur in which evil intent is a condition precedent to conviction, but in which a mistake of law, if proved, would negative such evil intent. Here it is admissible to prove such mistake of law.⁵ Thus in larceny it is admissible to prove that the defendant took the

Mistake of law admissible to negative evil intent.

¹ See Whart. on Neg. §§ 26, 418, 510, 520, 749; Miller v. Proctor, 20 Ohio St. 442, 1870; and see Whart. on Cr. Ev. § 724.

² See Whart. on Neg. §§ 52, 744–9, and Montrion v. Jeffrys, 2 C. & P. 113, 1825, where Abbott, C. J., declared that neither attorney, nor counsel, nor judge is expected to know all the law, nor to be liable for mistakes into which cautious men may fall. See, also, R. v. Mayor, etc., L. R. 3 Q. B. 629, 1878.

³ R. v. Jackson, 1 T. R. 653; R. v. Fielding, 2 Burr. 719; Linford v. Fitzroy, 13 Q. B. 240, 1849; People v. Powell, 63 N. Y. 88, 1875; State v. Porter, 4 Harring. 556, 1846; State v. Powers, 75 N. C. 281, 1876; State v. Gardner, 5 Nev. 377, 1869. See Com. v. Shed, 1 Mass. 227, 1806; People v. Coon, 15 Wend. 277, 1836; State v. Cutter, 36 N. J. L. (7 Vroom) 125, 1875; Jacobs v. Com., 2 Leigh, 709, 1830; State v. Gardner, 2 Mo. 22, 1834.

⁴ R. v. Stukely, 12 Mod. 493. *Infra*, § 1576.

⁵ See R. v. Langford, C. & M. 602, 1842; Cutter v. State, 36 N. J. L. 125, 1875; Dye v. Com., 7 Gratt. 662, 1851; Whart. on Cont. § 198; Whart. Cr. Ev. § 724; 1 Steph. Hist. Crim. Law, 114, citing Burns v. Newell, L. R. 5 Q. B. D. 454, 1879. “The fact that an offender is ignorant of the law is in no case an excuse for his offence, but it may be relevant to the question whether an act which would be a crime if accompanied by a certain intention or other state of mind, and not otherwise, was in fact accompanied by that intention or state of mind or not.” Stephen’s Dig. Cr. Law, art. 33, citing Barronet’s Case, 1 E. & B. 1, 1852, where it was held that if A., a foreigner, unacquainted with the law of England, kills B., in a duel in England, A.’s act is murder, although he may have supposed it to be lawful. Sir J. F. Stephen adds the following illustration: A., a poacher,

goods under a claim of right, however erroneous;¹ in malicious mischief, that the act was believed to be the exercise of a legal right;² in assault, that he committed an assault under a mistaken conviction of his legal rights;³ in perjury, that the alleged perjury was under *bond fide* and intelligent advice of counsel;⁴ in misconduct in office, that the alleged misconduct was under advice of counsel on a debatable question of law;⁵ or under a *bond fide* non-negligent misconception of power.⁶ If, however, the ignorance is the result of negligence, then the defendant may be indicted for the negligence. And when the question does not depend exclusively on intent, it is no defence that the act charged as a crime was committed under the advice of counsel that it was lawful.⁷ But when the question is one of intent, such proof is admissible though it must be proved that the defendant acted on it.⁸

§ 85 *b*. When the question is whether a particular fact or group of facts falls under a particular rule of law, an error in this respect is to be regarded as an error of fact.⁹

And so of mistakes of sub-
sumption
of facts in
law.

§ 86. Publication is the mode by which the will of the sovereign,

sets wires for game, which are taken by B., a game-keeper, under the authority of an act of parliament (5 Anne, c. 14, s. 4), of the existence of which A. is ignorant. A. forcibly takes the wires from B., and is tried for robbery. His ignorance of the act is relevant to the question whether he took the wires under a claim of right. *R. v. Hall*, 3 C. & P. 409, 1828. In *R. v. Reed*, Car. & Mar. 398, 1841, Coleridge, J., said: "Ignorance of the law cannot excuse any person, but, at the same time, when the question is, with what intent a person takes, we cannot help looking into his state of mind, as if a person takes what he believes to be his own, it is impossible to say he is guilty of felony." On the other hand, in *U. S. v. Reynolds*, 98 U. S. 145, 1878, Waite, C. J., said: "Ignorance of a fact may sometimes be taken as a want of criminal intent, but not ignorance of the law."

¹ *Infra*, §§ 884-9. So as to malicious trespass, *Lossen v. State*, 62 Ind.

437, 1878. See 2 Steph. Hist. Crim. Law, 114.

² *Infra*, § 1072 *a*.

³ *Infra*, §§ 455 *et seq*.

⁴ *Infra*, § 1249.

⁵ *Infra*, §§ 1576, 1582.

⁶ *State v. Gardner*, 5 Nev. 377, 1869. See *U. S. v. Railroad Cars*, 1 Abb. U. S. 196, 1867.

⁷ *U. S. v. Anthony*, 11 Blatch. 200, 1873; *State v. Goodenow*, 65 Me. 33, 1874; *Com. v. Elwell*, 2 Metc. 190, 1841; *Com. v. Goodman*, 97 Mass. 117, 1867; *Com. v. Emmons*, 98 Mass. 6, 1867; *Cutter v. State*, 36 N. J. L. 125, 1875.

That an opinion of an attorney-general is no defence, see *Dodd v. State*, 18 Ind. 56, 1862; nor is that of a justice of the peace. *State v. Goodenow*, 65 Me. 30, 1875; *Black v. Ward*, 27 Mich. 191, 1873.

⁸ *Long v. People*, 50 Mich. 249, 1883; *infra*, §§ 936, 1249.

⁹ Whart. on Cont. § 199.

as expressed through statute, is made known to the subject. The mere passage of a statute is not supposed to be a publication until a sufficient period of time has elapsed to enable the statute to be made known to the persons affected by it.¹

Statutes
not oper-
ative until
published.

In many jurisdictions, the custom is for statutes to contain clauses specifying the time at which they shall operate; and in some States this is prescribed by constitutional limitation. As a rule, however, as is already seen, it is no defence (within the above limits) that the statute under which the trial takes place was unknown to the party indicted. In New York, it is provided that

Ignorance
or mistake
of fact may
be proved
to negative
intent.

no act of the legislature shall take effect until twenty days after it is passed, unless there be a special provision to the contrary.²

§ 87. Ignorance or mistake of fact is admissible for the purpose of negating a particular intention.³ Thus if a man, supposing that he is killing a thief in his own house, kill one of his own family, he will be guilty, not of murder,

¹ R. v. Bailey, R. & R. 1, where a pardon was recommended on this ground; Burns v. Nowell, L. R. 5 Q. B. D. 454, 1878; Ship Cotton Planter, 1 Paine, 23, 1831; U. S. v. 14 Packages, Gilpin, 235, 1832; though see The Ann, 1 Gall. 62, 1814, cited *supra*, § 84; Heard v. Heard, 8 Ga. 380, 1850.

² 1 R. S. 244, § 12; Barb. C. L. 252.

³ See Dotson v. State, 62 Ala. 141, 1879. Responsibility, according to Berner, Lehrbuch, § 91, ceases when the will and the object are each present, but where they do not coalesce, and the connection between the two is prevented. Error facti et aberratio delicti. Under the latter the following cases are to be noticed:

(a) Consequences which by a suitable forecast could not have been foreseen have no causal connection with the will of the actor. Responsibility cannot attach to them. They are simply *casus*. Thus a slight bodily injury, which in the party injured produces serious results beyond the range of calculation, will be imputed

to the actor simply as what it in appearance was. He is not responsible for the unforeseen consequences. And with this accords the North German Code, § 224.

(b) If he acts on a false hypothesis, which, if it were correct, would justify his act, this act cannot generally be considered as a crime. For the will and the deed do not correspond.

(c) If he acts on a false hypothesis, which, if correct, would lower the grade of his guilt, the act is to be regarded as correspondingly lowered as to responsibility. For instance, A. shoots B., whom he supposes to be a stranger, but who turns out to be his father; this is not parricide, but mere homicide. So A. and B. go out together to steal; but A. is ignorant that B. is armed. A. is then responsible only as principal in a simple, as distinguished from an aggravated larceny. To this effect are the codes of the several German States. This law, it will be observed, is much more lenient than our own, which makes

but at the most, of negligent homicide;¹ or if, under an erroneous impression that the act is necessary in self-defence, he killed the supposed aggressor, the case is not murder, but is manslaughter or excusable homicide.² So a taking by mere accident, or in a joke, or mistaking another's property for one's own, is not larceny;³ nor is killing a wrong animal by mistake malicious mischief;⁴ nor is a false oath taken under advice of counsel, in the belief that the statement was true, perjury;⁵ nor is it extortion for an officer to receive money honestly believed to be due.⁶ It has also been held that where an innocent merchant vessel so conducts herself as to produce the belief she is piratical; a vessel capturing her is not liable to forfeiture.⁷ A prosecution, also, cannot be sustained for resisting an officer if it appear that the defendant honestly supposed the officer to be a private person.⁸ On the other hand, we must remember that if an unforeseen consequence ensue from an act which is in itself unlawful, and in its original nature wrong or mischievous, the actor may be criminally responsible for such consequences, although against the party's wish.⁹ We may therefore conclude that when a particular intent

conspirators liable for all their co-conspirators' acts committed in pursuit of the common design.

¹ *Supra*, § 38; *infra*, §§ 467, 495; 1 Hale, 42, 43; 4 Bl. Com. 27; *R. v. Levett*, Cro. Car. 538. *Nullum crimen est in casu*. Cicero, pro Planc. c. 14.

² 2 Hale, 507. *Infra*, §§ 467-95. See, also, *Com. v. Presby*, 14 Gray, 65, 1859.

³ See *infra*, §§ 884-85, 902. This has been held where an ignorant person, finding goods, honestly believes that they are his. *R. v. Reed*, C. & M. 306, 1841; *Merry v. Green*, 7 Mees. & W. 623. See *R. v. Matthews*, 14 Cox C. C. 5, 1828.

⁴ *State v. Matthews*, 20 Mo. 55, 1854; *State v. Graham*, 46 Mo. 490, 1870.

⁵ *U. S. v. Connor*, 3 McLean, 573, 1849.

⁶ *State v. Cutter*, 36 N. J. L. (7 Vroom) 125, 1875. *Infra*, § 1576.

⁷ *The Marianna Flora*, 11 Wheat. 1, 1826. See, also, *Clow v. Wright*, Brayt.

118, 1816; though see *U. S. v. Malek Adhel*, 2 How. 210, 1844; *U. S. v. Packages of Linen*, 1 Paine, 129, 1831, where forfeiture was held not to be dependent on the state of mind of parties implicated.

⁸ *Infra*, § 649; *R. v. Ricketts*, 3 Camp. 68; *Yates v. People*, 32 N. Y. 509, 1865; *Logue v. Com.*, 38 Pa. 265, 1861. *Contra*, *R. v. Forbes*, 10 Cox C. C. 362, 1866. See *Com. v. Kirby*, 2 Cush. 577, 1849; *Com. v. Cooley*, 6 Gray, 350, 1856; *People v. Muldoon*, 2 Parker C. R. 43, 1855; *State v. Belk*, 64 N. C. 10, 1869; *Johnson v. State*, 26 Tex. 117, 1862. In *State v. McDonald*, 7 Mo. App. 510, 1879, it was held that a conductor who *bonâ fide* ejected a passenger from a car on the ground of non-payment, was not indictable for assault; and see *Clow v. Wright*, Brayt. 118, 1816.

⁹ *Infra*, § 120. *U. S. v. Liddle*, 2 Wash. C. C. 205, 1810; *U. S. v. Ortega*, 4 Wash. C. C. 531, 1825; *U. S. v. Benner*, Baldwin, 234, 1855; 4 Bl. Com. 27.

is necessary to constitute the offence (*e. g.*, in larceny, *animus furandi*; in murder, *malice*), then ignorance or mistake is evidence to cancel the presumption of intent, and to work an acquittal either total or partial. In testing this ignorance we must take as the standard *the defendant's own mind*. The question is, how did the facts and law, on this matter of intent, appear to *him*; not how do they appear to the jury or judge.¹ But the error must be non-negligent. If there be opportunity to dispel it, and this opportunity is not used, the delusion is no defence.²

§ 88. When a statute makes an act indictable, irrespective of guilty knowledge, then ignorance of fact, no matter how sincere, is no defence.³ Thus, to an indictment for bigamy, it is no defence that the defendant, a woman, honestly believed (within the limit of seven years from the time he was last heard from) that her husband was

But when
scienter is
irrelevant,
ignorance
or mistake
of fact is
no defence.

¹ As authorities to the effect that error of fact may be proved to negative evil intent, see Broom's Leg. Max. 190; *R. v. Thurborn*, 1 Den. C. C. 387, 1846; *R. v. Forbes*, 7 C. & P. 224, 1835; *R. v. Allday*, 8 C. & P. 136, 1837; *R. v. James*, 8 C. & P. 131, 1859; *R. v. Tinkler*, 1 F. & F. 513, 1837; *R. v. Cohen*, 8 Cox C. C. 41, 1858; *R. v. Sleep*, 8 Cox C. C. 472, 1860; *R. v. Wagstaffe*, 10 Cox C. C. 530, 1867; *R. v. Matthews*, 14 Cox C. C. 5, 1878; *R. v. Twose*, 14 Cox C. C. 327, 1879; *U. S. v. Pearce*, 2 McLean, 14, 1848; *Com. v. Rogers*, 7 Metc. 500, 1843; *Com. v. Kirby*, 2 Cush. 579, 1849; *Marts v. State*, 26 Ohio St. 162, 1865; *Gregory v. State*, Id. 510, 1866; *Steinmeyer v. People*, 95 Ill. 383, 1880; *Com. v. Stout*, 7 B. Mon. 247, 1846; *Farbach v. State*, 24 Ind. 77, 1865; *Stern v. State*, 53 Ga. 229, 1874; *Gordon v. State*, 52 Ala. 308, 1875; *Carter v. State*, 55 Ala. 181, 1876; *People v. Miles*, 55 Cal. 207, 1880. That the test is the defendant's apprehension, not that of jury, or of third person, see *infra*, §§ 488-91.

² See *infra*, § 492.

³ Whart. Cr. Ev. § 75; 1 Stark. C. P.

196; Sedg. Stat. Law, 2d ed. p. 80; *R. v. Myddleton*, 6 T. R. 739; *R. v. Jukes*, 8 T. R. 536; *U. S. v. Leathers*, 6 Saw. 17, 1879; *State v. Melville*, 11 R. I. 417, 1877; *Gardner v. People*, 62 N. Y. 299, 1874; *Halsted v. State*, 41 N. J. L. 552, 1879; *State v. Stimson*, 24 N. J. L. (4 Zab.) 478, 1853; *State v. Heck*, 23 Minn. 549, 1876; *Farmer v. People*, 77 Ill. 322, 1875; *State v. King*, 86 N. C. 603, 1882. As maintaining a view opposite to that in the text, see article by Mr. Bishop, 4 South. Law Rev., N. S. 158; and see, also, 12 Am. L. Reg. 469. As to pleading of *scienter* in such cases, see Whart. Cr. Pl. & Pr. § 164.

Sir J. F. Stephen (Dig. Cr. Law, art. 34) states the law as follows: "An alleged offender is, in general, deemed to have acted under that state of facts which he, in good faith and on reasonable grounds, believed to exist when he did the act alleged to be an offence; provided that, when an offence is so defined by statute that the act of the offender is not a crime unless some independent fact coexists with it, the court must decide whether it was the intention of the legislature that the person

dead.¹ And an indictment has been sustained in Massachusetts against a man for marrying a woman who believed herself to be a

doing the forbidden act should do it at his peril, or that his ignorance as to the existence of the independent fact, or his mistaken belief, in good faith and on reasonable grounds, that it did not exist, should excuse him; provided, also, that voluntary or negligent ignorance of any such fact is no excuse for any such offence."

Of the last point he gives the following illustration: "A. abducts B., a girl under fifteen years of age, from her father's house, believing, in good faith and on reasonable grounds, that B. is eighteen years of age. A. commits the offence of abduction, although if B. had been eighteen years of age she would not have been within the statute." *R. v. Prince*, L. R. 2 C. C. 154; s. c. 13 Cox C. C. 138, 1877.

In *R. v. Prince*, above cited, it was said by Blackburn, J.:

"It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutory age."

In England we have *nisi prius* rulings by single judges to the effect that honest belief that the husband was dead would be a defence to an indictment against the wife for bigamy.

¹ *Com. v. Mash*, 7 Metc. 472, 1843. See *Com. v. Elwell*, 2 Ibid. 190, 1841.

"It was urged in the argument," said Shaw, C. J., in *Com. v. Mash*, "that where there is no criminal intent there can be no guilt; and if the former husband was honestly believed to be dead, there could be no criminal intent. The proposition stated is un-

R. v. Turner, 9 Cox C. C. 145, 1862; *R. v. Horton*, 11 Ibid. 670, 1870; but these decisions were subsequently overruled; *R. v. Gibbons*, 12 Cox C. C. 237, 1874. Afterward, in *R. v. Moore*, 13 Cox C. C. 534, 1877, Denman, J., consulting with Amphlett, L. J., held that "honest belief" might in some cases be a defence. But in a still later case, *R. v. Bennett*, 14 Cox C. C. 45, 1877, where honest belief of death within the seven years was set up, Bramwell, L. J., said to the jury: "I cannot, and never do, recognize as a defence such a ruling as my brother Martin laid down in *R. v. Turner*. I shall, therefore, follow *R. v. Gibbons*, nor will I grant a case, but will ask the jury to convict the prisoner on the evidence before them." The defendant was convicted and sentenced to two years' penal servitude.

In *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337, it is said that the *mens rea* may be dispensed with by statute, but that the intention so to prescribe should be clearly and strongly expressed.

Sir J. F. Stephen, commenting on *R. v. Gibbons*, 12 Cox C. C. 237, 1874, says: "It seems to me that if the belief was founded on positive evidence the case would be otherwise. Suppose, e. g., a woman saw her husband fall overboard in the middle of the Atlantic, and saw a boat go out to search for him and return without him; sup-

doubtedly correct in a general sense; but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does he of course intends. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it."

widow, although eleven years had elapsed since she had last seen or heard from her husband, whom she had left,¹ it being held by the court that the statutory exceptions do not apply to the deserting party. It has been further held, that when a guilty party in a divorce suit marries again without leave of court (this being legally essential) during the life of the other party, and afterward obtains such leave, an honest belief that the second marriage is or has become legal has no effect in making it so, and in protecting the parties.² That the defendant honestly believed in the existence of a non-existent divorce is also no defence.³

pose that she took out administration to his estate, heard nothing of him for five years, and then married again; would she be guilty of bigamy if by some strange chance he had escaped? Surely not. I am informed this view was taken by Denman, J., and Amphlett, J., in a case (*R. v. Moore*) tried at Lincoln Spring Assizes, 1877. I think the proviso in 24 & 25 Vict. c. 100. s. 57 (art. 257), ought clearly to be read, not as excluding the general common law principle stated in this article, but as supplementing and completing it, by providing that a second marriage, after seven years' ignorance as to the life of the first husband or wife, shall not be criminal, although the party so marrying has no positive reason to believe, and perhaps does not believe, that the absent person is dead." In the report of the English commissioners of 1879, the rule in *R. v. Gibbons* was adopted, and this was approved by Sir J. F. Stephen. See his explanation in *Nineteenth Century* for January, 1880. As to scope of Texas statute in this relation, see *Neeley v. State*, 8 Tex. App. 64, 1880.

In *Cundy v. Le Cocq*, 51 L. T. N. S. 265, 1882; 32 W. R. 721, L. R. 13 Q. B. D. 207, where it was held that ignorance that the vendee was drunk is no defence to a charge for selling to a drunkard (the statute creating the offence not containing the word "knowingly"), Stephen, J., said: "On

the other side it has been urged that the maxim of the criminal law, that before a person can be convicted of a crime there must be a 'guilty mind,' applies to this case. This maxim came into use in early times, when the criminal law was in an undefined state, for the guidance of those who administered that law, and in those times the maxim may have been of general application. A 'guilty mind' is a necessary element in some crimes, but those crimes have now been defined, and the maxim has been superseded in consequence of the greater precision in the definitions of crimes, and now, the question whether a 'guilty mind' is necessary to constitute an offence turns upon the words of each particular statute. The case of *Reg. v. Prince* (*ubi sup.*) shows that a guilty knowledge is not always necessary to constitute an offence; and *Reg. v. Bishop*, L. R. 5 Q. B. D. 359, 1879, is to the same effect." The same distinction is taken in *Attorney-Gen. v. Lockwood*, 9 M. & W. 378; *Roberts v. Egerton*, L. R. 9 Q. B. 494, 1875; and *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337, 1872. And see *State v. Hopkins*, 56 Vt. 250, 1881.

¹ *Com. v. Thompson*, 6 Allen, 591, 1863; *Com v. Thompson*, 11 Ibid. 23, 1866.

² *Thompson v. Thompson*, 114 Mass. 566, 1873. See *infra*, § 1695.

³ *State v. Goodenow*, 65 Me. 30,

Numerous illustrations to the same effect may be drawn from prosecutions for invasions of the laws making indictable the sale of liquors under certain conditions. It is no defence, for instance, to an indictment for keeping or selling adulterated or intoxicating liquors that the defendant did not believe them to be intoxicating or adulterated.¹ So, on an indictment for selling adulterated milk, the defendant is not protected by ignorance of the adulteration, or even by belief that the milk was pure.² And the same rule applies to indictments for selling other deleterious drinks.³

In several States selling intoxicating liquors to minors is indictable by statute, and in such cases, also, arises the question, whether the defendant knew that the vendee was a minor. Here, again, we have the rule before us applied, it having been repeatedly held that in cases in which knowledge is not part of the statutory offence, ignorance in this respect, coupled even with an honest belief that the vendee was of full age, is no defence;⁴ and the same rule applies to all cases of dealing illegally with minors.⁵

It is also no defence to an indictment for selling to persons of

1875; *Hood v. State*, 56 Ind. 263, *Ibid.* 385, 1875; *Com. v. Finnegan*, 1877; *Davis v. Com.*, 13 Bush, 318, 124 *Ibid.* 324, 1878; *Barnes v. State*, 1877. See, however, *Squire v. State*, 19 Conn. 398, 1847; *McCutcheon v. State*, 46 Ind. 458, 1874, where it was held that an honest belief by a man that his first wife had been divorced from him was a defence, when he had made diligent inquiries which sustained this view.

¹ *Com. v. Boynton*, 2 Allen, 160, 1861; *Com. v. Farren*, 9 Allen, 489, 1864; *Com. v. Smith*, 103 Mass. 444, 1869; *State v. Smith*, 10 R. I. 258, 1872; *People v. Zeiger*, 6 Park. C. R. 355, 1861. See *R. v. Woodrow*, 15 M. & W. 404. *Infra*, § 1507. *Contra*, *Farrell v. State*, 32 Ohio St. 456, 1877.

² *Com. v. Farren*, 9 Allen, 489, 1864; *Com. v. Waite*, 11 *Ibid.* 264, 1866; *State v. Smith*, 10 R. I. 258, 1872.

³ *Com. v. Boynton*, 2 Allen, 160, 1864. See *Barnes v. State*, 19 Conn. 398, 1847.

⁴ *Infra*, § 1507; *U. S. v. Dodge*, 186, 1866; *Com. v. Goodman*, 97 Mass. 117, 1871; *Com. v. Emmons*, 98 *Ibid.* 6, 1871; *Com. v. Lattinville*, 120

Ibid. 385, 1875; *Com. v. Finnegan*, 124 *Ibid.* 324, 1878; *Barnes v. State*, 19 Conn. 398, 1847; *McCutcheon v. People*, 69 Ill. 601, 1873; *Farmer v. People*, 77 *Ibid.* 322, 1875; *Flynn v. Galesburg*, 12 Ill. App. 200, 1882; *State v. Hartfiel*, 24 Wis. 60, 1869; *State v. Cain*, 9 W. Va. 559, 1876; *Ulrich v. Com.*, 6 Bush, 400, 1870; *State v. Hause*, 71 N. C. 518, 1874; *Crampton v. State*, 37 Ark. 108, 1880; *Pounders v. State*, 37 Ark. 399, 1880. *Aliter*, *Stern v. State*, 53 Ga. 229, 1874; (though see *Reich v. State*, 63 Ga. 616, 1879); *Adler v. State*, 55 Ala. 16, 1876; *Brown v. State*, 24 Ind. 113, 1865; *Robinius v. State*, 63 Ind. 235, 1878; *Moore v. State*, 65 Ind. 382, 1879; *Faulks v. People*, 39 Mich. 200, 1878; *Farbach v. State*, 24 Ind. 77, 1861; *Goetz v. State*, 41 *Ibid.* 162, 1872. The question in the latter cases depended on the construction of the statute.

⁵ *State v. Cain*, 9 W. Va. 559, 1876. See *Holmes v. State*, 88 Ind. 145, 1882.

intemperate habits that the defendant did not know that the vendee was of intemperate habits;¹ though it is otherwise when the statute makes the offence to be selling to persons of *known* intemperate habits, in which case knowledge is an ingredient of the prosecutor's case.²

Analogous cases have arisen under statutes making it indictable to abduct, seduce, or violate girls under a specific age. Here, also, it is no defence that the defendant mistook the girl's age.³ We have recently had a signal illustration of this application, where the rule was affirmed by the great majority of the English judges. The defendant was convicted under 24 & 25 Vict. of unlawfully taking an unmarried girl under sixteen years out of her father's possession and against his will. It was proved by the defendant that he *bonâ fide* believed, and had reasonable grounds for believing, that the girl at the time of the act was over sixteen. Cockburn, C. J., Kelly, C. B., Bramwell, Cleasby, and Amphlett, BB. ; Blackburn, Mellon, Lush, Grove, Quain, Denman, Archibald, Field, and Lindley, JJ., held that the defence was of no avail, and that the conviction was right. The sole dissentient was Brett, J.⁴ A similar ruling is to be found in the Iowa reports, it being held in that State that knowledge that a child is under ten years is not necessary to convict a defendant of the statutory offence of assaulting a child under ten years.⁵ And it has been held in England, by the Court for Crown Cases Reserved, that the defendant's belief that the patients received were not lunatics is no defence to an indictment for receiving lunatics without license.⁶ In Missouri, also, it is no

¹ *State v. Heck*, 23 Minn. 549, 1877; *Farmer v. People*, 71 Ill. 322, 1875; *Humpeler v. People*, 92 Ill. 400, 1880; *Dudley v. Sautbine*, 49 Iowa, 650, 1878. *Contra*, *Crabtree v. State*, 30 Ohio St. 382, 1875.

² *Smith v. State*, 55 Ala. 1, 1876. See *Crabtree v. State*, 30 Ohio St. 382, 1875.

³ *R. v. Booth*, 12 Cox C. C. 231, 1872; *R. v. Olifier*, 10 Ibid. 402, 1866; *R. v. Robbins*, 1 C. & K. 456, 1844; *State v. Ruhl*, 8 Ohio, 447, 1838; *Lawrence v. Com.*, 30 Gratt. 845, 1878.

Hence knowledge that a child was under ten years is not necessary to convict a defendant of the statutory offence of assaulting a child under ten

years. "The crime does not depend upon the knowledge of defendant of the fact that the child was under ten years of age, but upon the fact itself. So the statute provides." *Beck, J. State v. Newton*, 44 Iowa, 45, 1876, citing *Jamison v. Burton*, 43 Iowa, 283, 1876.

⁴ *R. v. Prince*, L. R. 2 C. C. 154; s. c. 13 Cox C. C. 138, 1877.

⁵ *State v. Newton*, 44 Iowa, 45, 1876.

⁶ *R. v. Bishop*, L. R. 5 Q. B. D. 259, 1880; 14 Cox C. C. 404; 42 L. T. N. S. 240, approved by Cooley, J., in Mich. 1884, *People v. Roby*, 17 Rep. 626, 1884. See 2 Steph. Hist. Crim. Law, 117, where the ruling in *R. v. Bishop* is sustained.

defence to a suit for marrying minors that the defendant believed them to be of full age.¹ Nor will the defendant be at liberty to prove that the minor appeared of full age. "His honest mistake in this regard will not protect him. The law explicitly declares what is required for his protection, and unless he adopts the means pointed out, he must suffer the consequences."²

In other lines of prosecutions, under statutes making acts indictable irrespective of intent, similar conclusions have been reached. Thus, it is no defence to an indictment for betting at a gaming-house that the defendant believed that the house was licensed;³ nor to an indictment for selling a calf under the statutory age, that the defendant did not know that the calf was below the limit;⁴ nor to an indictment against a public officer for illegally appropriating public money, that he believed the appropriation to be legal and right;⁵ nor to an information against a retailer of tobacco for having adulterated tobacco in his possession, that he believed it on plausible grounds to be genuine;⁶ nor to an indictment for carrying an illegal number of passengers, that the defendant did not know that there was an excess;⁷ nor to an indictment for selling naphtha, that the defendant did not know that the oil was naphtha;⁸ nor to an indictment for illegally usurping an office, that the defendant honestly believed that he was truly elected to the office;⁹ nor to an indictment for illegally voting, that the defendant honestly believed that he was duly qualified;¹⁰ nor to an indictment for selling liquor on Sunday, that the sale was by a clerk without the defendant's knowledge or consent;¹¹ nor to an indictment for inflict-

¹ *Beckham v. Nacke*, 56 Mo. 546, 1874.

² *State v. Griffith*, 67 Mo. 287, 1878, citing *Beckham v. Nacke*, 56 Mo. 546, 1874.

³ *Shuster v. State*, 48 Ala. 199, 1872.

⁴ *Com. v. Raymond*, 97 Mass. 567, 1867.

⁵ *Halsted v. State*, 12 Vroom, 552, 1879.

⁶ *R. v. Woodrow*, 15 M. & W. 404; cited and approved in *U. S. v. Bayaud*, 15 Rep. 200, 520; s. c. 16 Fed. Rep. 376, 1882; 21 Blatch. 287.

⁷ *U. S. v. Thompson*, 12 Fed. Rep. 245, 1882; *State v. Balt. Steam Co.*, 13 Md. 181, 1858; *Western R. R. v. Fulton*, 4 Sneed, 589, 1857; though

see *Duncan v. State*, 7 Humph. 148, 1846; *Com. v. Stout*, 7 B. Mon. 247,

1846. In *Duncan v. State*, and *Com. v. Stout*, the indictments were under statutes prohibiting officers of vessels from transporting "colored persons" in which statutes the question of color was left open.

⁸ *Com. v. Wentworth*, 118 Mass. 441, 1875; though see *Hearne v. Garten*, 2 E. & E. 66, 1850.

⁹ *Infra*, § 1811. See *State v. Hallett*, 8 Ala. 159, 1845; *McGuire v. State*, 7 Humph. 54, 1846; *State v. Hart*, 6 Jones, (N. C.) 389, 1859.

¹⁰ *Infra*, § 1835.

¹¹ *People v. Roby*, (Mich.) 17 Rep. 626, 1884. *Infra*, §§ 247, 1503.

ing capital punishment under a void warrant that the officer honestly believed the warrant to be valid.¹ With these rulings may be classed the well-known common law principle, that it is no defence to an indictment for a libel that the defendant was ignorant of the contents of the libel;² or that his motives were scientific or philanthropic.³

As diverging from the line of these cases just stated may be mentioned a series of rulings in Ohio, Indiana, and Texas. In Ohio the precedent was set in a case rather political than juridical in its type. James G. Birney, conspicuous in the old anti-slavery agitation, was indicted, in 1837, for harboring a fugitive slave.⁴ The statute under which the prosecution was instituted did not make either the *scienter* or the intent essential to the offence, though it might well be argued that as this was a statute in derogation of liberty, and as in a free State no one has a right to view another man as other than a free man, the case was exceptional, and notice of the enslaved status of the fugitive must be brought home to the defendant in order to charge him with the statutory offence. Under the pressure of this argument the Supreme Court held, that, to make out the case of the prosecution, it was essential to prove that the defendant knew that the party harbored by him was a fugitive slave. In a subsequent case this ruling was held to establish the general principle, that there can be no conviction of a criminal offence without proof of guilty knowledge, and hence of guilty intent.⁵ The same view has been taken in Indiana,⁶ Georgia,⁷ and, under local statute, in Texas.⁸

The function of imposing indictability on pernicious acts irrespective of intent is one which has been exercised by legislatures, not only frequently but from necessity.⁹ It may be indispensable to public safety that storing of gunpowder, or of highly inflammable

¹ *Infra*, § 401.

² *Curtis v. Mussey*, 6 Gray, 261, 1856; *Goetz v. State*, 41 Ibid. 162, 1872; *People v. Wilson*, 64 Ill. 195, 1871. *Robinius v. State*, 63 Ind. 235, 1878. *Infra*, § 1649.

³ *R. v. Hicklin*, L. R. 3 Q. B. 360, 1878. *Ex parte Bradlaugh*, 3 Q. B. D. 509, 1878. *Infra*, §§ 1607, 1654.

⁴ *Birney v. State*, 8 Ohio, 230, 1838.

⁵ *Crabtree v. State*, 30 Ohio St. 382, 1875; *Farrell v. State*, 32 Ohio St. 456, 1876.

⁶ *Brown v. State*, 24 Ind. 113, 1865;

Farbach v. State, 24 Ibid. 77, 1865;

Goetz v. State, 41 Ibid. 162, 1872;

Robinius v. State, 63 Ind. 235, 1878.

But see, as qualifying above, *Holmes v. State*, 88 Ind. 168, 1882.

⁷ *Stern v. State*, 53 Ga. 229, 1874.

⁸ *Watson v. State*, 13 Tex. App. 76,

1883; *Pressler v. State*, 13 Ibid. 95,

1883, which last case was under a statute making it indictable to sell knowingly to a minor.

⁹ *Supra*, § 23 a.

oils, in exposed localities should be prohibited ; and as in such cases the statutes could be easily eluded if a *scienter* be requisite to conviction, the policy that requires the enactment of the statute requires also that the statute should relieve the prosecution from proving a *scienter*. Sometimes this is done by an express clause in the statute, as where a woman concealing the death of a bastard child was, by the old statutes, "deemed" to have been concerned in killing it, and where it is provided that persons selling spirituous liquors shall be "deemed" common sellers of the same, or that delivery of such liquors shall be proof of sale,¹ or that persons carrying concealed weapons shall be presumed to carry them knowingly. Such provisions are constitutional as concerning matters of process,² and are illustrated by statutes prescribing that a person not heard of for a specific period shall be presumed to be dead, and that debts not acknowledged within a specific period shall be presumed to be paid. If this can be done by an express clause, it can be done by implication ; and if so, where the legislature imposes a specific penalty on a person doing a particular thing, irrespective of *scienter*, it will be the duty of the courts to enforce the prohibition.³ The question is one of policy ; and this may be taken into consideration when the legislative meaning is sought. That a man should be convicted of a malicious act without proof of malice, or of a negligent act without proof of negligence, is, of course, an enormity which no legislature could be supposed to direct. But it is otherwise as to certain mischievous acts which it may be a sound policy to prohibit arbitrarily, because they imperil public safety (as, for example, the selling of intoxicating drinks and defective storing of explosive compounds), and because to require *scienter* to be proved would be to defeat the object of the statutes, since in many cases, and those the most dangerous of the class, it would be out of the power of the prosecution to prove *scienter* beyond reasonable doubt. The legislature may properly say, "In such cases we presume *scienter* ; whoever deals with these dangerous agencies does so at his risk." The same reasoning applies to illicit intercourse with young girls, a case above given. The act is itself an invasion of good morals, and if indulged in brings with it its own risks. Even at common law ignorance as to aggravating facts cannot be set up as a defence, as, on a trial for burglary, is the case with ignorance that the build-

¹ *Infra*, § 1528.

² See this point well considered in

³ See Whart. on Cr. Ev. § 715; *Halsted v. State*, 12 Vroom, 340, 1879, *supra*, § 31. with note in 1 Crim. Law Mag. 340.

ing entered was a dwelling-house. *A fortiori* is this the case when a statute, on grounds of public policy, makes *scienter* irrelevant. It is also to be observed that to declare that honest ignorance of fact is a defence would extend the same privilege, in many cases, to honest ignorance of law. Ignorance, for instance, that the State prohibits by indictment dealing with minors is morally as good a defence, in cases where the party dealt with has apparently reached majority, as is ignorance that such party is a minor. In both cases the defendant is ignorant that he is doing an illegal thing. That in the former case it is conceded that such ignorance is no defence shows that honest belief that an illegal act is legal is no necessary ground for acquittal. We cannot, therefore, lay down the rule that ignorance of inculpatory facts shall always be a defence, without extending the same immunity to ignorance of inculpatory law. And if we cannot so extend this immunity, then we must hold that ignorance does not necessarily acquit when *scienter* is not an essential of the offence.¹

§ 89. Even where, as affecting intent, ignorance of fact is set up, the defence is unavailable where the defendant, by the exercise of due diligence, could have become aware of his mistake.² Of course, if the defendant was ignorant of facts from a knowledge of which alone could malice be inferred, he cannot be convicted of a malicious crime. But in such case he may be convicted of negligence when his ignorance was culpable, and was productive of harm. A man who negligently mistakes a visitor for a burglar, and kills the visitor, cannot, indeed, be convicted of murder, but he can be convicted of manslaughter. And, as a general rule, if the defendant is chargeable with negligence in not acquainting himself with the true facts of the case, his ignorance is no defence.³ It is no

And so where the fact is one of which the defendant ought to have been cognizant.

¹ "It is certain that ignorance is, as a rule, no excuse as regards the liabilities of a quasi-criminal kind which arise under penal statutes (Carter v. McLaren, L. R. 2 Sc. & D. 125), or such as are purely civil."—Pollock on Cont., Wald's ed. 385, citing Fowler v. Hollins, L. R. 7 Q. B. 616; Hollins v. Fowler, L. R. 7 H. L. 757; Coles v. Clark, 3 Cush. 399, 1849; Curtis v. Cane, 32 Vt. 232, 1860; Hoffman v. Carew, 22 Wend. 285, 1839; Pease v. Smith, 61 N. Y. 477, 1874; Koch v. Branch, 44 Mo. 542, 1870.

² *Infra*, § 492.

³ See Whart. on Negligence, § 415; Com. v. Viall, 2 Allen, 512, 1861; People v. Reed, 47 Barb. 235, 1866.

In Bonker v. People, 37 Mich. 4, 1878, it was held that under a statute forbidding any person to join others in marriage, knowing he is not authorized to do so, or knowing of any legal

defence, for instance, to a physician indicted for malpractice, that he was ignorant of facts with which it was his duty to become acquainted.¹ Nor is it a defence to an engineer for negligent homicide that his negligence arose from ignorance of facts which he ought to have known.² Nor is it a defence to an indictment for perjury that the defendant believed what he swore to be true, if he had no probable cause for so believing;³ nor can persons selling dangerous compounds, required by law to be subject to certain tests, set up as a defence that they were ignorant that the tests were not satisfied.⁴ It is otherwise, in cases of this class, where the party

impediment to the proposed marriage, actual personal knowledge is not required; but it was held that if a party so officiating neglects to take the testimony which he is required to take, and relies upon less satisfactory oral statements, such neglect will be imputed to illegal intent. "No doubt," said Cooley, C. J., "where guilty knowledge is an ingredient in the offence, the knowledge must be found; but actual, positive knowledge is not usually required. In many cases to require this would be to nullify the penal laws. The case of knowingly passing counterfeit money is an illustration; very often the guilty party has no actual knowledge of the spurious character of the paper, but he is put upon his guard by circumstances which, with felonious intent, he disregards. Another illustration is the case of receiving stolen goods knowing them to be stolen; the guilt is made out by circumstances which fall short of bringing home to the defendant actual knowledge. He buys, perhaps, of a notorious thief, under circumstances of secrecy and at a nominal price; and the jury rightfully hold that these circumstances apprise him that a felony must have been committed. *Andrews v. People*, 60 Ill. 354, 1870; *Schriedly v. State*, 23 Ohio St. 130, 1872. If by the statute now under construction actual personal knowledge is required, the statute

may as well be repealed; for it can seldom be established even in the grossest cases. How many justices are likely to know the exact age of all the girls in their township approaching the age of consent? or even of all those in their immediate neighborhood, except as they rely upon reputation or family report? Had he taken the proper evidence under oath and been deceived, perhaps he would have been justified, even though he had had reason to believe the age of consent had not been reached; but where he neglects the testimony which he is required to take, and pretends to rely upon the less satisfactory oral statements which he is not required to take, the neglect may well be imputed to illegal intent."

That in police prosecutions the *scienter* need not be proved, see *supra*, § 23 a.

¹ *R. v. Macleod*, 12 Cox C. C. 534, 1873; Whart. on Hom. §§ 143, 153.

² *U. S. v. Taylor*, 5 McLean, 242, 1851.

³ *R. v. Muscot*, 10 Mod. 192; *R. v. Schlesinger*, 10 Q. B. 670, 1847; *R. v. Petrie*, 1 Leach, 329 (3d ed.); *State v. Gates*, 17 N. H. 373, 1845; *Com. v. Cornish*, 6 Binn. 249, 1814; *Com. v. Cook*, 1 Rob. (Va.) 729, 1842; *State v. Knox*, Phil. (N. C.) 312, 1867. *Infra*, § 1246, and cases there cited.

⁴ *Hourigan v. Nowell*, 110 Mass. 470, 1872.

charged has used due diligence to inform himself.¹ Of course, where the statute makes the *scienter* essential to the offence, then the *scienter* must be proved.²

§ 90. In prosecutions for negligent exercise of a specialty, a person is not required to know facts outside of his profession. A person, for instance, not claiming to be skilled in medicine, and giving notice of his ignorance, cannot, if called upon to act as a medical attendant, be made responsible for his ignorance of the specialty, unless it appear that he displaced, by his rash acceptance of the post, a more competent person from undertaking its duties.³ And, generally, we may hold that where a person is employed, not as a specialist, but as a non-specialist, undertaking a business of which he professes to know nothing, he then can only be held liable for gross negligence, or *culpa lata*, consisting of ignorance of facts which every ordinary person ought to know.⁴

¹ *Hearne v. Garton*, 2 E. & E. 66, 1859; *U. S. v. Buck*, 4 Phila. 161, 1860; 8 Am. L. Reg. 540; *Duncan v. State*, 7 Humph. 148, 1846; *Squire v. State*, 46 Ind. 459, 1874.

² *R. v. Sleep*, 8 Cox C. C. 472, 1860. But see *U. S. v. McKim*, 3 Pitts. 155, 1869.

Subtle distinctions arise in this relation which in the Roman law are noticed under the titles of *Error in objecto*, and *Aberratio delicti*. *Error in objecto* is where A. designs to shoot B., but by mistake shoots C., mistaking C. for B., or where A. designs to steal B.'s property, but by mistake steals C.'s property. *Aberratio delicti* is where A. designs to shoot B., recognizes and aims at B., but accidentally shoots C., who at the moment happens to intervene. In other words, the error may arise from a mistake of the actor, or from a deflection of his aim. Error of the former class exists when the object at which the actor aims is not that which he supposes it to be. Error of the

second class exists when the means used by the actor glance from the intended object, and injure an unintended person. As to the first case, we may generally remark that when the object actually injured has the same legal consequence as the object intended, then, at common law, the fact that there was a mistake as to the victim is no defence. *Infra*, §§ 109, 120.

As to the *Aberratio delicti* more intricate questions arise which will also be hereafter considered. As a general rule we may here say that an injury designed for B., which is accidentally diverted from B. and falls on C., cannot logically be regarded as malicious so far as concerns C. Under such circumstances, A. may be indictable for a malicious attempt to injure B., and for a negligent injury of C. *Infra*, §§ 110, 111, 120, 317, 318.

³ Whart. on Neg. §§ 730-7.

⁴ Whart. on Neg. §§ 26-45-48, and cases cited *supra*, § 89.

V. CORPORATIONS.

§ 91. In the ancient case of *The Abbot of St. Bennet's v. The Mayor, etc., of Norwich*,¹ Pigot said *arguendo* that a "corporation cannot do a personal tort to another, as a battery or wounding, nor can they do treason or felony, so far as the corporation is concerned." Much the same language is used in the case of *Sutton's Hospital*,² and in *Orr v. The Bank*³ it was expressly ruled that a corporation, as such, could not through its agents be guilty of an assault and battery. It has been more recently held in England that such a body is not subject to be indicted for a violation of the Foreign Establishment Act.⁴ And Lord Holt is reported, in an anonymous case, to have laid it down generally that a corporation is not indictable at all, though its individual members are.⁵ This general proposition of Lord Holt has, however, received considerable qualification in modern times, and is now limited to cases of felonies, assaults, riots,⁶ and malicious wrongs.⁷ We may, therefore, hold that a corporation may be indicted for a breach of duty imposed on it by law, though not for a felony or for public wrongs involving personal violence, as riots or assaults.⁸ Thus an indictment will lie at common law against a cor-

Corporations indictable for breach of duty.

¹ Y. B. 21 Ed. IV. 7, 13.

² 5 Coke's Rep. 253.

³ 1 Ohio, 36.

⁴ *King of the Two Sicilies v. Willcox*, 14 Jur. 751, 1868.

⁵ *Anon.*, 12 Mod. 559. In *The State v. Great Works Co.*, 20 Maine, 41, 1842, Weston, C. J., states the law thus: "A corporation is created by law for certain beneficial purposes. It can neither commit a crime nor misdemeanor by any positive or affirmative act, or incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may by vote, entered upon their records, require an agent to commit a battery; but if he does, it cannot be regarded as a corporate act for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offence thus indi-

cated by them, the innocent dissenting minority would become equally amenable to punishment with the guilty majority. Such only as take part in the measure should be prosecuted either as principals, or as aiding and abetting, or procuring an offence to be committed, according to its character or magnitude." As to the liability of the individual members, see, further, *Kane v. The People*, 3 Wend. 363, 1829; *State v. Godfrey*, 12 Maine, 361, 1835; *R. v. R. R. Co.*, 9 Q. B. 315, 1846. As to form of indictment, see Whart. Cr. Pl. & Pr. § 100.

⁶ *Kyd on Corporations*, 225-6; *R. v. Birmingham Ry. Co.*, 3 Q. B. 223, 1842; 9 C. & P. 469, 1840.

⁷ *R. v. Willcox*, 1 Sim. N. S. 301; *Com. v. Proprietors*, 2 Gray, 339, 1854.

⁸ Per Patteson, J., *R. v. Birmingham Ry. Co.*, 3 Q. B. 223, 1842; *State v. Great Works Co.*, 20 Maine, 41, 1842;

poration for not repairing a road, a bridge, or a wharf, where by statute or prescription it is bound so to do;¹ or for disobedience to an order of justices for the construction of works in pursuance of a statute,² and this, though a specific remedy be given for the breach of duty, by the act of incorporation, if there be no negative words.³ In some jurisdictions in this country, it is true,⁴ it was once held that a corporation cannot be indicted for a nuisance in obstructing highways or rivers by its agents, the ground being the now exploded distinction between misfeasance and nonfeasance.⁵ But in England,⁶ after a full consideration of the authorities, a contrary principle was established. It was ruled there that an indictment lay at common law against an incorporated railway company for cutting through and obstructing a highway in a manner not conformable to the powers conferred on it by act of parliament. The case was put on general grounds; and the distinctions which had been attempted between nonfeasance and misfeasance were overthrown. Indeed, since it has been settled against some of the earlier authorities that trespass or case, for a private nuisance, would lie against a corporation,⁷ no good reason can be assigned why the same acts, when to the injury of the public at large, may not equally be the basis of criminal proceedings.⁸ And such is now generally considered to be

Com. v. Worcester Turnpike Co., 3 Pick. 15 Wend. 267, 1837; but see Com. v. 327, 1825; People v. Corporation of Turnpike Co., 2 Va. Cas. 362, 1819. Albany, 11 Wend. 539, 1834; People v. Long Island R. R., 4 Parker C. R. 41, 1842, overruled by State v. Portland, 74 Me. 268, 1881. See Com. v. Head, 523, 1859; Louisville R. R. v. State, 3 Turnpike Co., *ut supra*; State v. R. R., 23 Ind. 362, 1864. State v. Murfreesboro', 11 Humph. 217, 1851; Barnett v. State, 54 Ala. 579, 1875. See Morawetz on Corporations, § 94.

¹ Ibid.; Lyme Regis v. Henley, 3 B. & Adol. 77, 1832; R. v. Birm. Ry. Co., 3 Q. B. 223, 1842; 3 Railw. Cas. 148; s. c. 9 C. & P. 469, 1840; R. v. Severn R. R. Co., 2 B. & Ald. 646; R. v. Commissioners, 2 M. & S. 80; Simpson v. State, 10 Yerg. 525, 1837; State v. N. J. Turnpike Co., 1 Harr. N. J. 222, 1838; State v. Patton, 4 Ired. (N. C.) 16, 1843; Smoot v. Wetumpka, 24 Ala. 112, 1843. See Anon., Loft, 556.

² R. v. Birm. Ry. Co., *ut supra*.

³ Susquehanna Road v. The People,

⁴ See, to same point, 6 Vin. Abr. 309, Corp. Z. pl. 2.

⁵ See R. v. Great North of England Railway, 9 Q. B. 315, 1846.

⁶ Mayor of Lynn v. Turner, 1 Cowp. 86; Maund v. Monmouthshire Canal Co., 4 M. & G. 452, 1842; Lyme Regis v. Henley, 1 Bingham N. R. 222; 3 B. & Ad. 77, 1832; Eastern Counties R. Co. v. Broom, 2 Eng. L. & Eq. 406; Dater v. The Troy R. R. Co., 2 Hill, (N. Y.) 629, 1842; Chestnut Hill Turnpike Co. v. Rutter, 4 S. & R. 6, 1818.

⁷ Lord Denman, in R. v. Great N.

of Eng. R. R., 9 Q. B. 315, 1846, uses

the law when the object is the imposition of a fine on the corporation estate, or the abatement of a nuisance, a corporation being justly held to be as indictable for a misfeasance as for a nonfeasance.¹ But, at common law, under an indictment against a corporation as such there can be no punishment inflicted on the members of the corporation. They must be indicted personally to be punished corporally.²

this reasoning: "We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings; of this there is no doubt. But the public knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings."

¹ *State v. Vermont R. R.*, 30 Vt. 108, 1859; *Com. v. Proprietors*, 2 Gray, 339, 1854; *Com. v. Vt. R. R.*, 4 Gray, 22, 1855; *Susq. Turn. Co. v. People*, 15 Wend. 267, 1837; *People v. New York & N. H. R. R.*, 89 N. Y. 266, 1882; *State v. Morris. R. R.*, 3 Zab. (23 N. J. L.) 360, 1851; *Louisville v. State*, 3 Head, 523, 1859; and see *Com. v. Ohio*, etc., *R. R.*, 1 Grant, 329, 1856; *North. Cent. R. R. v. Com.*, 90 Pa. 300, 1879; *Com. v. Turnpike Co.*, 2 Va. Cas. 362, 1819; *State v. Fertilizer Co.*, 24 Ohio St. 611, 1873; *Cincinnati R. R. Co. v. Com.*, 80 Ky. 137, 1880; *Paducah R. R. v. Com.*, 80 Ky. 147, 1880; *State v. Ohio R. R.*, 23 Ind. 362, 1864; *Angell & Ames on Corp.* §§ 394, 396; *Whart. Cr. Pl. & Pr.* § 100.

That a municipal corporation is in-

dictable for a pollution of public waters, see *State v. Portland*, 74 Me. 268, 1880. That a railway corporation is indictable for Sabbath-breaking, see *State v. Balt. & Ohio R. R.*, 15 W. Va. 362, 1878. See, further, as recognizing criminal liability of corporations; *State v. Useful Man. Soc.*, 42 N. J. L. 504, 1880; s. c. 44 N. J. L. 502, 1882; *State v. Louisville R. R.*, 86 Ind. 114, 1882; *State v. Omaha*, 14 Nebr. 265, 1883. See, also, *infra*, §§ 341, 1474 *et seq.* That a corporation is indictable for libel see *infra*, § 1628 *a.* In *North. Cent. R. R. v. Com.*, 90 Pa. 300, 1879, quoted *infra*, § 1476, the indictability of private corporations for negligence was considered and affirmed. That a corporation is a "person" under statutes imposing duties, see *People v. Central R. R.*, 74 N. Y. 302, 1879; *State v. Cin. Fert. Co.*, 24 Ohio St. 611, 1873; *State v. Ohio & M. R. R.*, 23 Ind. 362, 1864.

² "Individual persons only," argues Merkel (*Holtz. Straf.* ii. 111), "can be made responsible criminally. *Juridical* persons cannot be thus made responsible. It is true that they cannot be regarded as inert masses of rights, for they are endowed by the law with independent business activity. But their will is a mere artificial creation; they are not possessed of that free, independent, personal action which is essential to penal responsibility. Suppose that a mayor, under authority of a municipal corporation, should organize a band of robbers in the town hall? Responsibility would be attached ex-

In several jurisdictions in this country, criminal proceedings against railroad corporations for negligent injuries are prescribed and regulated by statute.¹ Statutes have also been passed making it indictable for corporations to act except under certain limitations.²

§ 92. The old mode of proceeding against a corporation as such, to compel an appearance to an indictment, was by distress infinite;³ while under recent statutes the course adopted is to summon and thus bring into court the proper officers of the corporations proceeded against, enforcing the process by attachment or distringas.⁴ A fine is the usual penalty inflicted,⁵ though, according to Lord Holt, in an indictment against the inhabitants of a county for not repairing, an attachment may go against all to "catch as many as one can of them."⁶ In such case, however, the indictment is against the inhabitants individually. And the individual members of a corporation, concurring in a wrongful act, may be severally indictable as a cumulative remedy.⁷

clusively to the persons who thus abused their office; not to the municipal corporation." "Corporations," says Geib (Lehrbuch, § 87), "cannot, as such, commit crimes, as they are mere fictions, without the power of personal determination. They have no free will, but are bound by the will of the natural persons of whom they are composed. The latter are the responsible parties." This, however, is not inconsistent with legislation by which an indictment is used as a process against a corporation guilty of negligence through its agents. See *Com. v. Boston & Low. R. R.*, 126 Mass. 61, 1879; *People v. Cent. R. R.*, 74 N. Y. 302, 1879.

¹ See *State v. Boston, etc., R. R.*, 58 N. H. 410, 1878; *Com. v. Boston & Me. R. R.*, 129 Mass. 500, 1880; *Com. v. Boston & Me. R. R.*, 133 Mass. 383, 1882; *Com. v. Boston & Low. R. R.*, 134 Mass. 211, 1882.

In New York the Revised Statutes provide that an indictment may be found against a corporation for some offences, since those statutes provide

that "whenever an indictment shall be found against any corporation" it shall be "ordered by summons to appear and plead," and that if it neglects, "a distringas," as a procedure in the nature of an execution, "shall issue against its property to enforce the appearance." This "distringas" may be in any amount the court shall direct.

² See *Lee Ins. Co. v. State*, 60 Miss. 395, 1875.

³ *R. v. Birming. Ry. Co.*, 3 Q. B. 223, 1842, per Patteson, J.; s. c. 9 C. & P. 469, 1840, per Parke, B. See 6 *Viner Abr.* 310, and *Angell & Ames Corp.* § 526, 2d ed.

⁴ *Railroad v. State*, 32 N. H. 215, 1835; *State v. Western R. R.*, 89 N. C. 585, 1883, and cases cited in § 91.

⁵ *R. v. Birming. Ry. Co.*, *ut supra*.

⁶ *R. v. Wilts, Cas. Temp. Holt*, 339. But see *Morgan v. Corporation of Carmarthen*, 3 Keble, 350.

⁷ *R. v. R. R.*, 3 Q. B. 223, 1842; *State v. Godfrey*, 3 Fair. (12 Me.) 361, 1835; *Kane v. People*, 3 Wend. 363, 1829; *State v. Conlee*, 25 Iowa, 237, 1868.

§ 93. *Quasi* corporations, as counties, townships, parishes, have long been held subject to indictment for a neglect of the duties imposed on them by law; as for not maintaining a road or bridge,¹ or for not opening them when laid out.² And it is now well settled that such corporations are indictable for a neglect of a duty imposed on them by statute to repair roads, even though other remedies be given, if such remedies are not exclusive.³

Quasi corporations
indictable
for breach
of duty.

VI. PERSONS UNDER COMPULSION.

§ 94. Compulsion may be viewed in two aspects: (1) Where the immediate agent is physically forced to do the injury, as where his hand is seized by a person of superior strength, and is used, against his will, to strike a blow, in which case no guilt attaches to the person so coerced.⁴ (2) Where the force applied is that of authority or fear. Thus, where a person not intending wrong, is swept along by a party of persons whom he cannot resist, he is not responsible if he is compelled to do wrong by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm if he refuses;⁵ but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence.⁶ Thus it is a defence to

Persons
under
compul-
sion irre-
sponsible.

¹ *Infra*, §§ 1473, 1584 *a*; *R. v. Wilts*, 6 Mod. 307; *R. v. Dixon*, 12 Mod. 198; *R. v. Strington*, 2 Wms. Saunders, 167, *notes*; *R. v. Clifton*, 5 T. R. 498; *R. v. Sheffield*, 2 T. R. 106; *R. v. Com.*, *Ib.* 232; *R. v. Mayor, etc.*, 3 East, 86; *R. v. Lancashire*, 2 B. & Ad. 813, 1831; *R. v. Hendon*, 4 B. & Ad. 628, 1833; *R. v. Devonshire*, 2 N. & M. 212; *R. v. St. Giles*, 5 M. & S. 260; *State v. Whitingham*, 7 Vt. 391, 1835; *State v. Town of Fletcher*, 13 Vt. 124, 1841; *State v. Dover*, 10 N. H. 394, 1839; *Mower v. Leicester*, 9 Mass. 247, 1812; *Biddle v. Proprietors*, 1 Mass. 169, 1806. See *Com. v. Wilmington*, 105 Mass. 599, 1870; *State v. Commis.*, Walk. (Miss.) 366, 1824; and cases cited at large in Whart. on Neg. §§ 250 *et seq.*, 959 *et seq.*

² *State v. Kittery*, 5 Greenl. (5 Me.) 254, 1826. See *R. v. Shelderton*, 2 Keb. 221; *R. v. Vill. of Hornsey*, 1 Roll. R. 406; Whart. Cr. Pl. & Pr. § 100.

³ *State v. Kittery*, 5 Greenl. (5 Me.) 254, 1826; *State v. Dover*, 10 N. H. 394, 1839; *State v. Fletcher*, 13 N. H. 124, 1842; *Susqueh. R. v. People*, 15 Wend. 267, 1837; *State v. New J. C. T. R.*, 1 Harr. (N. J.) 222, 1830; *State v. Murfreesboro'*, 11 Humph. 217, 1851.

⁴ 1 East P. C. 225.

⁵ See *Oliver v. State*, 17 Ala. 587, 1849; *infra*, §§ 102, 405, 462. As doubting this position, see remarks of Lord Denman in *R. v. Tyler*, 8 C. & P. 615-6, 1838; *infra*, §§ 207, 212.

⁶ Dig. Crim. Law, art. 31, citing *R. v. MacGrowther*, 18 St. Tr. 391; *R. v. Crutchley*, 5 C. & P. 133, 1831. See, also, 1 Steph. Hist. Crim. Law, pp. 106 *et seq.* As to duress, see Whart. on Cont. §§ 144-154; and see summary of publications in 29 Alb. L. J. 298. As to responsibility of servant for nuisance, see *infra*, §§ 1422, 1432.

an indictment for treason that the defendant was acting in obedience to a *de facto* government, or to such concurrent and overbearing sense of the community in which he resided, as to imperil his life in case of dissent.¹

Under the Roman law, when a subordinate acts in obedience to a superior's lawful commands, the defence *respondeat superior* applies.² With us, also, a command, to be a defence, must be lawful.³ "In all cases," says Sir J. F. Stephen, "in which force is used against the person of another, both the person who orders such force to be used and the person using that force are responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior; but the fact that he did so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders."⁴ But unless the order were one which the subaltern was required by the law of the land to obey,⁵ or unless

¹ *Infra*, §§ 1803, 1803 a.

² L. 37, pr. D. ad L. Aquil. (9. 2.) L. 13. § 1. D. de iniur. (47. 10.) Is, qui iure publico utitur, non videtur iniuriæ faciendæ causa hoc facere: iuris enim executio non habet iniuriam. (L. 167. § 1. D. de reg. iur. (50. 17.) Qui iussu iudicis aliquid facit, non videtur dolo malo facere, quia parere necesse habet. L. 169. pr. D. eod. Is damnum dat, qui iubet dare; eius vero nulla culpa est, cui parere necesse sit. Can. 13. Caus. 23. qu. 5. Miles quum obediens potestati, sub qua legitime constitutus est, hominem occidit, nulla civitatis suæ lege reus est homicidii: immo, nisi fecerit, reus est imperii deserti atque contemti.

³ *Infra*, §§ 646 *et seq.*; U. S. v. Carr, 1 Woods, 480, 1872.

⁴ Dig. C. L. art. 202.

Of this are given the following illustrations:

(1) "A., a marine, is ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and has ammunition given him

for that purpose. Boats persisting, after repeated warnings, in approaching the ship, A. fires at one and kills B. This is murder in A., although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship [though desirable for the maintenance of discipline]. R. v. Thomas, 1 Russ. Cr. 823; 4 M. & S. 442.

(2) "A., the driver of an engine, orders B., the stoker, (whose duty it is to obey his orders), not to stop the engine. The train runs into another in consequence, and C. is killed. B. is justified by A.'s order. R. v. Trainer, 4 F. & F. 105, 1863; 1 Russ. Cr. (5th ed.) 837, 838. The language of Willes, J., in this case, seems to be a little too wide, unless it is taken in connection with the particular facts."

For *malicious* acts the subaltern is personally responsible. *Infra*, § 411.

⁵ U. S. v. Carr, 1 Woods, 480, 1872; U. S. v. Jones, 3 Wash. C. C. 220, 1822; Mitchell v. Harmony, 13 How. 115, 1851; State v. Sutton, 10 R. I. 159,

physical compulsion were applied,¹ the superior's order is no defence.

As will hereafter be seen,² wrong done on our territory by a foreigner, under his sovereign's orders, is imputable to the sovereign. Even acts done in obedience to an insurgent government will be excused by the parent government where such insurgent government had the power of enforcing its orders.³

§ 94 *a*. The subject of marital compulsion has just been considered.⁴ The compulsion of a master is no defence to a servant, when charged with crime, unless such compulsion deprived the servant of his free agency.⁵ An agent, also, on the same ground, cannot set up as a defence his principal's command.⁶ Nor with the same limitation is a parent's order to a child a defence.⁷

Servant or child cannot defend on this ground.

VII. PERSONS UNDER NECESSITY : SELF-DEFENCE.

§ 95. Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.⁸ Homicide through necessity—*i. e.*, when the life of one person can be saved only by the sacrifice

Necessity a defence when life or other high interests are imperilled.

1872; *State v. Sparks*, 27 Tex. 627, *Infra*, § 1504. As to principal's liability, see *infra*, § 247.

1864; *People v. Melius*, 1 N. Y. Cr. R. 39, 1882.

⁵ "The agent or servant cannot be

¹ *State v. Bugbee*, 22 Vt. 32, 1850; *Hays v. State*, 13 Mo. 246, 1850; *Com. v. Blodgett*, 12 Metc. 56, 1847, and cases cited *infra*, § 94 *a*. See *Riggs v. State*, 3 Cold. 149, 1867. As to *de facto* governments, see *infra*, § 1803.

excused for a violation of the criminal law because the act was done in the course of his agency or servitude." *Reese v. State*, 73 Ala. 10, 1882, citing *Winter v. State*, 30 Ala. 22, 1857.

² *Infra*, §§ 283, 310.

⁷ See *Humphrey v. Douglass*, 10 Vt. 71, 1837; *People v. Richmond*, 29 Cal. 414, 1865.

³ *Ford v. Surget*, 97 U. S. 59, 1878. *Infra*, § 1803.

⁸ Stephen's *Crim. Dig.* art. 32. See *R. v. Stratton*, 21 St. Tr. 1045, cited by Sir J. F. Stephen.

⁴ *Supra*, § 78.

⁵ See *State v. Bugbee*, 22 Vt. 32, 1850; *Com. v. Hadley*, 11 Metc. 66, 1846; *Com. v. Drew*, 3 Cush. 279, 1849; *State v. Hull*, 34 Conn. 132, 1867; *State v. Matthis*, 1 Hill, (S. C.) 37, 1833; *Hately v. State*, 15 Ga. 347, 1852; *Jordon v. State*, 22 Ga. 545, 1857; *Schmidt v. State*, 14 Mo. 137, 1852; *State v. Bryant*, 14 Mo. 340, 1852. Necessity has been frequently spoken of as Right against Right, though, according to the more recent opinion in Germany, it is more properly Privilege against Privilege, or Goods against Goods. (*Gut gegen Gut*.) When two privileges, equally protected by the law, collide, the

of another—will be discussed in a subsequent chapter.¹ The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief.² To the same general effect speak high English and American authorities.³ Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.⁴

The same reasoning justifies a crew, in cases of necessity, in rising and deposing a master;⁵ a prisoner in escaping from a burning prison;⁶ a citizen in joining a rebellion, when otherwise his life would be imperilled;⁷ a vessel in entering a blockaded port or breaking home revenue laws.⁸ On the same reasoning a nuisance may be temporarily tolerated;⁹ and when any important authorized industry would be imperilled by the observance of laws prohibiting labor on the Sabbath, these laws may be for the occasion disobeyed;¹⁰

question arises which is to yield. And the answer is, the lesser must yield to the greater. The greater is that which includes and conditions the other; the present and immediate is greater than the future and possible; if both are equal, self-sacrifice may require the possessor of the one to yield to the possessor of the other; but the law only requires this surrender in cases where one person is arrayed against several. Otherwise, though there may be an invasion of privileges, there is no invasion of law. Merkel, in Holtz. ii. 137.

¹ *Infra*, § 510. See *Com. v. Jailer*, 7 Watts, 366, 1838.

² See citations *infra*, § 510.

³ See Broom's Leg. Max. 10; 1 East P. C. 70; though see 4 Bl. Com. 31; 1 Hale, 565.

⁴ Rossi *Traité*, ii. p. 212. Berner, *Deimpunitate propter summam necessitatem*, etc. (1861); Geib, *Lehrbuch*, ii. 225; and an interesting compen-

dium in Holtzendorff, *Ency.* ii. 180. See *infra*, § 510.

⁵ *U. S. v. Ashton*, 2 Sumn. 13, 1834; *U. S. v. Borden*, 21 L. Rep. 100; *U. S. v. Hammer*, 4 Mason, 105, 1827. See *infra*, § 1878.

⁶ *Infra*, § 1679.

⁷ *Supra*, § 94; *infra*, §§ 1803, 1803 a. See *Res. v. McCarty*, 2 Dall. 86, 1781; *U. S. v. Thomas*, 15 Wall. 337, 1872. So in submitting to a rebellion, and paying to the *de facto* authorities money confiscated by them. *U. S. v. Thomas*, *ut sup.*

⁸ *The Diana*, 7 Wall. 354, 1868; *The Gertrude*, 3 Story, 68, 1842; *The William Gray*, 1 Paine, 16, 1835. See Whart. Com. Am. Law, §§ 146, 233, 573-6.

⁹ *Infra*, §§ 1424, 1474, 1475.

¹⁰ *Com. v. Knox*, 6 Mass. 76, 1809; *Com. v. Conway*, 3 Leg. Chron. (Pa.) 27; *Murray v. Com.*, 24 Pa. 270, 1855; *Crocket v. State*, 33 Ind. 416, 1870; *State v. Goff*, 20 Ark. 289, 1860. See

and property may be destroyed when necessary to avert any serious danger to the community.¹ "The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects."²

§ 96. It has been sometimes said that necessity can never be advanced as a defence when the necessity is the result of the defendant's own culpable act.³ This, however, as Berner⁴ demonstrates, cannot be accepted as universally true. Thus a person who negligently causes a house to catch fire will not, by this negligence, be barred from setting up necessity as a defence, if, in rushing from a burning chamber, he

Culpability does not preclude defence.

infra, § 1431 *a*. See particularly Lord Macaulay's Report on Indian Codes, p. 52.

It is true that in the great majority of cases of this class the person maintaining, as against another, his own right, might act in accordance with a higher morality if he should sacrifice himself instead of maintaining his own right to the injury of another. But the State does not exact heroism from its subjects, nor does it undertake to teach self-sacrifice. It permits, as much for the interests of good order as from its inability to teach pure morality, its subjects to repel, under due restrictions, assaults on their persons or property, even though in repelling these assaults the aggressor is put in danger of his life. But self-defence, it must be remembered, is not limited to assaults. A person whose house is on fire may seize, without incurring the charge of felony, the hose of a neighbor as a means of extinguishing the fire. A person who is bathing, and whose clothes have been stolen, may snatch up clothing he may find on a clothes-line, so as not to be obliged to enter into a village naked. For these two examples I am indebted to Berner, § 85.

In *Gilbert v. Stone*, Aleyn, 35 Style, 72, decided in 1648, it was held no defence to a man for breaking into another's close, and taking a horse, that he was pursued by twelve men, and was in fear of his life. But this would not be good law in a case in which the defendant acted convulsively under a necessity he did not provoke and could not avoid. And even were we to concede civil liability, yet, supposing that it should appear that from an unprovoked attack this could be the only way of escaping with life, no criminal prosecution could be maintained.

In *Com. v. Brooks*, 99 Mass. 434, 1868, it was held that seizure by a *de facto* government of money belonging to a legitimate government was a defence to a suit by the latter against a custodian not implicated in the seizure.

¹ Whart. Com. Am. Law, §§ 573, 576.

² Lord Stowell, *The Gratitude*, 3 C. Rob. Ad. 266. See *The James Wells v. U. S.*, 7 Cranch, 22, 1812; *The Struggle v. U. S.*, 9 Cranch, 71, 1815.

³ See, to this effect, *The Argo*, 1 Gall. 150, 1814.

⁴ *Lehrbuch d. Strafrechts*, 140.

should crush another in the throng; nor would a trespasser, who, upon stealing fish, should fall overboard, and in his struggle to save himself upset a boat, be barred from setting up necessity, if life should thereby be accidentally lost, because his act which put him in this situation was wrongful. But if the necessity be rashly rushed into, it may cease to be a defence.¹

§ 97. The distinction between necessity and self-defence consists principally in the fact that while self-defence excuses the repulse of a wrong, necessity justifies the invasion of a right.² It is, therefore, essential to self-defence that it should be a defence against a present unlawful attack,³ while necessity may be maintained though destroying conditions that are lawful. In self-defence the attack must be upon interests which it is the duty of the party assailed to defend. But the right is not limited to attacks on his own person. Whatever the law places under his protection, that he may defend according to the law.⁴ Self-defence by an individual also differs from preventive punishment by a State in this, that the former hinders the crime, and is prospective, the latter punishes for the crime, and is retrospective. Since to constitute self-defence the attack must be unlawful, as a general rule, the right does not exist as against an officer armed with a legal warrant. Children, also, cannot exercise this right against their parents;⁵ nor pupils against their teachers;⁶ nor apprentices against their masters;⁷ provided the limits of the right of correction by the assailant be not overstepped. It follows that there can be no self-defence against self-defence. Self-defence is only permissible against an *unlawful* attack. If A., unlawfully attacked by B., resorts to violent means to repel the aggression, his repulse of B. is lawful; but if B., in pursuance of the struggle,

¹ *Infra*, § 485; The Joseph, 8 Cranch, 451, 1814; The New York, 3 Wheat. 59, 1818.

² See on this point, Berner, § 86; Levita, *Recht der Nothwehr*, 1856; Schaper, *bei Holtzend.* ii. p. 137. The following citations from the Roman law may be useful in this connection:

“Melius est occurrere in tempore, quam post exitum vindicare.” L. 1. c. (3. 17).

“Pudicitiam quum eriperet militi tribunus militares in exercitu C. Marii,

propinquus ejus imperatoris, interfec-
tus ab eo est, cui vim afferebat: facere
enim probus adolescens periculose,
quam perpiti terpitur maluit. Atque
hunc ille summus vir, scelere solutum,
periculo liberavit.” Cicero pro Milon.
c. 4. Paullus Rec. Sent. v. 23. 8.

³ See *Filkens v. State*, 69 N. Y. 101, 1877.

⁴ *Infra*, § 98.

⁵ *Infra*, § 631.

⁶ *Infra*, § 632.

⁷ *Infra*, § 634.

deliberately and unnecessarily renews the attack on A., this is not self-defence, since self-defence only obtains against an unlawful attack.¹

§ 97 a. As will hereafter be seen more fully, the right of self-defence can only be appealed to to ward off a danger that is actual and immediate; though in determining what is immediate we must be guided by the conditions of each particular case. The fact, however, that an attack has been expected does not preclude me from repelling it when it comes. A public man, for instance, as was the case with the Duke of Wellington during the Reform Bill riots, may have good grounds to expect an attack on his house; but this does not prevent him from vigorously defending his house when the assault is actually made.² It has also been said that the right does not exist when the party attacked had an opportunity of calling on the public authorities to intervene. This, however, is not universally true. As there are few attacks which the injured party could not have more or less clearly expected, it would be incumbent on him, if the position here contested is sound, to call on the government for protection in every case, or else to lose the right.³ But to call on the government for aid is only necessary when such aid can be promptly and effectively given. There are many cases of suspicion, also, in which a prudent man would decline to call in governmental aid, feeling that the case is not sufficiently strong to justify so extreme a remedy. As a rule, therefore, we cannot say that self-defence cannot be resorted to when the party asserting the right could have protected himself by calling in the government.⁴ Of this position we have abundant illustrations in

Right may be exercised even though public authorities might have been called upon previously.

¹ *Infra*, § 485.

I have endeavored to give an exposition of several philosophical theories of self-defence in the *Southern Law Review* for 1879, p. 366; condensed in the 8th edition of the present treatise, § 97.

That the English law of self-defence has fluctuated in sympathy with political economy, see article in *Crim. Law Mag.* for Jan. 1882.

² See *R. v. Scully*, 1 C. & P. 319, 1824. *Infra*, §§ 487-496.

³ *Beatty v. Gilbants*, 47 L. T. N. S. 194, Q. B. D. (1882), cited more fully

infra, § 1535, where it is held that the fact that the leaders of the "Salvation Army" expected that its meetings would be attacked by a mob, did not make it necessary for them to disperse or invoke police aid.

⁴ It was for this reason that the clause in the German Code, limiting in this respect the right of self-defence, was ultimately stricken out. See *Berner*, § 86; and see *infra*, § 487. *Evers v. People*, 6 Thomp. & C. 156; 3 Hun, 716, 1875; *State v. Doty*, 5 Oreg. 491,

cases of nuisance which a private citizen is authorized to abate without appealing to the law.¹ "At common law," so speaks a learned New Jersey judge,² "it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. . . . This common law right still continues. Any citizen, acting either as an individual or as a public official under the orders of local or municipal authorities, . . . may abate what the common law deems a public nuisance."³ We must not push this right so far as to sustain deliberate aggressions on others. But we ought to maintain it so far as is proper for the defence of self. There is no pebble in our way on the highway that we could not remove by action of law. But there is no pebble on the highway as to which an action of law would not be absurd. We kick it out of the way, just as we exert the right of self-defence in innumerable other cases in which going to law would be equally absurd. And we may in like manner forcibly remove an intruder from a house or a railway car without stopping to call in a magistrate,⁴ or tear from a wall an insulting libel,⁵ or push back from a highway an overhanging bough.⁶ If so, we may defend life and limb, though the attack is one we may have so far anticipated as to have been able to call in official aid in advance.⁷

¹ See *infra*, § 1426. *R. v. Cross*, 3 Camp. 226; *R. v. Jones*, *Ib.* 230; *People v. Cunningham*, 1 Den. 524, 1845; *Wood on Nuisances*, § 529.

² *Manhattan Man. Co. v. Van Keuren*, 23 N. J. Eq. 251, 1850; *Turner v. Holtzman*, 54 Md. 148, 1880.

³ See *Brightman v. Bristol*, 65 Me. 426, 1875; *Earp v. Lee*, 71 Ill. 193, 1874.

⁴ *Infra*, §§ 621-22, 1100, 1105; *Overdeer v. Lewis*, 1 W. & S. 90, 1841. In *Beddall v. Maitland*, 44 L. T. R. (N.S.) 248, C. D. (1881), the rightful owner of a house forcibly ejected a person wrongfully in possession, and injured his furniture. It was held that the violent entry of the rightful owner might be an offence under 5 Richard II. stat. 1, c. 8, but that no damages could be obtained for the forcible

entry. Damages were, however, given for the injury to the furniture. See *Newton v. Harland*, 1 Scott N. R. 474. *Infra*, § 1100.

⁵ *De Bost v. Beresford*, 2 Camp. 511.

⁶ *Lonsdale v. Nelson*, 2 B. & C. 302, 1823.

⁷ As illustrating the principle in the text may be mentioned a case in North Carolina decided in 1878, where it was held that the owner of land has the right to arrest and repress, as a nuisance, a person using loud and obscene language on the highway in front of such land; and when the person so offending is armed with a pistol, the limitation *molliter manus* does not apply. *State v. Davis*, 80 N. C. 351, 1878; citing *State v. Perry*, 5 Jones, 9, 1853; *State v. Robbins*, 78 N. C. 431, 1878.

§ 98. Whoever possesses a right is entitled to defend that right. No matter what may be the character of the right, it cannot lawfully be taken from the owner by violence; and violence applied for this purpose he may violently resist. The Roman law is emphatic on this point, making the right to defend one of the incidents of the right to possess. “Vim vi repellere licet, idque ius natura comparatur.”¹ “Ut vim atque iniuriam propulsemus, iuris gentium est.”² “Vim vi defendere omnes leges omniaque iura permittunt.”³ Nothing, as has been well said,⁴ can be more general than these utterances. In our own law there have been tendencies to limit the right to the defence of home, of person, and of relatives in the first degree. No doubt there is a peculiar sanctity attached to these conditions which justifies even the taking of life in their defence. But this circumstance must not make us insensible to the fact that whenever a right has any value, then its possessor may protect it forcibly from assault.⁵

Objects for which self-defence may be exerted.

§ 99. It has also been said that a party who can fly from an aggressor is bound to fly, and cannot set up self-defence. This, as we will hereafter see,⁶ is so far true that an assailed party cannot, unless driven to the wall, take his assailant's life. But as an elementary proposition it is not true that if I can evade an attack by flight then I must fly to evade the attack. If this were the law, few persons in times of trouble could remain at their posts. This, however, by confining the right of self-defence to attacks of which there could be no prior suspicion, would virtually abrogate the right. For it would be to say that the right of self-defence only exists when there is nothing to defend. And besides, the fundamental principle is that right is not required to yield to wrong.⁷

Flight not necessary to self-defence.

¹ L. i. § 27 D. de vi.

² L. 3. D. de iust. et iure.

³ L. 45. D. § 4, ut leg. Aq.

⁴ Berner, § 87.

⁵ *Infra*, §§ 480, 495-508; and see particularly § 501.

⁶ *Infra*, § 486.

⁷ This is a settled rule of Roman law. See *Clarus Rec. Sent. Levita*, p. 237; and see cases cited *infra*, §§ 486-501. That an assault in defence of personal right is justifiable, see *infra*, §§ 501, 621. *R. v. Mitton*, 3 C. & P. 81, 1827; *R. v. Driscoll*, C. & M. 214, 1841; *State v. Elliot*, 11 N. H. 540, 1840; *State v. Miller*, 12 Vt. 437, 1840; *Com. v. Kennard*, 8 Pick. 133, 1829; *Com. v. Clark*, 2 Metc. (Mass.) 23, 1841; *Com. v. Powers*, 7 Metc. (Mass.) 596, 1843; *Com. v. Dougherty*, 107 Mass. 243, 1871; *Com. v. Mann*, 116 Mass. 58, 1874; *Filkins v. People*, 69 N. Y. 101, 1867; *Parsons v. Brown*, 15 Barb. 590, 1857; *State v. Gibson*, 10 Ired. 214, 1849; *State v. Covington*, 70 N. C. 71, 1874. See, however, *Hendrix v. State*, 50 Ala. 148, 1873. The law is thus stated by Sir J. F. Stephen

§ 100. We must remand to future sections the discussion of the question, what degree of violence may be used in defence of home.¹ It is only necessary here to repeat what has just been said, that the right to property of all kinds may be forcibly defended when it is forcibly attacked, and that the degree of force to be used in the defence is to be measured not by the value of the article, but by the degree of force used in the attack. Were it otherwise, the property of the poor would be discriminated against, and the right to defend property limited only to those rich enough to possess property of value. Nor is it possible to gauge our attachment to any piece of property by its mere money standard. An article of no money value may conduce greatly to my comfort and happiness; and beside this, I have a right to repel spoliation even of things of little value, on the ground that yielding to spoliation in little things is a yielding to spoliation in all things.

The right extends also to mere possession, so that the bare possessor of a thing has a right forcibly to repel a forcible attempt to take it from him.² Thus, a party having a right to the use of a well, though such right be not exclusive, may repel by force an intruder attempting to draw from it.³

§ 101. An interesting question, which will be hereafter more fully discussed, arises as to the extension of the right of self-defence to injuries to honor. The cases which have heretofore been adjudicated in this relation have been mainly those in which persons whose character has been assailed have assaulted or killed the assailant. On these facts it has been uniformly held, as an elementary principle, that no words, no matter how insulting, will excuse an assault.⁴ At the same time insults of all kinds, words as well as blows, are to be taken into consideration in determining how far hot blood can be considered to exist.⁵ It is easy, also, to conceive of cases in which a party insulted is entitled to remove the instrument of insult; and we may adopt as sound law a ruling already noticed, that a person

(Steph. Dig. Cr. L. art. 200): "Any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm; and if the assault upon him is, notwithstanding, continued, he is in the position of a person assaulted in the em-

ployment of lawful force against the person of another." *Infra*, § 486 a.

¹ See *infra*, §§ 495-508, 1112.

² See *infra*, § 501.

³ *Roach v. People*, 77 Ill. 25, 1875.

⁴ See *infra*, § 619.

⁵ *Infra*, §§ 455 et seq.

insulted by a libel has a right to remove it from a wall on which it is posted.¹

§ 102. A future danger, as we will hereafter see, cannot be anticipated by an attack upon the expected aggressor, unless this be the only means of warding off the attack.² Nor is the party attacked excusable in using greater force than is necessary to repel the attack,³ remembering that the danger of the attack is to be tested, as will be hereafter noticed, from the standpoint of the party attacked, not from that of the jury or of an ideal person. Whoever, by his misconduct, puts another in a condition in which the mind cannot act with reasonableness, cannot complain that such reasonableness is wanting. If the injured party acts negligently or unfairly in coming to the conclusion that he is in danger of life, then he is liable for the consequences if he exceed the limit of self-defence; but if his conclusion be honest and non-negligent, then the party assailing him must bear the consequences of the mistake. This view has been maintained by the German courts;⁴ and will be vindicated fully hereafter.⁵ The same limitation, prohibiting an excess of force, applies to the private abatement of nuisances.⁶

Danger must be immediate and defence not to exceed attack.

¹ *Du Bost v. Beresford*, 2 Camp. 511; cited *supra*, § 97 *a*.

² See *infra*, §§ 484, 498, 624.

³ *Com. v. Dougherty*, 107 Mass. 243, 1871; *State v. Ross*, 26 N. J. L. 224, 1873; *State v. Lazarus*, 1 Const. C.R. 34, 1817; *Gallagher v. State*, 3 Minn. 270, 1859; *Patten v. People*, 18 Mich. 314, 1868; *State v. Burke*, 82 N. C. 551, 1880; *Oliver v. State*, 17 Ala. 587, 1849; *Cotton v. State*, 31 Miss. 504, 1860. *Infra*, §§ 498, 624.

⁴ *Archiv*, 1848, p. 592.

⁵ See *infra*, §§ 488–491.

In the same connection we may notice the following striking remarks from a leading German commentator:

If the State would not expose to spoliation the rights she undertakes to protect—rights such as life, limb,

freedom, honor, chastity, property of all kinds, family relationships—she must leave the limits of self-defence to be determined, not by the tribunal by whom the case is ultimately to be coolly tried, but by the individual assaulted himself, according to his capacity as exercised in the excitement, the confusion, and the surprise of the attack. It is particularly to be kept in mind that in self-defence the conflict is not simply between power against power, but between superior and prepared against inferior and unprepared power; that the assailant is rarely able to convince the assailed that the attack has an object less destructive than at the first glance it appeared to be; that the assailant knew this when he made the venture; that he in this way knowingly exposed his

⁶ *Infra*, § 1426. See *State v. Paul*, 5 R. I. 185, 1858; *State v. Parrot*, 71 N. C. 311, 1874.

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² See *infra*, § 501.

³ *Roach v. People*, 77 Ill. 25, 1875.

⁴ See *infra*, § 619.

⁵ *Infra*, §§ 455 *et seq.*

When the danger is over, the right of self-defence ceases.¹ It follows that when a thing which is the object of attack is finally taken from him, the loser cannot ordinarily use violence to recover it. For this purpose he must resort to process of law. The technical right extends to the defence of a thing before it is taken; not to its recovery after it is taken. “*Quamvis vim vi repellere omnes leges et omnia iura permittunt,—tamen id debet fieri cum moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam iniuriam.*”² If, however, he can retake it without undue violence he may do so.³ But an assault on his person he cannot punish when the danger is over. His right is defence, not retribution.⁴

§ 103. The inference to be drawn from the weapon used⁵ applies with peculiar force to cases of self-defence. A man who, when attacked, draws out a pistol and shoots down his assailant, cannot, under ordinary circumstances, claim that he was surprised by the attack. No one in a civilized society, where the law gives protection to those in danger, is entitled to carry concealed weapons, in order to meet an attack which he could avert by the ordinary processes of law. If, however, the weapon is one which it is customary to carry, or if it is caught up on a sudden, in fright or in hot blood, by the assailed, then no inference of premeditation can be drawn.⁶

life and limbs to the violence, wild and frantic as it would necessarily be, which he himself called forth in the person assailed. Schaper, in Holtz. Straf. ii. 139.

¹ See *infra*, §§ 484 *et seq.*

² C. 2 x. De homic. v. 12, c. 18. eod. Berner, § 88. *Infra*, § 462.

³ State v. Elliot, 11 N. H. 540, 1840.

⁴ See *infra*, § 487. R. v. Driscoll, C. & M. 214, 1841; R. v. Mitton, 3 C. & P. 31; Com. v. Ford, 5 Gray, 475, 1856; People v. Caryl, 3 Parker C. R. 826, 1855; State v. Lowry, 4 Nev. 161, 1868; Territory v. Drennan, 1 Montana, 41, 1868.

The right (self-defence) can only be exercised at the moment of the attack. It cannot, therefore, be exercised against the absent, though they be instigators of an actual attack. But

between those present and acting among the assailants the assailed is not bound to distinguish between the several degrees of activity or responsibility. Nor is he bound to call upon any of them to say what they purpose, and in what way they mean to carry out their purpose, since this depends upon contingencies which no one of them can preascertain. Nor does retreat of the assailant by itself necessarily exclude the idea of a perilous attack. An assailant may retreat as a feint, as is sometimes the case with robbers in attacks on country seats, and it may be added in other cases of malicious assaults. Schaper, in Holtz. Straf. ii. 145.

⁵ *Infra*, § 122.

⁶ See fully Whart. on Cr. Ev. § 764; and *infra*, §§ 484 *et seq.*

CHAPTER IV.

MALICE AND INTENT.

Malice is evil intent, and is convertible with *dolus*, § 106.

To *dolus*, will, object, and causation are essential, § 107.

Sufficient if party charged contemplated result as a contingency, § 108.

Dolus classified as *determinatus* and *alternativus*, § 109.

Dolus determinatus is where a single object is persistently pursued, § 110.

Dolus alternativus is where the purpose is capable of alternate realization, § 111.

Malice to a class includes malice to an individual, § 112.

Fallacy of distinction between malice express and implied, § 113.

Malice presumed to be continuous, § 114.

But duration to be inferred from facts, § 115.

Premeditation requires no fixed period, § 116.

Intent at time of action enough, § 117.

Malice does not require physical contact, § 117 *a*.

In cases of doubt, verdict is taken for the lower degree, § 118.

Motive to be distinguished from intent: combination of motives no defence, § 119.

Unintended injury derives its character from purpose to which it is incidental, § 120.

Motive need not be proportionate to heinousness of crime, § 121.

Malice inferable from facts, § 122.

Consciousness of unlawfulness not essential, § 123.

Malice distinguishable from fraud, § 124

§ 106. MALICE may be defined as intent to do injury to another;¹ and may, for the purposes of this treatise, be regarded as having the same meaning as *dolus*.² *Dolus*, also, includes the idea of fraud, which in our present legal use is not convertible with malice; but so far as concerns injuries effected by force, *dolus* and malice are equivalent terms. A wound,

Malice is evil intent, and is convertible with *dolus*.

¹ Malice is where a person willingly does that which he knows will injure another in person or property; Blackburn, J., in *R. v. Ward*, 1 L. R. C. C. 356, 360, 1872. See *Holland v. State*, 12 Fla. 117, 1867. See 13 *Crim. Law Mag.* 831.

² For more detailed definitions see *Com. v. Drum*, 58 Pa. 9, 1868; *Harris v. State*, 8 Tex. App. 90, 1880; *McKinney v. State*, 8 Tex. App. 626,

1880; *Beck v. State*, 76 Ga. 452, 1886; *Kelly v. State*, 68 Miss. 343, 1890; *Powell v. State*, 28 Tex. App. 393, 1890; *Gonzalez v. State*, 30 Tex. App. 203, 1891; *Ellis v. State*, 30 Tex. App. 601, 1892; *People v. Daniels*, (Cal.) 34 Pac. Rep. 233, 1893; *People v. Borgetto*, 99 Mich. 336, 1894; *Cherry Crim. Law*, pp. 40-42; 8 *Law Mag. & Rev.* (4th ser.) 406.

which by our law would not be regarded as malicious, would not by the Roman law be regarded as caused by *dolus*. A wound, to whose author the Roman law does not impute *dolus*, would not be regarded by our law as malicious. Between *dolus* and *culpa* the line is drawn in the Roman law in the same way as in our own law the line between malice and negligence. There is, however, this difference between the two jurisprudences: to *dolus*, as a psychological study, the Roman jurists devoted great attention; to malice, as a psychological study, our jurists have given but little attention, contenting themselves in dealing curtly with the subject in the concrete.¹ In our own system, malice, in its most general sense, includes all unlawful intent; and is therefore distinguished from motive, which is ultimate purpose, and which, unless introduced as a link in a chain of inculpatory or exculpatory proof, is irrelevant. The motive of A. in killing B. may have been to rid the community of a villain. But this does not touch the issue, so far as A.'s state of mind is concerned; the question is not was A.'s motive good in killing, but was it his intent to kill.²

§ 107. According to an able recent commentator on the Roman Law,³ the following are the essential ingredients of *dolus*:

1. The internal will.
2. The external act.
3. The causal relation of the will to the act.

If the will is not brought into connection with the act, the act is not to be considered as willed; yet we must remember that no thoughtful man can insulate a particular act so as to cut that act off from the consequences that naturally follow from it. I throw a stone into the water, intending simply to get rid of the stone from the land. Yet at the same time I cannot, as one who has previously observed similar results, and who reasons from the most familiar principles of physics,

To *dolus*
will, ob-
ject, and
causation
are essen-
tial.

¹ See Austin's Jurisp. ii. 327; Whart. for some considerable time before the Hom. 129. It should not be forgotten commission of the fact; which is a in this connection that the legal mean- mistake, arising from the not well dis- ing of the term *malitia* or malice is tinguishing between *hatred* and *malice*. different from its popular meaning, *Envy, hatred, and malice* are three which makes it synonymous with spite. distinct passions of the mind." Kel.

Thus Lord Holt says: "Some have 127. The confusion arising from this been led into mistakes by not well con- ambiguity is discussed in 2 Steph. sidering what the passion of malice is; Hist. Crim. Law, 120.

they have construed it to be a rancor of mind lodged in the person killing

² See *supra*, § 11; *infra*, § 119.

³ Gessler's *Dolis* Tübingen, 1860.

forget that this stone will cause a ripple on the surface of the water. A similar case, it is argued, arises when A. shoots at B., intending to kill him, but the ball glances and kills C., whom A. has reason to expect to be in close vicinity.¹ The intention to kill B., could it be so insulated as to detach it from any consequence except that intended, could not support an indictment for killing C.; but if it cannot be so insulated, and if shooting at B. naturally involves the contingency of missing B. and hitting C., then *dolus* is to be imputed to the killing C.²

We must at the same time remember that an instrumental intent, the realization of which produces an injury to another, may be either indifferent or criminal. A man may drop a stone from a roof on a street, and may do this either sportively or with intent to hurt a passer-by. When there is an intent to hurt, in other words, when to the intent to use a particular instrument the intent to hurt by the use of such instrument is added, then *dolus* exists. *Dolus* (malice) is therefore the condition of an offence by an instrument specifically intended, and the act must be immediately directed by the intent.³ *Culpa* (negligence) is the condition of an offence not intentional, but imputable to the lack of such diligence as it was the duty of the party to bestow.

§ 108. It is here that emerges the question that has been productive of so much difficulty in this branch of jurisprudence. Is it sufficient to constitute *dolus* (malice) that the fatal result should only appear to the assailant as a mere possibility? In answering this question we must remember that we are not able to select

¹ See Meyer, § 106, who defines *dolus* to be the will to do in the concrete that which the law forbids in the abstract. § 101, 1889; but the great weight of authority is against this view. *R. v. Latimer*, 17 Q. B. D. 359; s. c. 16 Cox C. C. 70, 1886; *Angell v. State*, 36 Tex. 542, 1871; *Wareham v. State*, 25 Ohio St. 601, 1874; *Lacefield v. State*, 34 Ark. 275, 1879; *State v. Lee Vines*, 34 La. An. 1079, 1882. In such a case the felonious intent is transferred. *State v. Montgomery*, 91 Mo. 52, 1886; *State v. Renfrow*, 111 Mo. 589, 1892; *Com. v. Breyessee*, 160 Pa. 451, 1894.

² See *infra*, §§ 120, 128, 318; *R. v. Smith, Dears.* C. C. 559; s. c. 7 Cox C. C. 51; 33 E. L. & Eq. 567, 1855; *R. v. Stopford*, 11 Cox C. C. 643, 1870. It has been attempted to distinguish between the case of a mistake of person, as where C. takes A. for B., and shoots or strikes him, and a mistake of aim, as when he intends to hit B. and hits A., on the ground that in the latter case the element of intent is lacking; *R. v. Hewlett*, 1 F. & F. 91, 1858; *People v. Robinson*, 6 Utah, 1778; *Morse v. State*, 6 Conn. 9, 1825.

³ See *R. v. Chapman*, 1 Den. C. C. 432, 1849; *R. v. Preston*, 2 Den. C. C. 353, 1851; *Resp. v. Roberts*, 1 Dall. 39, 1778; *Morse v. State*, 6 Conn. 9, 1825.

arbitrarily the instruments we want to effect a particular end, nor is there any instrument which we can speak of as absolutely in our power. Whatever we attempt we have to execute by means of agencies whose operation may be modified by numerous contingencies over which we have no control. No plan of wrong, therefore, can be framed by even the most capable and cautious of conspirators, which they must not regard as dependent upon contingencies for its consummation. An assailant, therefore, in meditating an attack on another, must contemplate the possibility of miscarriage. This possibility may be greater or less. A good marksman may be almost sure of hitting his intended victim ; a man who sends an explosive compound to an enemy may estimate that the probability of injuring his enemy is slight. If the means adopted are such as cannot possibly succeed, then there is no such connection between the instrumental intent and the final intent as is essential to constitute guilt. But if there be no such impossibility, and if the means adopted, improbable as it would seem, have a fatal result, then the end is to be regarded as having been intended.¹

§ 109. We shall hereafter have occasion to distinguish between motive and intent ;² motive being in this sense the moving power impelling to action for a particular result, intent being the purpose to use a particular means to effect such result. An analogous distinction is expressed in Germany by the words *Vorsatz* and *Absicht*. The intent, for instance, may be directed to the use of a particular instrument, but this instrument may be used to give effect to one of several motives, *e. g.*, a blow may be given with the motive of wounding, or disgracing, or killing ; or when a house is set on fire, the motive may be either plunder or homicide. In this view *dolus* may be regarded as either *determinatus*, *alternativus*, or *eventualis*.

§ 110. 1. *Dolus determinatus* exists when the instrument is intentionally used to effect a single purpose, as when a deadly poison is intentionally given with the sole purpose of killing. It makes no difference whether or no the instrument will effect the object with apparent certainty. The person whose life is attempted may have warded off susceptibility to disease by antidotes. Or it

¹ See *infra*, §§ 169, 317-8, and see *Infra*, § 119. See *Cherry Cr. R. Robinson v. State*, 54 Ala. 86, 1875 ; 9 p. 12. *Crim. Law Mag.* 139.

may happen that the assailant may be limited in carrying out his plan to a single agency comparatively uncertain. In either case *dolus determinatus* is established.

§ 111. 2. *Dolus alternativus* or *eventualis*.—It may happen that the instrument selected may have two or more distinct effects, and that of the possibility of this the assailant is or ought to be aware. This may occur in the following cases :

Dolus alternativus is where the purpose is capable of alternate realization.

a. The assailant has a primary object in view, and his final intention is directed to effect this object ; but he recognizes a second object as either the possible or probable result of the instrument he employs. Cases of this class are divided by the Roman authorities as follows :

a¹. *Dolus eventualis*.—When only the second object is criminal, as where A. shoots at a mark, seeing B. near the mark, and knowing that a slight divergence may cause the shot to miss the mark and to strike B. ; and when B. is struck and killed.¹

b¹. *Dolus determinatus et eventualis*.—When both objects are criminal ; as where A. shoots at B. and hits C., who is so near to B. that the hitting of C. was or ought to have been within the contemplation of A. as probable.²

b. When it is indifferent to the assailant which of several probable objects is effected by the instrument chosen by him.

a¹. When only one of these objects is criminal, which is *dolus alternativus* in its single sense.

b¹. When all are criminal, as where a man shoots at a crowd, not caring whom he hits ; which is *dolus alternativus* in the ordinary sense.³

c. When the assailant desires to effect, and does effect, several criminal objects simultaneously. This brings a concurrence of several *doli determinati*, which are to be tried severally.⁴

d. The assailant has his intention fixed on a single criminal object, but while effecting such object he, accidentally and against his will, effects, by the instruments used, another

¹ See *R. v. Hewlett*, *supra*, § 107 ; 2 Steph. Hist. Crim. Law, 112.

² *Infra*, §§ 120, 608.

⁴ See Whart. Cr. Pl. & Pr. §§ 468

³ See *supra*, § 107 ; *infra*, §§ 120, *et seq.*

criminal object. If so, the first contingency involves only *dolus*; the second only *culpa*. This covers the case, hereafter fully discussed, of a person who, when shooting a tame fowl, accidentally, and against his will, kills the owner of the fowl.¹

Dolus generalis is where an injury is directed at a crowd, let the blow fall where it may.²

§ 112. By the leading English writers of the old school, malice is held to denote not only special malevolence to the individual slain, but a generally wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent on mischief.³ And, in general, any formed design of doing mischief is by these authors called malice, whether the mischief be intended to fall upon a particular person, or upon any person who may be within its range.⁴ Thus placing an obstruction on a railway track, with intent to kill, is a malicious homicide, and is murder, whether the intent be to kill a particular person, or to kill any one who may be on the train.⁵ And malice to a class includes malice to the members of that class.⁶

¹ See *supra*, § 106, and cases cited. *Infra*, § 320.

² *R. v. Fretwell*, L. & C. 443; s. c. 9 Cr. C. C. 471, 1864; *State v. Nash*, 86 N. C. 650; s. c. 41 Am. Rep. 472, 1882; *Scott v. State*, 49 Ark. 156, 1886; *People v. Raher*, 92 Mich. 165; s. c. 31 Am. St. Rep. 575, 1892. *Infra*, §§ 120, 319, 383.

³ Fost. 256, 262.

⁴ 1 Hawk. P. C. c. 13, s. 18; Fost. 257; 1 Hale, 451; 4 Black. Com. 199. *Infra*, §§ 120, 319.

⁵ *Presley v. State*, 59 Ala. 98, 1877. See *Clifton v. State*, 73 Ala. 473, 1883.

⁶ *Infra*, §§ 120, 319, 383; *R. v. Martin*, (Crown Cas. Res.) 72 L. T. Journ. 83, 1881, and cases cited *supra*, n. 2.

In *R. v. Martin* (Crown Cas. Res.) 72, L. T. Journ. 83, 1881, the defendant was charged with malicious wounding, which resulted from his extinguishing the gas in the outward entry of a theatre and put-

ting a bar across the passage, which caused a tumult in which several persons were wounded. The defendant was convicted, and the conviction was sustained by the court, Lord Coleridge, C. J., saying:

"The prisoner was indicted under the statute 24 & 25 Vict. c. 100, s. 20, which enacts that any one who unlawfully and maliciously wounds or inflicts grievous bodily harm upon any other person, with or without a weapon, shall be guilty of an offence, and punishable accordingly. (The words, 'with or without a weapon,' were introduced because difficulties often arose as to the use of a weapon or instrument.) What the prisoner in the present case did was this: he came out first and turned off the gas, and put across the passage an iron bar, and then he went his way. The people in the theatre, as they came out, finding the place dark, very

§ 113. The older English text-books distinguish between "malice express" and "malice implied." This, however, as is elsewhere shown,¹ cannot be sustained. Our only way of proving malice is by inferring it from circumstances. Even should a party, when examined on the stand, say, "I did the act maliciously," the question would still remain, how far the statement is to be believed. The mode of proof is not demonstration, but inference.²

Fallacy of distinction between malice "express" and "implied."

naturally fell into a panic and rushed forward, and of course met the iron bar, and the person injured knocked his head against the bar and was seriously injured,—though happily not killed. For that the prisoner was indicted, and the jury found all that was necessary to sustain the charge under the enactment that he did unlawfully and maliciously inflict grievous bodily harm upon the person injured—that is, without a weapon or instrument in his hand. The question is whether under these circumstances he was guilty of everything the enactment includes, and I am clearly of opinion that he was. He must be taken to have intended the natural consequences of what he did. And what he did was to do what would certainly alarm and frighten a number of people and also to obstruct their exit by something which, when they came against it, would certainly cause them serious injury, and then if a person did thus come against it, and was so injured, then the prisoner did 'unlawfully and maliciously' cause him to be so injured—that is 'maliciously' not in the sense of actual malice against the particular individual, but in the sense of doing an unlawful act calculated to injure, and by which another person was in fact injured—that is 'maliciously' injuring—just as in the case of a man who unlawfully fires a gun among a crowd, and who, if he kills one of them, is clearly guilty of murder. That principle is

one of sound sense and reason and it is applicable here. The prisoner, therefore, was most properly convicted, and if he receives exemplary punishment I shall be satisfied with the result."

¹ Whart. Cr. Ev. §§ 16, 734 *et seq.* The distinction, however, is still kept up in Texas. *Jones v. State*, 5 Tex. App. 397, 1879; *Martinez v. State*, 30 Tex. App. 129, 1891; *Sherar v. State*, 30 Tex. App. 349, 1891; *Baltrip v. State*, 30 Tex. App. 545, 1891; and seemingly in West Virginia; *State v. Welch*, 36 W. Va. 690, 1892.

² See Whart. Cr. Ev. §§ 7, 785–9; 7 Crim. Law Mag. 273; 9 Crim. Law Mag. 139. Malice is inferred from the mere fact of killing; *State v. Douglass*, 28 W. Va. 297, 1886; from the weapon used; *McClain v. Com.*, 110 Pa. 263, 1885; *McKee v. State*, 82 Ala. 32, 1886; *State v. Hockett*, 70 Iowa, 442, 1886; *Webb v. State*, (Ala.) 14 So. Rep. 865, 1894; *Walker v. State*, (Ind.) 36 N. E. Rep. 356, 1894; or from all the facts in the case; *Hicks v. State*, 25 Fla. 535, 1889; *Yates v. State*, 26 Fla. 484, 1890; *Crosby v. People*, 137 Ill. 325, 1891.

In prosecutions under police statutes, intent is held to be either immaterial or to be presumed from the prohibition of the act. 13 Crim. Law Mag. 839, §§ 13, 14; *Betts v. Armstead*, 20 Q. B. D. 771, 1888; *Pain v. Boughtwood*, 24 Q. B. D. 353, 1890; *U. S. v. Adams*, 2 Dak. 305, 1880; *McKibbin v. State*, 40 Ark. 480, 1883; *State v.*

§ 114. Supposing malice be proved to have existed a short time before a crime, it will be presumed to have continued down to the actual commission, unless modifying circumstances are shown to have taken place, or the defendant is in some other way proved to have acted under fresh controlling motives.¹ Yet the presumptions in such cases are not of law, to be imposed in all cases by the court, but of fact, to be drawn or repelled by the circumstances of the particular case.² In this view we must remember that it is not a law of our nature that an intention once formed continues; and we must also remember that it is far from being the case that by those who threaten crime, crime is uniformly executed. The most deliberate assassinations are those whose preparations are most artfully concealed; while persons who are apt the most noisily to threaten are often those who are the most reluctant to execute.³

§ 115. No human gauge existing by which duration of malice can be measured, we are obliged to resort for this purpose to the same probable reasoning by which the existence of malice is proved. A. shoots B. in the public streets, without authority and without provocation. As reasonable beings usually intend any important step they take, we infer that A. intended this shot; but this, as we will hereafter see, is a matter not of legal presumption, but of logical inference.⁴

§ 116. To premeditation, which is an essential ingredient of malice, and which by many statutes is made a condition of certain crimes, it is logically necessary that there be a period of prior consideration;⁵ but as to the duration of this period no limit can be arbitrarily assigned. The reasons for this are obvious: (1) No psychological tests which the

Probasco, 62 Iowa, 400, 1883; Lane v. State, 16 Tex. App. 172, 1884; Boat-right v. State, 77 Ga. 717, 1886; Ross v. State, 116 Ind. 495, 1889; *In re Carlem*, 127 Pa. 330, 1889; State v. White Oak River Corp., 111 N. C. 661, 1892.

¹ *Infra*, § 477. See Cannon v. State, 57 Miss. 147, 1879; Jones v. State, 57 Miss. 684, 1880.

² *Infra*, § 122. See U. S. v. Cornell, 2 Mason, 91, 1820; People v. Clark, 7 N. Y. 385, 1852; People v. Moore, 8 Cal. 90, 1857; Fahnestock v. State, 23 Ind. 231, 1864; Com. v. Drum, 58 Pa. 9, 1868; State v. Holme, 54 Mo. 153, 1873; Binns v. State, 66 Ind. 428, 1879.

³ See Whart. Cr. Ev. §§ 738, 816; and see *infra*, § 477.

⁴ Murray v. Com., 79 Pa. 311, 1875; Lamar v. State, 63 Miss. 265, 1885.

⁵ This is clearly seen in the case of larceny of property found. There the

law can supply can help us in determining how long a time an evil intent was harbored. (2) In men of quick action, engaged in desperate enterprises, evil designs hastily hustle upon each other, shaping themselves almost instantaneously to meet new contingencies as they arise. The old are much less rapid in coming to a conclusion than are the young. Persons with mechanical aptitudes are more rapid in deciding as to mechanical acts than are persons without such aptitudes. A soldier would require less time to deliberate as to the use of a gun, a chemist as to the preparation of a poison, than would a person not accustomed to fire-arms or poisons. No limit as to premeditation can be arbitrarily imposed by the law. Whether there has been premeditation must be determined by the concrete case.

As to the relations of premeditation to hot blood the following points may be noticed :

(1) The fact that passion intervenes after a premeditated offence has been undertaken does not sustain the defence of hot blood.

(2) A crime conceived in hot blood, but executed coolly and with deliberation, is to be regarded as premeditated.

(3) On the other hand, the fact that a crime may have been contemplated vaguely beforehand does not make it premeditated if its execution took place in hot blood or sudden passion.¹

§ 117. It is constantly laid down that intent at the time of action is enough. It is not meant to assert by this that a person who, under a sudden impulse, kills another is guilty of murder. To say this would be unwarranted, for the reason that we have no means of saying that a particular impulse is sudden. What we have a right, however, to say, and what the law means by this maxim to say, is this, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer (as a presumption of fact, but not of law) that the blow was intended prior to the striking, although it may be at a period of time inappreciably distant.²

intent to convert to the finder's use Ga. 369, 1889; *Allen v. State*, 91 Ala. must exist at the time of taking it 19; s. c. 24 Am. St. Rep. 856, 1890.

into possession; a subsequent intent ¹ See *infra*, §§ 315, 380, 480; Berner, will not make it a crime. *Weaver v.* 9th ed. § 94. As to cooling time, see *State*, 77 Ala. 26, 1884; *Morrison v.* *infra*, § 450; and as to time necessary to *State*, 17 Tex. App. 34; s. c. 50 Am. intention, see *Whart. Cr. Ev.* §§ 738, 816. Rep. 120, 1884; *Roberts v. State*, 88 ² The rule in the text is applied even

§ 117 *a.* Malice may be exerted against a party at a distance ;
 as where A. lays poison for B. in his food, which B.
 afterward takes and dies. And so where A. procures
 an idiot or lunatic to kill B., which is done. In both
 instances A. is guilty of the murder as principal.¹ The
 same result follows when an injury is produced by frightening the
 injured party.²

§ 118. As is elsewhere seen,³ wherever on a prosecution
 for an offence, embracing two or more degrees, there is
 reasonable doubt as to whether the evidence sustains the
 higher degree, the verdict is to be taken for the lower.
 The rule in such case is "*in dubio mitius.*"⁴

§ 119. The will acts under a variety of motives, some
 very complex.⁵ The motive varies with the man, what is
 strong with one being weak with another. The gratifica-
 tion of passion is a responsible motive ; and so also is the
 general intent to violate law, fall the consequences on

as to murder in the first degree, Lewis *v.* State, 15 Tex. App. 647, 1883 ;
 which by statute requires delibera- Cook *v.* State, 77 Ga. 96, 1886 ; Malone
 tion. *Infra*, § 380 ; R. *v.* Noon, 6 Cox *v.* State, 77 Ga. 767, 1886 ; State *v.*
 C. C. 137, 1852 ; U. S. *v.* Cornell, 2 Hockett, 70 Iowa, 442, 1886 ; Ham-
 Mason, 91, 1820 ; U. S. *v.* McGlue, 1 mil *v.* State, 90 Ala. 577, 1890 ; State *v.*
 Curt. C. C. 1, 1851 ; State *v.* Lipsey, 3 Dennison, 44 La. An. 135, 1892 ; Green
 Dev. (N. C.) 485, 1832 ; Coffee *v.* State, *v.* State, (Ala.) 13 So. Rep. 482, 1893 ;
 3 Yerg. 283, 1832 ; Woodsides *v.* State, State *v.* Ashley, (La.) 13 So. Rep. 738,
 2 How. (Miss.) 655, 1837 ; Dains *v.* 1893.

State, 2 Humph. 439, 1841 ; Green *v.* ¹ *Infra*, §§ 167, 206-24, 278-9.

State, 13 Mo. 382, 1850 ; People *v.* ² *Infra*, § 167 ; *supra*, § 116.

Clark, 7 N. Y. 385, 1852 ; People *v.* ³ Whart. on Cr. Ev. §§ 334, 721.

Sullivan, 7 N. Y. 396, 1852 ; Mitchum ⁴ See, also, *infra*, § 392.

v. State, 11 Ga. 615, 1852 ; People *v.* ⁵ See *infra*, § 153 ; Whart. Cr. Ev. §§
 Moore, 8 Cal. 90, 1857 ; Fahnestock 784 *et seq.* ; Ettinger *v.* Com., 98 Pa.
v. State, 23 Ind. 231, 1864 ; State *v.* 338, 1881 ; Marler *v.* State, 68 Ala.
 Decklots, 19 Iowa, 447, 1865 ; Laner- 580, 1881 ; Hogan *v.* State, 13 Tex.
 gan *v.* People, 50 Barb. (N. Y.) 266, App. 319, 1882 ; Pinckord *v.* State, 13
 1867 ; Com. *v.* Drum, 58 Pa. 9, 1868 ; Tex. App. 468, 1883 ; Turner *v.* State,
 McAdams *v.* State, 25 Ark. 405, 1869 ; 70 Ga. 765, 1883 ; Johnson *v.* State, 24
 Peri *v.* People, 65 Ill. 17, 1872 ; Peo- Fla 162, 1888 ; State *v.* Rainsbarger,
 ple *v.* Cotta, 49 Cal. 166, 1874 ; Miller 74 Iowa, 196, 1888 ; O'Brien *v.* Com.,
v. State, 54 Ala. 155, 1875 ; Nichols *v.* 89 Ky. 354, 1889 ; Jacobs *v.* State, 28
 Com., 11 Bush, 575, 1875 ; State *v.* Tex. App. 79, 1889 ; Williams *v.* Com.,
 Rhodes, 1 Houst. C. C. 476, 1877 ; 85 Va. 607, 1889 ; Miller *v.* State, 68
 Leighton *v.* People, 88 N. Y. 117, 1882 ; Miss. 221, 1890 ; Johnson *v.* State, 29
 Ernest *v.* State, 20 Fla. 383, 1883 ; Tex. App. 150, 1890 ; State *v.* Lentz,
 State *v.* Brown, 41 Minn. 319, 1889 ; 45 Minn. 177, 1891 ; Com. *v.* McManus,
 Clifford *v.* State, 58 Wis. 477, 1883 ; 143 Pa. 64, 1891 ; Pate *v.* State, 94

whom they may.¹ And the law is, that no matter what may be the motives leading to a particular act, if the act be illegal, it is indictable, notwithstanding that some one or more of these motives may be meritorious.² Thus the motive of promoting ultimate public good is no defence to an indictment for nuisance;³ intending to instruct the public is no defence to an indictment for libel;⁴ the motive of returning the goods is no defence to an indictment for embezzlement,⁵ or for larceny,⁶ nor is the motive of giving away the goods to another;⁷ scientific enthusiasm is no defence to an indictment for disinterring a corpse;⁸ the motive of notifying of a fire is no defence to an indictment for arson;⁹ the motive of ridding the community of a bad man is no defence to an indictment for homicide;¹⁰ the motive of paying a debt with the proceeds is no defence to forgery.¹¹ No matter what other motives, good or

Ala. 14, 1891; Johnston v. State, 94 Ala. 35, 1891; Franklin v. Com., 92 Ky. 612, 1892; Wilkerson v. State, 31 Tex. Cr. 86, 1892; Hodge v. State, 97 Ala. 37, 1893; Butler v. State, 92 Ga. 601, 1893; Davidson v. State, (Ind.) 34 N. E. Rep. 972, 1893; State v. O'Neil, 51 Kans. 651, 1893; Thomas v. Com., (Ky.) 20 S. W. Rep. 226, 1893; People v. Harris, 136 N. Y. 423, 1893; Gonzales v. State, 31 Tex. Cr. 508, 1893; Hall v. State, 31 Tex. Cr. 565, 1893; Snodgrass v. Com., (Va.) 17 S. E. Rep. 238, 1893.

¹ See 1 Whart. & St. Med. Jur. §§ 399, 404, 405; Whart. on Cr. Ev. §§ 135, 740.

² *Supra*, § 88; *infra*, §§ 380-1; 5 Law Quarterly Rev. 188; R. v. Johnson, 11 Mod. 62, 1706; R. v. Cox, R. & R. 362, 1818; R. v. Davis, 1 C. & P. 306, 1824; R. v. Gillon, 1 Mood. C. C. 85; s. c. 1 Lew. C. C. 57, 1825; R. v. Batt, 6 C. & P. 329, 1834; R. v. Ward, 4 A. & E. 384, 1836; *infra*, §§ 1416, 1421; R. v. Geach, 9 C. & P. 499, 1840; R. v. Bowen, C. & M. 149, 1841; R. v. Doddridge, 8 Cox C. C. 335, 1860; R. v. Morby, 8 Q. B. D. 571, 1882; R. v. Dudley, 14 Q. B. D. 273, 1884; People v. Curling, 1 Johns. 220,

1806; State v. Cocker, 3 Harring. 554, 1840; State v. Moore, 12 N. H. 42, 1841; Perdue v. State, 2 Humph. 494, 1841; Com. v. Belding, 13 Metc. 10, 1847, (*infra*, § 1416); Com. v. M'Pike, 3 Cush. 181, 1849; State v. Dineen, 10 Minn. 407, 1865; State v. King, 86 N. C. 603, 1882; People v. Cornetti, 92 N. Y. 85, 1883; State v. Coleman, 20 S. C. 441, 1883. See Whart. Cr. Ev. § 135; and see, as to distinction between motive and intent, 2 Steph. Hist. Crim. Law, 110; Cherry Cr. L. 12. Accordingly, motive is as a general rule not material; Cherry Cr. L. 10; and need not be shown, unless the crime is doubtful. People v. Sliney, 137 N. Y. 570, 1893; State v. Workman, (S. C.) 17 S. E. Rep. 694, 1893.

³ *Infra*, §§ 1416, 1420.

⁴ *Infra*, § 1594. Steele v. Brannans, L. R. 7 C. P. 261, 1872.

⁵ *Infra*, § 1053.

⁶ *Infra*, § 906.

⁷ *Infra*, § 899.

⁸ Com. v. Cooley, 10 Pick. 37, 1830; 1 Russ. 630, 9th ed. *Infra*, § 1432 a.

⁹ R. v. Regan, 4 Cox C. C. 335, 1850.

¹⁰ *Infra*, §§ 488 et seq.

¹¹ *Infra*, § 718.

bad, co-operated, if the intent to do the particular unlawful act is either proved or implied, the offence, if committed, is complete.¹ If the law were otherwise, there would be few convictions of crime, for there are few crimes in which extraneous motives are not mixed up with the particular evil motive.²

§ 120. When an intent exists to do wrong, and an unintended illegal act ensues as a natural and probable consequence, the unintended wrong derives its character from the general evil intent.³ A general malevolent purpose to break the law, for instance, or to inflict injury irrespective of any particular malice, gives color to a particular wrongful act committed in execution of the general malevolent purpose. A man out of general malignity may fire on a crowd, or may displace a rail on a railway; and then, if any life be lost, he is responsible for murder, though he may have had no intention of taking any particular life.⁴ It has been further ruled that if a man shoots A. by mistaking the person, when intending to shoot B., he is responsible for shooting A., under statutes which make it penal to shoot at another with *intent to kill the person shot*

¹ U. S. v. Stores, 4 Woods, 641, 1882; State v. King, 86 N. C. 603, 1882; State v. Jones, 79 Mo. 441, 1883; State v. Slingerland, 19 Nev. 135, 1885. See Pence v. State, 110 Ind. 95, 1886. In R. v. Woodburne, 16 St. Tr. 54, 1722, it was held that though the intent was to murder and not to disfigure, the defendant might be convicted of maiming with intent to disfigure. This, which strains to its extremest

As to concurrent bad motives, see R. v. Batt, 6 C. & P. 329, 1834; R. v. Hill, 2 Mood. C. C. 30, 1837; R. v. Geach, 9 C. & P. 499, 1840; R. v. Doddridge, 8 Cox C. C. 335, 1860; State v. Moore, 12 N. H. 42, 1841; People v. Carmichael, 5 Mich. 10, 1858; Clifton v. State, 73 Ala. 473, 1888. It is no defence that the act was done in sport or jest. Hill v. State, 63 Ga. 578, 1879; Smith v. Com., 100 Pa. 324, 1882; People v. Stubenvoll, 62 Mich. 329, 1886; Henderson v. State, (Ala.) 13 So. Rep. 146, 1893. See cases cited *infra*, §§ 373 a, 608 a. tension the doctrine in the text, is sustained by Sir J. F. Stephen in his History of Crim. Law.

² See *supra*, §§ 107-110; 9 Crim. Law Mag. 145; State v. McCahill, 72 Iowa, 111, 1887; State v. Munchrath, 78 Iowa, 268, 1889; State v. Levelle, 34 S. C. 120, 1890; Baker v. State, 30 Fla. 41, 1892.

One who administers a drug with intent merely to stupefy; State v. Wagner, 78 Mo. 644; s. c. 47 Am. Rep. 131, 1883; State v. Wells, 61 Iowa, 629; s. c. 47 Am. Rep. 822, 1883; or to excite sexual desire; State v. Deschamps, 41 La. An. 1051, 1890, will be liable if it cause death.

³ See *infra*, §§ 122, 1168; Whart. Cr. Ev. § 734 *et seq.*; 1 Whart. & St. Med. Jur. §§ 399-405; Ideler, Lehrbuch, pp. 254-266; Spectator, July 26, 1879. ⁴ See *supra*, § 110; *infra*, §§ 186, 319. Morgan v. State, 13 Sm. & M. 242, 1849.

*at.*¹ And so has it been held with regard to murder at common law.² We have the same distinction taken as to burglary, where the intent was to steal something different from that actually stolen;³ and as to arson, where the intent was to get a reward by giving the earliest information of a fire at the police station, and not to injure the owner;⁴ or where an unintended house was burned.⁵ And so if there be a deliberate intent, when taking lost goods, to steal, no matter who may be the owner, this intent may be viewed as an intent to steal from A., when A. is subsequently discovered as owner.⁶

In other words, when there is a general intent to do evil, of which evil the wrong actually done may be looked upon as a probable incident, then the party having such general intent is to be regarded as having intended the particular wrong.⁷ A man using a deadly weapon in a crowd, intending to kill, must be regarded as intending to kill all within the range of the weapon, whether as a primary object, or as incidental to such primary object.⁸ And a

¹ *R. v. Jarvis*, 2 Mood. & R. 40, *prohibitum* in this relation is now exploded. A man who inflicts injury s. c. 33 E. L. & Eq. 567, 1855; incidentally to attempting a statutory Walker v. State, 8 Ind. 290, 1856; crime is, on the reasoning of the text, People v. Torres, 38 Cal. 141, 1869; as responsible as is the man who inflicts injury incidentally to a common Callahan v. State, 21 Ohio St. 306, 1876. See Com. v. McLaughlin, 12 law crime. Cush. 615, 1853; and see, also, *supra*, § 107; *infra*, § 645 a.

² See *infra*, §§ 317-320, 645 a; *R. v. Saunders*, 2 Plow. 473, 1876; Angell v. State, 36 Tex. 542, 1871.

³ *Infra*, § 810.

⁴ *R. v. Regan*, 4 Cox C. C. 335, 1850. It has also been held that when a party intending to commit a rape takes money from the woman attacked, it may be robbery, though no money was demanded; *R. v. Blackham*, 2 East P. C. 711, 1787; *infra*, § 856.

⁵ *R. v. Pedley*, 2 East P. C. 1026; 22 Geo. III.; *R. v. Proberts*, 2 East P. C. 1030; 20 Geo. III. *Infra*, §§ 836, 1283.

⁶ *R. v. Moore*, L. & C. 1, 1861; s. c. 8 Cox C. C. 416, 1861.

⁷ The distinction taken in the old books between *malum in se* and *malum*

⁸ *Bailey's Case*, R. & R. C. C. 1, 1800; *State v. Myers*, 19 Iowa, 517, 1865; *Golliher v. Com.*, 2 Duval, 163; s. c. 87 Am. Dec. 493, 1865; *State v. Nash*, 86 N. C. 650; s. c. 41 Am. Rep. 472, 1882; *Scott v. State*, 49 Ark. 156, 1886; *Spies v. People*, 122 Ill. 1, 1887; *State v. Adams*, 78 Iowa, 292, 1889; *Minaghan v. State*, 77 Wis. 648, 1890; *People v. Raher*, 92 Mich. 165; s. c. 31 Am. St. Rep. 575, 1892; *Combs v. Com.*, (Ky.) 21 S. W. Rep. 353, 1893. So, also, a man is criminally liable for an accident that may happen from shooting in a public street. *People v. Fuller*, 2 Park. Cr. Rep. 16, 1823; *Sparks v. Com.*, 3 Bush, (Ky.) 111; s. c. 96 Am. Dec. 196, 1867; and, in general, for any reckless behavior that shows a criminal disregard for the safety of others. *Mayes v. People*,

general intent to do evil, such as to cover all the natural probable consequences of the act, may be inferred from the circumstances of the case.¹ If, however, as will hereafter be seen, it is plain that the offender's will was directed exclusively to a particular end in which he failed, and that the act done by him was unintended in any sense, and was not a natural or probable result of his misconduct, then the more logical course is to indict him for a malicious attempt to do the unperformed act and for negligence in the act performed.² A

106 Ill. 306; s. c. 46 Am. Rep. 698, 1883; *State v. Emery*, 78 Mo. 77; s. c. 47 Am. Rep. 92, 1883; *State v. Barbee*, 92 N. C. 820, 1885; *People v. Stubenvoll*, 62 Mich. 329, 1886; *Com. v. Matthews*, 89 Ky. 287, 1889; *Guinn v. Com.*, (Ky.) 12 S. W. Rep. 672, 1889; *Johnson v. State*, 94 Ala. 35, 1891; *State v. Morrison*, 104 Mo. 638, 1891; *Pool v. State*, 87 Ga. 526, 1891; *Brown v. Com.*, 91 Ky. 472, 1891; *State v. Grote*, 109 Mo. 345, 1891; *Cook v. State*, (Ga.) 18 S. E. Rep. 823, 1893. But the offence will not be of the highest grade. *Johnson v. State*, *supra*; *Burton v. State*, 92 Ga. 449, 1893.

¹ *Supra*, §§ 110-11. *R. v. Fretwell*, 64 L. & C. 443; s. c. 9 Cox C. C. 471; *Washington v. State*, 60 Ala. 10, 1877; *Aiken v. State*, 10 Tex. App. 610, 1881; *State v. Gilman*, 69 Me. 163, 1879; *State v. Sloanaker*, 1 Houst. C. C. 62, 1858. See fully cases cited, *infra*, §§ 317 *et seq.*, 383. Thus he who sets fire to his own house, intending to defraud the insurers, and burns his neighbor's house by the communicating of the fire, is indictable for maliciously burning the latter house. *R. v. Proberts*, 2 East P. C. 1030, 2093. *Infra*, § 830. That the injury must be a probable consequence of the act, see *R. v. Faulkner*, 13 Cox C. C. 550, 1877, cited *infra*, § 829; *Com. v. Adams*, 114 Mass. 323, 1873.

² *R. v. Pembliton*, 2 L. R. C. C. 119; s. c. 12 Cox C. C. 607, 1874; *infra*, § 1070. As to concurrence of

malice and negligence, see *infra*, § 128. The killing of A. in mistake for B. is well settled to be with malicious intent. *Infra*, §§ 317-22; *State v. Smith*, 32 Me. 369, 1851; *State v. Payton*, 90 Mo. 220, 1886. And in spite of the contrary decisions, the great weight of authority is in favor of the view that if A. aims at B. and hits C., the intent will be transferred to C., and A. will be guilty. *R. v. Stopford*, 11 Cox C. C. 643, 1870; *R. v. Latimer*, 17 Q. B. D. 359; s. c. 16 Cox C. C. 70, 1886; *Dunaway v. People*, 110 Ill. 333; s. c. 51 Am. Rep. 686, 1884; *McGehee v. State*, 62 Miss. 772; s. c. 52 Am. Rep. 209, 1885; *Burchett v. Com.*, (Ky.) 1 S. W. Rep. 423, 1886; *Territory v. Rowand*, 8 Mont. 432, 1889; *Jennings v. Com.*, 16 S. W. Rep. 348, 1891; *Com. v. Breyessee*, 160 Pa. 451, 1894; *contra*, *R. v. Hewlett*, 1 F. & F. 91, 1858; *Morgan v. State*, 13 Sm. & M. 242, 1849; *Barcus v. State*, 49 Miss. 17, 1873; *Com. v. Morgan*, 11 Bush, (Ky.) 601, 1876; *Lacefield v. State*, 34 Ark. 275, 1879; *People v. Robinson*, 6 Utah, 101, 1889. The grade of offence is the same as if the criminal had effected his original intention. *State v. Henson*, 81 Mo. 384, 1884; *State v. Montgomery*, 91 Mo. 52, 1886; *Pinder v. State*, 27 Fla. 370, 1891; *State v. Renfrow*, 111 Mo. 589, 1892; *Com. v. Breyessee*, 160 Pa. 451, 1894; except that it will reduce homicide to murder of the second degree. *Musick v. State*, 21 Tex. App. 69, 1886.

third contingency arises when A., looking out for B., sees C., whom he mistakes for B., and whom he kills. This is murder, because his intent to kill, however mistaken his reasoning, was really pointed at C.¹ But where one of several utterly distinct intents is necessary to constitute an offence, proof of one will not sustain the averment of another. Thus the allegation of an intent to steal, in an indictment for burglary, will not be sustained by proof of an attempt to commit a sexual offence.²

§ 121. It is sometimes argued, "Is it likely that one man should kill another for so small an object? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle, that the homicide was the result of sudden passion, rather than *lucri causa*? Or for a mere prejudice or spite is it likely that one man may assassinate another, and thus expose himself to the gallows? Or a person likely to incur the penalties of larceny for the sake of an article of no intrinsic worth?" No doubt when a tender mother kills a child, or friend kills a friend, and nothing more than the fact of killing is proved, we may be led to infer misadventure or insanity from the motivelessness of the act. But we have no right to make such inference because the motive is disproportionate. We are all of us apt to act on very inadequate motives; and the history of crime shows that murders are generally committed from motives comparatively trivial. A man unaccustomed to control his passions, and unregulated by religious or moral sense, exaggerates an affront, or nourishes a suspicion, until he determines that only the blood of the supposed offender can relieve the pang. For the smallest plunder, also, murders have been deliberately executed. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If

Motive
need not
be propor-
tionate to
heinous-
ness of
crime.

If the killing of B. would have been justifiable, the killing of C. by mistake or accident will be excusable. State *v.* Spaulding, 34 Minn. 361, 1885; Pinder *v.* State, 27 Fla. 370, 1891; Butler *v.* State, (Ga.) 19 S. E. Rep. 51, 1893.

See 10 Cent. L. J. 37 *et seq.*

¹ See *infra*, §§ 317-18; Meyer, Lehrbuch, 1875, § 30.

The old doctrine that an intention to burn A.'s house will sustain an

averment, in an indictment for the arson of B.'s house, that the intent was to burn B.'s house (1 Curw. Hawk. p. 140) can no longer be sustained. Whart Cr. Ev. §§ 149-50. See R. *v.* Faulkner, 13 Cox C. C. 550, 1877.

² *Infra*, § 811; *supra*, § 88 *et seq.*; and see Whart. Cr. Ev., 9th ed. § 149.

See, however, State *v.* Ruhl, 8 Iowa, 447, 1859, cited *supra*, § 88; *infra*, §§ 1756, 1761.

we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime; never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs. When a powerful passion seeks gratification, it is no extenuation that the act is illogical; for when passion is once allowed to operate, reason loosens its restraints, and hence when there is a general wrongful intent, no specific commensurate motive need be shown.¹

§ 122. Malice, as is elsewhere abundantly shown,² is to be inferred from all the facts in the case, as a presumption of fact, and is never to be arbitrarily assumed as a presumption of law.³

§ 123. To malice, consciousness of unlawfulness is not essential. At the first glance, it is true, it seems hard to punish a person for doing that which he thinks he has a right to do. And in questions of title to property this is undoubtedly the rule, because a man cannot be said to intend to steal that which he believes to be his own. In other cases also, the knowledge that a thing is unlawful (in other words, the *scienter*) is an essential ingredient of the offence, as where the charge is an assault on an official person, knowing his legal status. But apart from these exceptions, ignorance of the law, as is elsewhere shown, is no defence;⁴ otherwise, the administration of penal law would depend on the uncertain and unascertainable mental conditions of persons accused.

§ 124. The task, often pronounced to be impossible, of exhaustively defining fraud, will not be here attempted.⁵ It is enough to say, that fraud in a general sense, is the deceitful unlawful

¹ See *R. v. Fursey*, 6 C. & P. 81, *v. State*, 58 Ga. 35, 1877; *Smith v. 1833*; *Kelly v. Com.*, 11 S. & R. 345, *Com.*, 100 Pa. 324, 1882. But see 1824; *Com. v. Laros*, 84 Pa. 200, 1877; *Brown v. State*, 4 Tex. App. 275, *McLain v. Com.*, 99 Pa. 86, 1881; *Forsythe v. State*, 6 Ohio, 19, 1833; *Preston v. State*, 8 Tex. App. 30, 1880; *Hubby v. State*, 8 Tex. App. 597, 1880.

² See Whart. Cr. Ev. §§ 39, 40, 734, 764. The same rule is applicable to *scienter*; *Bonker v. People*, 37 Mich. 4, 1877;

³ See Whart. Cr. Ev. §§ 734, 764; and in cases of homicide. *Infra*, § R. v. Harvey, 3 D. & R. 464, 1823; R. 380.

⁴ See *supra*, § 84.

⁵ See 3 Steph. Hist. Crim. Law, 121.

appropriation of the property of another, and a fraudulent intent is the intent to effect such appropriation. All fraud, therefore, is malicious, though all malice is not fraud, <sup>Malice distinguish-
able from
fraud.</sup> since many malicious offences (*e. g.*, those falling under the head of malicious mischief) exclude the idea of such appropriation. To fraud, also, deceit is essential, which is not always the case with malicious offences. A man may openly before the public rob another, yet, though this would be malicious, and would be indictable as robbery, it would not be fraudulent, as involving no deceit.

CHAPTER V.

NEGLIGENCE: AND HEREIN OF OMISSIONS.

| | |
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| Negligence is the omission of usual care, § 125. | Classification of indictable omissions, § 131. |
| Negligence is an intellectual, malice a moral defect, § 126. | Omissions may be malicious as well as negligent, § 131 <i>a</i> . |
| Tests of indictable negligence, § 127. | Mere omissions to render help not indictable, § 132. |
| Concurrence of malice and negligence, § 128. | Omission to guard dangerous agency indictable, § 133. |
| Negligence cannot constitute accessoryship, § 129. | Not necessary that negligence should be subject to civil suit, § 134. |
| Omission, to be indictable, must be defective discharge of duty, § 130. | Master may be liable for servant's negligence, § 135. |
| Omissions are breaches of affirmative commands; commissions of negative commands, § 130 <i>a</i> . | [As to contributory negligence, see <i>infra</i> , §§ 162-3.] |

§ 125. A NEGLIGENT offence is an offence which ensues from a defective discharge of a duty, which defect could have been avoided by the exercise, by the offender, of that care which is usual, under similar circumstances, with prudent persons of the same class.¹ Negligence is of two kinds: *culpa levis*, which is the lack of the diligence and care usual with good specialists of the particular class under the circumstances; and *culpa lata*, which is the lack of the diligence and care exercised by honest and worthy non-specialists, dealing with similar objects.² In criminal cases this distinction operates mainly to determine the degree of evidence required to convict. A non-specialist (*e. g.*, a person not claiming to be a physician or lawyer) cannot be convicted merely on proof of want of or failure to apply due qualifications; while a person claiming to be a specialist can be convicted on such proof.³ *Culpa levissima*, or that slight aberration from duty incident to all human action, is not punishable, since, as there

¹ Whart. on Neg. chap. i. See discussion in 4 Crim. Law Mag. 8. See *State v. Emery*, 78 Mo. 77, 1883.

² See Whart. on Neg. §§ 27 *et seq.*

³ Whart. on Neg. § 26; *supra*, § 89; as to physicians, see *infra*, § 362.

are no persons to whom such negligence is not imputable, there are no persons, unless we recognize its non-indictability, who could escape punishment.¹

§ 126. Malice, as is elsewhere noticed,² arises from an evil purpose, negligence from a failure of purpose; malice is imputable to a defect of heart, negligence to a defect of intellect.³ If what results corresponds to what was intended, then the offence is malicious; if it does not correspond to what was intended, then, if the actor did not at the time exercise due care, the offence is negligent. On what we may call, therefore, the subjective side of an offence, there are two phases of indictability, the malicious and the negligent, corresponding to the ancient *dolus* and *culpa*. The legislature, however, may make penal dangerous acts irrespective of malice or negligence.⁴

Negligence
an intel-
lectual,
malice a
moral, de-
fect.

¹ Whart. on Neg. § 26. Sir J. F. Stephen defines negligent offences as follows :

“Every one upon whom the law imposes any duty, or who has by contract, or by any wrongful act, taken upon himself any duty tending to the preservation of life, and who neglects to perform that duty, and thereby causes the death of (or bodily injury to) any person, commits the same offence as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty.

“Provided, that no one is deemed to have committed a crime only because he has caused the death of, or bodily injury to, another by negligence which is not culpable. What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case. An intentional omission to discharge legal duty always constitutes culpable negligence.

“Provided, also, that no one is deemed to have committed a crime by reason of the negligence of any servant or agent employed by him.” Dig. Cr. L. art. 232 (5th ed.). See *R. v. Allen*,

7 C. & P. 153, 1835; *R. v. Barrett*, 2 C. & K. 343, 1846; *R. v. Conrahy*, 2 Craw. & Dix, 86, 1844; *R. v. Tindall*, 1 Nev. & P. 719; 6 A. & E. 143, 1837. To impose criminal responsibility, Sir J. F. Stephen, 3 Hist. Crim. Law, 11, maintains that there “must be more, but no one can say how much more, carelessness than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused.” But the better view is that the only difference between criminal and civil procedure in such case, is that in the first there can be no conviction if there be reasonable doubt of guilt, while in the second the verdict goes with preponderance of proof.

² *Supra*, § 106; and see Whart. on Neg. § 7.

³ See *U. S. v. Keller*, 19 Fed. Rep. 633, 1884; *State v. Smith*, 65 Me. 257, 1874; 2 Steph. Hist. Crim. Law, pp. 95 *et seq.*

⁴ *Supra*, § 88.

§ 127. Not every negligent act is necessarily indictable. The following incidents, however, may be noticed as involving
 Tests of
indictable
negli-
gence. indictability :

(1) *Infractions of police order.*—By statute, and sometimes by common law, specific duties become incumbent on all citizens. For non-performance of such duties, unless another special remedy be provided, an indictment may lie.¹

(2) *Imperfect discharge of official duty.*—Wherever a specific duty is imposed on a public officer, there a negligent defect in the discharge of this duty, when inflicting injury on an individual, is indictable.²

(3) *Omission to discharge specific duty assumed or imposed by law.*—As we will presently see, this kind of negligence, when followed by injury, is indictable.³

(4) *Meddling with dangerous agencies.*—It is the duty of all men to be cautious in dealing with dangerous agencies; and whoever, by carelessness in handling such agencies, injures another, is indictable.⁴

§ 128. Interesting questions may arise when malice and negligence (or *dolus* and *culpa*) concur in a particular transaction. This may happen as follows :

Concur-
rence of
malice
and negli-
gence. (1) When there are two successive acts of the same person, in the first of which there is a criminal intent which fails of execution, and in the second of which, without the intent to effect it, the object designed in the first act is effected. A., for instance, believes he has killed B., and casts him hastily into the water, to conceal the body, by which act, and not by the prior wounds, B. is killed. If the second act is to be viewed as a continuation of the first, then the death is to be imputed to the malice pervading the entire act. It is, however, conceivable that there is no such continuity. It may be that the original wound is struck in excitement; that the assailant, when the transaction is over, actually believes that the assailed is dead; and that subsequently the drowning of the body is in cool blood, after the heat of the contest is over, and with the intention only of putting the body out of sight. In such case the first act would be indictable as an attempt to kill; the second, as a negligent homicide.⁵

¹ *Supra*, § 24.

⁴ See *Infra*, §§ 329, 370.

² See *infra*, §§ 1563, 1568.

⁵ See *infra*, § 155.

³ *Infra*, §§ 130 *et seq.*, 156. See as to physicians, *infra*, § 362.

(2) It may be, however, that an unexpected and unintended consequence is coupled in the same act with a malicious design. A man, for instance, designs to seriously hurt, and unintentionally kills. In such cases, if the hurt he designs is a felony, the killing, by statute, if not by common law, may be murder; but it is otherwise if the intention is merely to inflict a slight hurt not a felony.¹

§ 129. Negligent co-operation cannot constitute accessoryship in a malicious act, although a party occupying an official situation may be liable for negligence in the non-arrest of a criminal. To constitute the offence of accessoryship there must be malice, and the malice cannot be inferred in any case where the co-operation is purely negligent. On the other hand, to negligent acts there may be malicious accessories; though, unless these acts are felonies by statute, all concerned, under the rule that in misdemeanors all parties are principals, are to be treated as principals. A curious and interesting question arises where one person intentionally puts another in the position of doing a negligent act, as where fire-arms are mischievously placed in the hands of a negligent or inexperienced person, or when the superintendent of a railroad knowingly and maliciously places a locomotive under the control of an engineer whom the superintendent knows to be incompetent. In such cases there is good ground for maintaining that the person thus originating the harm is liable for the consequences of the negligence of the immediate operator; and this is also the case when dangerous agencies are negligently left in the hands or in the way of incompetent persons.² But with these exceptions, a party, who by negligence produces another's negligence, cannot, as we have seen, be chargeable with the consequences of the latter's negligence. Morally reprehensible, also, as may be he who by negligence induces another to perform a guilty act, he cannot be made responsible without unduly enlarging the range of criminal law. And even he who negligently induces another to injure himself is not responsible for such injury.³

§ 130. Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which

¹ See *infra*, § 317; *supra*, §§ 107-111, would not be felony. See §§ 883 et 120. If, on the other hand, the offender should design malicious mischief to property, and then, without intending it, carry it away, the offence

² *Infra*, §§ 130, 133, 154.

³ Meyer, Lehrbuch, § 32. See *infra*, § 230.

the defendant is especially invested,¹ though in such cases they may constitute indictable offences. There is no such thing, in fact, as an omission that can be treated as an absolute blank. A man who is apparently inactive is actually doing something, even though that something is the abstinence from something else that he ought to have done. Even sleeping is an efficient act, and may become the object of penal prosecution when it operates to interrupt an act on the part of the defendant which the law requires of him with the penalty of prosecution for his disobedience. As, therefore, an omission takes its character from the prior responsibility that it suspends, that responsibility must be scrutinized when we undertake to estimate the penal character of an omission to perform it. And as a general rule in this respect we may say, that *when a responsibility specifically imposed on the defendant is such that an omission in its performance is, in the usual course of events, followed by an injury to another person or to the State, then the defendant is indictable for such an omission.*² If the duty is absolute, then the defendant is responsible for its non-performance. "I myself," said Lord Campbell, in a case where this question was discussed,³ "tried a prisoner for not taking proper care in managing the shaft of a mine. He intrusted the management to an incompetent person, who said at the time he was incompetent. The prisoner was con-

¹ R. v. Gray, 4 F. & F. 1098, 1864; ought to be punished in exactly the R. v. Lowe, 4 Cox C. C. 449, 1850; R. v. Vann, 2 Den. C. C. 325, 1853; 5 Cox C. C. 379; State v. Bailey, 1 Fost. (N. H.) 185, 1849; State v. Berkshire, 2 Ind. 207, 1851. *Infra*, §§ 331 *et seq.*

² See R. v. Hughes, D. & B. C. C. 248, 1857; 7 Cox C. C. 301; R. v. Haines, 2 C. & K. 368, 1847; R. v. Lowe, 3 C. & K. 123; 4 Cox C. C. 449, 1850. *Infra*, §§ 156, 358. As to parents' neglect of child, see *infra*, §§ 336, 1563 *et seq.* The point in the text is considered in 2 Steph. Hist. Crim. Law, 112.

Lord Macaulay, in his Report on the Indian Penal Code, thus discusses the question in the text:

"Two things we take to be evident: first, that some of these omissions

³ R. v. Pocock, 17 Q. B. 34, 1851;

s. c. 5 Cox C. C. 172, 1849, cited *infra*, §§ 154, 339.

victed, and I did not hesitate to impose a severe sentence." But it is otherwise when the performance of the duty is discretionary.¹

§ 130 *a*. Penal laws are either affirmative, equivalent to "thou shalt," or negative, equivalent to "thou shall not." An omission to do what the first orders is equally indictable with an actual doing what the second forbids. The chief distinction between the two classes of laws is that the first, the affirmative command, requires a continuous course of action; while the second, the negative, is usually limited to a single act. Thus among affirmative commands we may reckon continuous duties of officers of all classes. A public officer is required to execute his office diligently; if he fails to do so, he is indictable for misconduct in office, though the failure may consist in a mere omission. Persons exercising private offices are subject to a similar duty, though as a rule they are not indictable for omissions unless such omissions are productive of harm to persons whom they have specially in charge.² The same distinction applies to omissions in the discharge of natural duties. A husband is indictable for an omission in the discharge of his duty to his wife, whenever this duty imposes on him specially her support, she being incapable of self-help, and whenever through the omission she is injured. A parent is in like manner indictable for an omission to feed and shelter a helpless child exclusively dependent on him. So if I put another person in a position where injury will accrue to him, if I omit to relieve him, should I withdraw from him the care I undertook to give him, I am indictable for the injury I cause by the omission.³ But the duty in such case must be averred and proved.⁴

Omissions are breaches of affirmative commands; commissions of negative commands.

§ 131. Indictable omissions may be classified as follows:

Classification of omissions.

I. Omissions constituting defects in the performance of duties which have been undertaken. Under this head fall most of the adjudicated cases of so-called omissions—*e. g.*, omissions by switch-tenders to turn switches, of telegraph operators to send messages, of physicians to give required attention to patients.⁵

¹ *R. v. Pocock*, *Ibid.* See, also, cases, discharge of offices discussed *infra*, §§ 329–376, 1563–1585.

² See *State v. McEntyre*, 3 Ired. 171, 1842, cited *infra*, § 1570.

⁴ *Com. v. Hartwell*, 128 Mass. 415, 1880.

³ See the question of omissions in

⁵ See *infra*, §§ 133, 156, 330, 367. Cf. 3 Steph. Hist. Crim. Law, 10.

II. Omissions constituting defects in the performance of duties which have not been *eo nomine* undertaken—*i. e.*, non-contractual duties.

1st. From the standpoint of general civic duty, among which may be noticed the omission of an accessory after the fact to notify the government of a felony, and the omission of a person swearing to a fact to acquaint himself as to such fact.¹

2d. From the standpoint of official duty, as where an officer whose duty it is to make an arrest neglects to do so.

3d. From the police standpoint, as where a person neglects to cover a ditch or well belonging to him, over which he knows travellers are accustomed to pass, or to cleanse a defective drain.² Under this head may be classed the omission of masters to control their servants in the use of agency which may be injuriously applied.³

§ 131 *a.* It has been frequently said that omissions are always negligent, and that consequently indictments based on omissions must be negligent as distinguished from malicious offences. But this is a mistake.⁴ A man undertaking a duty may intentionally omit some act essential to its discharge, and in this case he is indictable for a maliciously imperfect discharge of the duty.⁵ And in this way, the increment of malice may turn a non-indictable offence into an indictable offence. Thus, if A. omits to succor B. when drowning, A. is not indictable for the omission. It is otherwise, however, if A. should induce B. to bathe with him, promising to succor B. in case of danger, and then should intentionally leave B. beyond his depth, and fail to relieve him, so that B. is drowned. In this case A. is indictable for malicious homicide.

§ 132. Whether a person who is under no specific obligation to rescue the life of another in danger is indictable for omitting to do so, when he can do so without danger to his own life, has been much discussed. In the Roman law the negative was maintained.⁶ To such omissions, how-

Omissions may be malicious as well as negligent.

Mere omission to render help not indictable.

¹ *Infra*, § 1247.

R. v. Hughes, D. & B. 248, 1857; s. c.

² *Berner*, § 90; 1 Ben. & Heard 7 Cox C. C. 301, cited *infra*, § 369. Lead. Cas. 49; *R. v. Wharton*, 12 See cases in § 133.

Mod. 510, 1702. *Infra*, §§ 329–369.

³ L. 3. § 22; L. 6. § 8. 9; D. de remilit. (4 q. 16). Tacit. Annal. xiv. 42–45.

⁴ *Infra*, §§ 135, 247.

⁵ See 4 Crim. Law Mag. 9.

⁶ See remarks of Lord Campbell in

ever, the canon law attached ecclesiastical penalties.¹ In our own system, mere omission to render help, unless in contravention of a duty specially assumed or imposed, is not an indictable offence.² It is otherwise where the omission is to perform a legal duty.³

§ 133. Where a party puts a dangerous instrument in motion and then leaves it, penal responsibility is not diverted by the fact that the immediate injury is caused by an omission or negation of action ;⁴ as where a party after putting poisoned food on his enemy's table, waits until the latter himself takes the food ; or where, as we have just seen, a skilful swimmer, by false promises, entices another in deep water, and then leaves him to drown ; or where a midwife, after cutting the umbilical cord, does not bind it up, so that the child bleeds to death ;⁵ or where a watchman omits to give notice of the approach of a train ;⁶ or where a person shooting a pistol neglects to properly guard it.⁷ In all such cases of withdrawal of action, after the destructive agency has been put in motion, there is no question of mere omission (*Unterlassung*). Such withdrawal of action, so argues a German jurist,⁸ closes almost all crimes of commission ; for the actor brings his train of causes just to the point where that

Omission to guard a dangerous agency indictable.

¹ Can. 7. Caus. 23. qu. 3.

² See *infra*, §§ 330-31.

If the law undertook to compel men to perform toward each other offices of mere charity, then the practical and beneficent duty of supporting self would be lost in the visionary and illusory duty of supporting every one else. It is scarcely necessary to point attention to the fact, that if the maxim be true that he who injures another by his omissions is indictable, then the converse must also be true that every one is obliged by law to omit nothing that would be of any aid to anybody else. But this, by destroying all specialty in business, would destroy all business that is made up of specialties. No public enterprise (*e. g.*, a railroad when in working order) could be carried on safely if every one who conceives something to be wrong in it is required to rush in and rectify the supposed mistake.

No man could courageously and consistently discharge his special office if all other persons were made both his coadjutors and overseers. Industry, also, would cease if the consequences of idleness were averted by making almsgiving compulsory ; and finally, by requiring by law that alms should be given to all that need, there would be none who would not be too needy to give alms.

³ *Infra*, § 156.

⁴ See *infra*, § 166.

⁵ *Infra*, §§ 156, 337, 393 ; Berner, *Lehrbuch*, p. 434.

⁶ *Com. v. Boston & Me. R. R.*, 133 Mass. 383, 1882 ; *infra*, § 349.

⁷ *Smith v. Com.*, 100 Pa. 324, 1882 ; *State v. Hardie*, 47 Iowa, 647, 1877 ; *State v. Emery*, 78 Mo. 77, 1883. See *infra*, § 344 ; *R. v. Jones*, 12 Cox C. 628, 1873.

⁸ Berner, *ut supra*.

train can be left to itself; and even when he shoots at an opponent, he simply *lets it happen* (lasst es nur geschehen) that the ball goes on its mission, and perforates its object, so that the latter by his wound loses his life.¹ And it may be held generally that it is the legal duty of a person putting in action a dangerous agency to prudently guard such agency, and if he fails to do so, he is responsible penally for the consequences.²

§ 134. To make negligence indictable it is not necessary that it should be in violation of a contract. Wherever the defendant fails to discharge a duty imposed on him, whether this duty be by natural law, or statute, or contract, then he is indictable for injuries thus produced, provided as has just been seen, the duty is one with which he is specially charged. Civil and criminal responsibility are in this view far from being convertible. On the one hand, contracts, as a general rule, cannot be made the basis of a criminal prosecution.³ On the other hand, there are many cases in which indictments lie (*e. g.*, nuisance and neglect of official duty in which there is no special damage to an individual) where no civil action can be maintained.⁴ And we may readily suppose cases in which contributory negligence sufficient to defeat a civil suit would not defeat a criminal prosecution.⁵

Negligent homicides will be hereafter specifically considered.⁶

§ 135. A master or other principal, who acts through subordinates, and whose duty it is to exercise due care in the appointment of such officers, may be indictable, on the principle of *culpa in eligendo*, for an injury caused by the negligence of a subordinate whom he has negligently appointed.⁷ And the master is likewise liable for his servant's negligence when such negligence is a natural incident of the employment.⁸ Wherever, also, due supervision could have prevented the mischief, then the master neglecting such supervision is indictable.⁹ But unless negligence of selection, or the lack of such due

¹ *R. v. Gardner*, 1 F. & F. 669, Holmes, J., in *Com. v. Pierce*, Mass. 1859. 1884, 18 Rep. 756. See *infra*, §§

² *Infra*, §§ 337-43; *Com. v. Bost. & Low. R. R.*, 126 Mass. 69, 1879.

⁶ *Infra*, §§ 329-370.

³ *R. v. Daniell*, 6 Mod. 99, 1701; *R. v. Wheatley*, 1 W. Bl. 273; *Com. v. Hearsey*, 1 Mass. 137, 1806.

⁷ See Whart. on Neg. § 170.

⁸ *Com. v. Bost. & Low. R. R.*, 126 Mass. 61, 1878.

⁴ *Supra*, § 15; *infra*, §§ 1421 *et seq.*

⁹ *Infra*, § 341; *R. v. Dixon*, 3 M. &

⁵ *Infra*, §§ 162, 163; remarks of S. 11, 1814; *R. v. Medley*, 6 C. & P.

supervision as is usual among good business men under the circumstances, be imputable to the master, he is not criminally responsible for the servant's misconduct in matters not incidental to the service.¹

292, 1834; R. v. Michael, 2 M. C. C. mett, 3 Cox C. C. 281, 1848; Com. v. 120; s. c. 9 C. & P. 356, 1840; Com. Mason, 12 Allen, 185, 1866; Barnes v. v. Nichols, 10 Metc. 259, 1845; Com. State, 19 Conn. 398, 1856; State v. v. Morgan, 107 Mass. 199, 1871. See Privett, 4 Jones, (N. C.) 100, 1848; *infra*, § 247. Hipp v. State, 5 Blackf. 149, 1841;

¹ R. v. Bennett, Bell C. C. 1, 1858; Anderson v. State, 39 Ind. 553, 1872; s. c. 8 Cox C. C. 74, 1858; R. v. Wil- and cases cited *infra*, §§ 247, 1503.

CHAPTER VI.

FITNESS OF OBJECT OF OFFENCE.

I. PHYSICAL UNFITNESS.

To a crime a fit object is necessary. Objects physically unfit, § 136.

II. JURIDICAL DEFECTS.

Objects may be juridically unfit, § 137.

Outlaws are still under protection of the law, § 138.

Convicts can only be punished according to law, § 139.

An assailant may divest himself of legal protection, § 140.

A party may by assent to an injury bar a prosecution.—*Volenti non fit injuria*, § 141.

But not as to public criminal immoralities, § 142.

Nor as to inalienable rights, § 143.

Consent will not excuse the taking of life, § 144.

Nor the deprivation of liberty, § 145.

Nor waive constitutional rights of trial, § 145 *a*.

Capacity to consent and actual consenting prerequisite, § 146.

Contributory negligence may be a defence, § 147.

Laches on prosecutor's part may be a defence, § 148.

Trap laid by prosecutor not ordinarily a defence, § 149.

Consent obtained by fraud is no defence, § 150.

I. PHYSICAL UNFITNESS.

§ 136. THE object of an intended crime may be such as to relieve the party charged from indictability. A., for instance, intending to murder B., may run his sword through a bolster, dressed in B.'s clothes, and placed in B.'s bed. This, if preceded by steps taken to kill B., may be an attempt to kill, but would not constitute a consummated offence. We can, in addition, conceive of cases in which shooting at a shadow on the roadside, supposing it to be a man, or at a scarecrow in a field, under the same supposition, would not even be an attempt. Or, to recur to a case elsewhere mentioned, a lady in crossing the British channel carries with her what she supposes to be Brussels lace, which she intends to smuggle into England. The lace, however, turns out to be of English manufacture, and therefore not an article susceptible of being smuggled into England.¹

¹ As to attempts to effect non-existent objects, see *infra*, § 186.

II. JURIDICAL DEFECTS.

§ 137. The object on which the alleged offence is committed may be not only existing, but may be that which the accused supposes it to be, and yet it may have juridical defects which withdraw it from the category of objects protected by the law. An impersonal object is only so protected when it belongs to the State, or to a juridical person. Waifs (unless belonging to the State), animals *ferae naturae*, the water of the ocean and of navigable streams, are not the objects of larceny. It is not necessary, however, in order to throw the shield of juridical protection over a right, that it should be corporeal. A man's reputation is his right in such a sense that he who wantonly assails it is open to an indictment for libel. This, however, is because the rights of the individual are guaranteed by the State, the State intervening to protect the rights which it guarantees. It follows that a criminal prosecution lies for threatening to attack, at least by arms, the State itself, though no physical hurt be inflicted on individuals; the treason being an invasion of the direct rights of the State. But offences against religion and morals, unless injuring individuals, or affecting the social fabric, and thereby assailing the State, are not indictable crimes.

Object
may be
juridically
unfit.

§ 138. *Infamous persons*, no matter how great may be their degradation, are still under the protection of the law. An outlaw, or a person fleeing from justice, may be arrested, as is elsewhere seen, without a warrant,¹ but he cannot be personally hurt (unless such hurt be necessary to his arrest) without exposing the party injuring to criminal prosecution. Nor does any degree of collateral criminality in a party justify the infliction on him of injury by individuals.²

Outlaws
are still
protected
by law.

§ 139. *Persons condemned to death* are under the protection of the law until the period comes for their execution, and the executioner undertakes the work. "Non licet privata potestate hominem occidere vel nocentem."³ To the executioner alone is public authority to kill given, and this authority he is bound to execute in the way the law requires. In no other way is the killing justifiable. As a general

Convicts
can only
be pun-
ished ac-
cording to
law.

¹ See Whart. Cr. Pl. & Pr. §§ 1 et seq.

² See *People v. Stetson*, 4 Barb. 151, 1848.

³ Can. 9. Caus. 23, qu. 5.

principle, therefore, we may say that a convict can only be punished according to law, and that for any excess or variation of punishment those having him in charge are penally liable.¹

Subject, however, to this qualification, an officer is not penally liable for an injury inflicted by him on another person when in inflicting the injury the officer acted under the direction of the State.² “Is damnum dat, qui, jubet dare; ejus vero nulla culpa est, qui parere necesse sit.”³

§ 140. A party may juridically divest himself of the protection of the law by assailing another in such a way that that other is authorized, in self-defence, to forcibly repel the assailant. The plea of self-defence is generally interposed in cases of homicide, and it is in connection, therefore, with the special topic of homicide that the law in this relation is considered in the greatest detail. It should be remembered, however, that there are other criminal prosecutions to which the same defence may be applicable. Thus, in false pretences, it is a defence that the prosecutor knew of the falsity of the statement.⁴ On the general question the following observations may be made:

1. Rights may come in collision in such a way that neither party is compelled to make a sacrifice for the benefit of the other.⁵

2. Whenever a lesser right comes into collision with one far greater, then it is the duty of the possessor of the former right to recede.⁶

§ 141. *Volenti non fit injuria* is a maxim known both to the Roman and the English law; and in all prosecutions in which the injury is purely private, and is inflicted on the alienable as distinguished from the inalienable rights of the party injured, the maxim is recognized as good by all modern jurisprudence.⁷ Of this we will have frequent illustrations in the following pages. Thus, consent by

¹ See 1 East P. C. 297; 1 Hale, 481; and this finding was subsequently sustained by the Supreme Court of the United States. *Ex parte Mason*, 105 U. S. 696, 1881.

R. v. Friend, R. & R. 20; *R. v. Porter*, L. & C. 394; 9 Cox C. C. 449; *R. v. Miles*, 6 Jur. 243; *State v. Roberts*, 52 N. H. 492, 1872; *State v. Hull*, 34 Conn. 132, 1867. See *infra*, § 408.

The principle in the text was affirmed in the United States in 1882 by a military court in the case of *Mason*, a soldier, who undertook, some weeks after the shooting of President Garfield by Guiteau, to shoot Guiteau;

² See Berner, § 84.

³ L. 169 pr. de R. I. See *infra*, §§ 307, 401, 508; *supra*, § 94.

⁴ *Infra*, §§ 150, 1178.

⁵ *Supra*, §§ 95 et seq. See fully *infra*, §§ 484 et seq., 884.

⁶ See *infra*, § 484.

⁷ *R. v. Read*, 1 Den. C. C. 377, 1848;

an owner to the taking of goods is a defence to a prosecution for larceny;¹ consent to entrance into a house is a defence to a prosecution for burglary;² consent to an assault, not connected with a breach of public order, is a defence to a prosecution for assault;³ consent to an intended rape bars a prosecution for rape;⁴ consent to an intended robbery bars a prosecution for robbery.⁵ But it is to be remembered that this proposition is by its very terms limited to injuries strictly private, and to those which concern the merely alienable rights of the party injured. And it should be also kept in mind that where an attempt is resisted, an indictment may be maintained for the attempt, though the consummated offence was subsequently agreed to.⁶ Another qualification to be observed is,

2 Car. & Kir. 957; R. v. Wollaston, 12 Cox C. C. 180; 26 Law T. Rep. 408, 1872; R. v. Martin, 2 Mood. C. C. 128; State v. Beck, 1 Hill, (S. C.) 363. In the Roman law we have the oft-cited maxim, *Volenti non fit injuria*; or as put by Aristotle, ἀδικοῦται δ' οὐδεὶς ἐκῶν. Ethic Nicom. v. 13. But this maxim was held not to include inalienable rights; while the better opinion was, that so far as concerns the State, no private individual can, by consenting that a crime shall be committed on him, estop the State from prosecuting. The Code on this point is clear. L. 38 D. de pact. (2. 14.) *Ius publicum privatorum pactis mutari non potest.* L. 45. § 1. D. de reg. iur. (50. 17.) *Privatorum conventio iuri publico non derogat.* L. 6. C. de pact. (2. 3.) *Pacta, quae contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati iuris est.* L. 13. pr. D. ad L. Aquil. (9. 2.) *Liber homo suo nomine utilem Aquilliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur.*

But the Roman law cautiously limits the maxim to cases where, as in theft, etc., "against the will" is an essential ingredient of the offence, and in which there is no breach of the peace or

public scandal. L. 46. § 8. D. de furt. (47. 2.) § 8. I. de oblig. quae ex delict. (4. 1.) *Sed et si credat aliquis invito domino se rem commodatam contrectare, domino autem volente id fiat, dicitur furtum non fieri.* L. 1. § 5. D. de iniur. (47. 10.). . . quia nulla iniuria est, quae in volentem fiat. cap. 27. de reg. iur. in VI. 5. 13.) *Scienti et consentienti non fit iniuria.* L. 1. § 5. D. quod. vi aut clam. (43. 24.) *Quid sit vi factum videamus. Vi factum videri Quintus Mucius scripsit, si quis contra, quam prohiberetur, fecerit.* L. 145. D. de reg. iur. (50. 17.) *Nemo videtur fraudare eos, qui sciunt et consentiunt.* L. 3. § 5. D. de hom. lib. exhib. (43. 28.) *Si quis volentem retineat, non videtur dolo malo retinere.* L. 6. § 2. D. de L. Fab. de plagiar. (48. 15.) *Lege Fabia cavetur, ut liber, qui hominem ingenuum, vel libertinum invitum celaverit, . . . eius poena teneatur.* L. 3. § 4. D. ad L. Iul. de vi public. (48. 6.) See Lorimer's Inst. (1874) p. 32. As to consent to attempts, see *infra*, § 188.

¹ *Infra*, § 915.

² *Infra*, §§ 766-770.

³ *Infra*, §§ 556, 577, 636.

⁴ *Infra*, § 554.

⁵ *Infra*, § 855.

⁶ *Infra*, § 188.

that a consent to the doing a particular thing is a bar only to a prosecution for doing such thing precisely and nothing more.¹

§ 142. Any injury committed in such a way as to be an offence to the body politic can be prosecuted in defiance of the consent of the party immediately injured. Prize-fighters, for instance, may agree to beat each other, and if this is done in private, and death or mayhem does not ensue, no prosecution lies at each other's instance;² but it is otherwise when there is a breach of the peace,³ or when the fighting is so conspicuously brutal as to produce public scandal, or work public demoralization.⁴ Consent cannot cure duels, or incest, or seduction,⁵ or adultery, or the maiming of another so as to render him unfit for public service,⁶ or such operations on women as prevent them from having children, or operations to produce miscarriage,⁷ or (when this is by statute indictable) profligate dealings with minors. The reason is that parties cannot by consent cancel a public law necessary to the safety and morality of the State. *Jus publicum privatorum voluntate mutari nequit.*⁸

§ 143. The distinction between alienable and inalienable rights is asserted in the Declaration of Independence and in the Bills of Rights of most of the United States. Inalienable rights as thus generally defined are life, liberty, and the pursuit of happiness. The distinction, however, is not modern; it lies at the basis of the penal sections of the canon law, and

¹ R. v. Bennett, 4 F. & F. 1105, Billingham, 2 C. & P. 234; R. v. Perkins, 4 Ibid. 537. And see Com. v. R. v. Flattery, 13 Ibid. 388; Don Wood, 11 Gray, 85, 1857; Sanders v. Moran v. People, 25 Mich. 356, 1872; State, 60 Ga. 126, 1878. See cases Com. v. Stratton, 114 Mass. 303, 1873; cited *infra*, §§ 217, 373, 636.

Richie v. State, 58 Ind. 355, 1877. ⁵ See Tucker v. State, 8 Lea, 638, 1881.

² See Champer v. State, 14 Ohio St. 437, 1862; State v. Beck, 1 Hill, (S. C.) 363, 1833; R. v. Coney, L. R. 8 Q. B. D. 534; 15 Cox C. C. 46; 46 L. T. (N. S.) 307, where it was held by a majority of the English judges that mere presence at a prize-fight, without aiding or abetting, does not make the parties so present participants. *Infra*, § 636.

³ State v. Burnham, 56 Vt. 445, 1879. ⁶ See Berner's Lehrbuch des Strafrecht's, 132. *Infra*, §§ 451-2. And see R. v. Bennett, 4 F. & F. 1105; R. v. Sinclair, 13 Cox C. C. 28; and cases cited *infra*, §§ 577, 636.

⁴ Foster, 260; 1 East, 270; R. v.

from that law is more or less fully absorbed into the common law of continental Europe.¹

§ 144. *Life* is the first of these inalienable prerogatives. Thus, a man who kills another with the latter's consent is guilty of homicide.² Although some of the jurists of the stoical school here argued in the negative, the affirmative was determined under the Justinian Code; and by the English common law the criminality of the act is such that the consent of the party slain does not even lower the degree. And this rule exists not only in cases where there is malice, but where no malice exists, as in agreements for concurrent suicides.³ Yet we may readily conceive of cases where the degree of guilt would be greatly reduced. A physician, at the request of a dying man suffering intolerable agonies, may, from humane motives, precipitate death; or a soldier on the battle-field, after urgent appeals, may, with intense agony on his own part, yet from the same humane motives, take the same course as to a dying comrade. Yet even here the maxim *Volenti non fit injuria* cannot be applied. There is nothing in the consent to bar a verdict of guilty. That verdict, however, would be for the lowest form of voluntary manslaughter, and could properly be followed by executive pardon.

Consent
will not
excuse
taking of
life.

We may, therefore, justly argue that if life be an inalienable prerogative, then taking it by self is a public wrong, and those who are accessaries to this public wrong cannot plead in defence the suicide's consent.⁴

As will hereafter be more fully illustrated, consent will authorize a surgical operation in cases of danger, though the effect of such operation may be fatal.⁵

¹ See *infra*, §§ 451-2.

² Hawkins' Pleas of the Crown, Book 1 C. P. S. 6; *R. v. Dyson*, Russ. & Ry. C. C. R. 523; *Com. v. Parker*, 9 Metc. 263, 1845. So as to administration of poison. *Com. v. Stratton*, 114 Mass. 303, 1873. See this question discussed as to suicide, *infra*, §§ 451-2.

³ See *infra*, §§ 451-2.

⁴ See *infra*, §§ 451-2; *Com. v. Parker*, 9 Metc. 263, 1845; Macaulay's Indian Code, 449. As to consent in waiving constitutional and other privileges of trial, see Whart. Cr. Pl. & Pr. §§ 351, 518, 733.

Lord Macaulay's Report on the Indian Code, 449.

"That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods," Harlan, J. *Hopt v. People*, 110 U. S. 579, 1883.

⁵ *Infra*, § 362. Steph. Dig. C. L. art. 225 (5th ed.). As to how far assent is to be inferred, see *McClellan v. Adams*, 19 Pick. 333, 1837.

On this topic may be consulted

§ 145. *Deprivation of liberty*, no matter on what pretext, rests on the same principles. No man has a right to take away another's liberty, even though with consent, except by process of law. And the reason is that liberty is an inalienable prerogative of which no man can divest himself, and of which any divestiture is null.¹ Undoubtedly this in one relation conflicts with the attitude once assumed by English and American courts, when maintaining that the slave trade is not piracy by the law of nations. But the abolition of slavery in the United States, and the civil rights amendments and enactments that followed, relieve the courts in this country from the pressure of the precedents referred to, and restore the old doctrine of inalienability of liberty. It is true that cases of this class are not very likely to arise. But should it appear that incarcerations are effected, even by consent, by ecclesiastical or medical authority, of persons whose liberty is thus wrongfully destroyed, the fact of consent could not, if the doctrine here advanced be correct, be used as a defence, when such party seeks release. And *a fortiori* would it be no defence to an indictment for kidnapping Africans, that the Africans consented to be kidnapped.² Agreements, also, by a party absolutely giving up the exercise of his business capacity, are void, though agreements not to do business in particular localities may be sustained.³

Nor waive constitutional rights of trial. § 145 a. Constitutional rights to trial by an independent jury, whose deliberations are to be guarded against outside interference, are to be placed in the same category. These a defendant cannot waive.⁴

§ 146. It need scarcely be added that even in those cases of purely private wrongs to which the maxim *Volenti non fit injuria*

¹ Of this we have a remarkable illustration in a Pennsylvania case, in 1826, in which it was held that an agreement not to bring a writ of error in a criminal case, especially one of high degree, does not estop the defendant from bringing such writ. The question arose after a conviction of burglary, where it was alleged that the defendant had agreed in writing

not to bring a writ of error, and where a motion to quash the writ was on this ground made. But Tilghman, C. J., in refusing the motion, said: "What consideration can a man have received, adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement not to bring a writ of error to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement, yet the principle is, in both cases, the same." *Smith v. Com.*, 14 S. & R. 69, 1827; and see *Whart. Cr. Pl. & Pr.* §§ 541, 733.

² See *State v. Weaver*, Busbee, 9, *contra*; a decision which cannot now be sustained.

³ *Whart. on Cont.*, §§ 430 *et seq.*

⁴ See *Whart. Cr. Pl. & Pr.* § 733.

applies the party injured must be capable of giving consent.¹ Thus, consent by insane persons and young children incapable of assenting is no bar.² In cases of rape this has been frequently adjudicated;³ and the same reasoning holds good in cases of larceny. Thus consent is no defence to an indictment for larceny from or assault upon an insane person, or a person in a state of unconsciousness of the meaning of the guilty act.⁴ And so acquiescence extorted by fear or fraud is no defence.⁵ But where a surgical operation is probably necessary

Capacity
to consent
and actual
consenting
a pre-
requisite.

¹ *R. v. Mayers*, 12 Cox C. C. 311; *Hadden v. People*, 25 N. Y. 373, 1862. *Infra*, § 189.

² *E. g.*, in cases of abduction, in *U. S. v. Aucorala*, 17 Blatch. C. C. 423, 1880; *State v. Rollins*, 8 N. H. 550, 1837; *Com. v. Nickerson*, 5 Allen, 518, 1862. As to infants, see *Givens v. Com.*, 29 Gratt. 830, 1877, and cases cited, *infra*, § 577.

³ See *infra*, § 577; *Hays v. People*, 1 Hill, (N. Y.) 351, 1841; *State v. Johnston*, 76 N. C. 209, 1877. In *Com. v. Burke*, 105 Mass. 376, 1870, the court held that "without her consent," and "against her will," were convertible terms; and hence that carnal knowledge of a woman unconscious with drink was rape. The statutory crime of having carnal knowledge of children is not dependent on consent, *infra*, §§ 577, 612.

⁴ See *Hadden v. People*, 25 N. Y. 373, 1862.

⁵ *Infra*, § 150; 2 East P. C. 486.

In November, 1872, the question of consent, as affected by ignorance of the act, came before Kelly, C. B., Martin, B., Brett, Grove, and Quain, JJ., on a crown case reserved, in which the defendant was charged with an indecent assault upon two boys, of eight years old. "The boys were not asked by the counsel on either side if it" (the act which consisted in his playing with their private parts, and then throwing them on their backs and laying on them, etc.) "was done

against their will or with their consent," but they stated that they did not know what the defendant was going to do to them when he took them into the field and placed them on his lap and laid them on the ground. The defendant having been convicted, Kelly, C. B., said: "I am of opinion that the conviction should be affirmed. There being no actual consent, and on the other hand no actual fraud to induce consent, I think that where a child submits to an act of this kind in ignorance, the offence is similar to that perpetrated by a man who has connection with a woman while asleep." "In the present case the acts were done to children, and they were unconscious of the nature of the acts which the prisoner did or was about to do, and were therefore not in a condition to exercise their wills one way or the other, and I think that the acts done by the prisoner amounted to an assault." *R. v. Lock*, 27 Law T. Rep. 661; 12 Cox C. C. 244, 1872. *Infra*, § 556. The report in Law Rep. 2 C. C. R. 12, is more brief, and closes as follows: "And though there was submission on the part of the children, I do not think there was any consent; for they were so wholly ignorant of the nature of the act done as to be incapable of exercising their wills one way or the other." See *R. v. Bennet*, 4 F. & F. 1105, 1858; *R. v. Case*, 4 Cox C. C. 220, 1850; 1 Den. C. C. 580. *Infra*, § 577.

to relieve the patient from great danger, the fact that the patient is incapable of giving assent will justify proceeding with the operation without consent.¹ And it has been held in England, that it is a defence to an indictment for an indecent assault (not amounting to an assault with intent to ravish) on a child of over seven years, that the child assented.²

§ 147. As will hereafter be more fully seen³ there is no reason why a party who negligently puts himself in the way of danger should not be obliged to bear the consequences of his negligence, subject to the same qualifications as are applied in civil suits for damage produced by negligence.⁴

Of course his negligence, in exposing himself to danger, will be no defence to an indictment against persons who recklessly injure him when in that condition.⁵ And the person charged with contributory negligence must be one capable of being a juridical cause.⁶

§ 148. There may be a constructive estoppel of a prosecution of forgery by proof of such acts on the prosecutor's part as to furnish another reasonable ground for himself to have authority to sign for him his name;⁷ and so in larceny, by proof that the prosecutor intrusted the property stolen to the taker.⁸

§ 149. The law as to detectives and decoys may be thus noted:

(1) When to the constitution of an offence it is necessary that it should be committed without the consent of the party assailed, it is no defence that opportunities for the consummation of the offence were offered by government or by prosecution. Thus the owner laying a trap, such as putting out lights or lessening the difficulties of entrance, does not preclude a prosecution for burglary.⁹ Exposing, also, of marked goods, by their owner, to a supposed thief, has been repeatedly held not to bar a prosecution for larceny.¹⁰

¹ Steph. Dig. C. L. art. 225 (5th Kew, 12 Cox C. C. 355, 1872. *Infra*, ed.); *McClellan v. Adams*, 19 Pick. §§ 163, 1188. 333, 1837.

² *R. v. Roadley*, 14 Cox C. C. 463, P. 224, 1835; *R. v. Parish*, 8 C. & P. 1878; 45 L. T. N. S. 515; *R. v. Read*, 94, 1837; *R. v. Beard*, 8 C. & P. 143, 1 Den. C. C. 377, 1848; 2 Cox C. C. 1837.

266. *Infra*, § 577.

³ *Infra*, §§ 162-3, 703.

⁴ See *infra*, § 163.

⁵ See Whart. on Neg. §§ 335 *et seq.*; *R. v. Kew*, 12 Cox C. C. 355, 1872.

⁶ Whart. on Neg. §§ 302 *et seq.*; *R. v.*

⁷ *Infra*, § 669; *R. v. Forbes*, 7 C. &

⁸ *R. v. Wilkinson*, R. & R. C. C. 470.

⁹ *Infra*, §§ 766, 770; and see, generally, *R. v. Ady*, 7 C. & P. 140, 1840; *Thompson v. State*, 18 Ind. 628, 1862.

¹⁰ *Infra*, §§ 917, 1039; *R. v. Hedge*,

On the other hand, if, in cases of this class (*e. g.*, those in which to constitute the offence it is necessary that it should be without the consent of the party to be injured), the party endangered consents, then the prosecution fails.¹ Thus, if a woman consent to a sexual assault, there can be no prosecution for rape;² if the owner of property surrender his goods to a thief, he cannot maintain larceny³ or embezzlement;⁴ if he leave his house-door open, he cannot maintain burglary;⁵ if he consent to be robbed in order to prosecute the robber, he cannot maintain robbery;⁶ but if on the other hand he simply leave marked property in such a position that if stolen it could be identified;⁷ or if, while keeping his door fastened, he put out the lights, and collect a party of armed friends to seize the expected burglar; here the existence of such traps forms no defence.

(2) The employment by the government of a detective in the guise of a confederate does not preclude a prosecution in cases where the detective does not make himself apparent principal in the crime. A distinction is here made between the detective and the decoy. The detective discloses, it may be often by the agency of the criminals themselves, who are led to expose themselves unguardedly, a crime already concocted; the decoy suggests the crime and is herein its originator. It is true that all detectives are in one sense decoys, and all decoys are in one sense detectives. But when the decoy ceases to be detective, and becomes the apparent originator of the crime, then one of two consequences follows. If he was not employed by the government, then he becomes a co-conspirator liable to the same punishment as his associates, on the same principle as that which makes a person who appropriates lost property for the purpose of getting a reward indictable for larceny.⁸ If, on the other hand, he was employed by the government to cause the

2 Leach, 1033; *R. v. Egginton*, 2 B. & P. 508, 1801; *R. v. Williams*, 1 C. & K. 195, 1843; *R. v. Bannen*, 1 Ibid. 295, 1844; *R. v. Lawrence*, 4 Cox C. C. 438, 1851; *R. v. Johnson*, C. & M. 218, 1841; *U. S. v. Foye*, 1 Curt. 364, 1854; *Pigg v. State*, 43 Tex. 108, 1875; *Allison v. State*, 14 Tex. App. 122, 1883.

¹ Archbold's Crim. Pr. & Ev. 364; *R. v. Egginton*, 2 B. & P. 508, 1801; *State v. Covington*, 2 Bailey, (S. C.) 569, 1832; *Dodge v. Brittain*, Meigs, (Tenn.) 84, 1838; *Alexander v. State*, 12 Tex. 540, 1882. See 3 Ch. C. L. 925. *Infra*, §§ 231 *et seq.*

² *Infra*, §§ 550 *et seq.*

³ *Infra*, §§ 914, 917.

⁴ *Infra*, § 917.

⁵ *Infra*, § 770.

⁶ *R. v. Fuller*, R. & R. 408, 1817; *R. v. McDaniel*, Fost. 131, 1755; 2 East Q. C. 605, aff. by Dillon, J., U. S. v. Whittier, 5 Dill. 35, 1878.

⁷ *Infra*, § 917.

⁸ *Infra*, § 906. See *Stoughton v. State*, 5 Wis. 291, 1854, and other cases cited, *infra*, § 1424; see article

offence to be committed, the government is precluded from asking that the offenders thus decoyed should be convicted. They are associates with the government in the commission of the crime, and the offence being joint, the prosecution must fail. If that which one principal does is not a crime, the other principal cannot be convicted for aiding him.

(3) Detectives, whose office is limited to that of observing a crime when in the process of concoction, or of exploring its causes when consummated, and who have not instigated it or encouraged it, except so far as is necessary, in order to be able to report its character, are public agents entitled, when acting *bona fide* and discreetly, to confidence and support. It is true that allowance is to be made for that zeal which leads officers of this class sometimes to attach undue importance to supposed signs of crime. It is important, also, that their testimony should, as far as possible, be corroborated. But the mere presence and apparent approval of a policeman is no defence where there is no authoritative instigation of the offence by the government;¹ nor *a fortiori* is the presence and apparent approval of a disguised detective, not recognized as such by the offender, appointed to act as such by the government or the parties endangered.²

(4) Where a criminal scheme is in operation (as where a number of libellous³ or indecent documents are printed for transmission by mail), a party who calls for one of these is no more a participant in the crime of publication than is a party who buys a newspaper at a counter participant in the crime of publication.⁴

The same remark applies to the obtaining, by solicitation, of

in London Law Times, July 30, 1881; real criminal, see *Price v. People*, 109 25 Alb. L. J. 184; 15 Irish Law Times, Ill. 109, 1883. That a detective acting 129; and note to 10 Fed. Rep. 97; 30 *bona fide* is not an accessory before the Am. Rep. 129; 20 Cent. L. J. 3. In fact, see *infra*, § 231 *a*, and cases there *Blaikie v. Lawton*, 18 Scottish Law cited. On this point, see *R. v. O'Cal-* Rep. 583, a conviction was quashed on laghan, noticed in 70 Law T. (Journal), the ground that the offence was insti- 13, where the question in the text is gated by an agent of the police. To discussed. the same effect see observations of ³ *R. v. Burdett*, 4 B. & Ald. 95, 1820; court in *Saunders v. People*, 38 Mich. Com. v. Blanding, 3 Pick. 304, 1824; 218, 1878. *State v. Avery*, 7 Conn. 268, 1829; *Swindle v. State*, 2 Yerg. 581, 1830.

¹ See *State v. Jansen*, 22 Kan. 498, 1880.

² That a detective is not indictable for an apparent attempt at crime committed by him in order to expose the

³ *R. v. Burdett*, 4 B. & Ald. 95, 1820;

⁴ See *infra*, §§ 1828, 1831; *Bott v. U.*

S., 11 Blatch. 346, 1871; *Moore v. U.*

S., 19 Fed. Rep. 39, 1883.

single articles, whose sale is prohibited by law, from a stock in the vendor's hands, as where a small quantity of drink is bought from a stock behind the counter,¹ or where counterfeit money is obtained from one who has such money on hand,² or where persons engaged in systems of revenue fraud are enticed to expose themselves in a way that leads to detection. In this line of cases it is not the crime that is instigated by the government. The crime has been already concocted—the prohibited books printed, the prohibited coin manufactured, the prohibited goods arrayed for importation. All that the government (or the prosecution, as the case may be) invites, is the exposure of that which already exists in overt shape. If the government, for instance, should say, "Import these goods, or write this libellous letter," there could be no prosecution. But if it simply say, though in disguise, "Is this the letter you have written, or these your goods?" then the prosecution can be maintained.³

(5) The testimony of accomplices, when introduced as witnesses for the prosecution, will not, as a rule, when uncorroborated, sustain a conviction; but detectives employed by government or prosecution to attend unlawful meetings in order to discover their secrets, or to watch persons concerned in crime, are not, even though apparently assenting to the purposes of such meetings, to be regarded as accomplices.⁴

¹ *Infra*, §§ 1523, 1529.

² *R. v. Holden*, R. & R. 154, 1812; 2 Taunt. 344; *infra*, § 707.

³ "Where persons are suspected of being engaged in the violation of criminal laws, or of intending to commit an offence, it is allowable to resort to detective measures to procure evidence of such fact or intention. Many frauds upon the postal, revenue, and other laws are of such a secret nature that they can be effectually discovered in no other way. Accordingly, there have been numerous convictions upon evidence procured by means of what are called decoy letters—that is, letters prepared and mailed on purpose to detect the offender; and it is no objection to the conviction, when the prohibited act has been done, that it was discovered by means of letters

specially prepared and mailed by the officers of the government, and addressed to a person who had no actual existence. The books contain many cases where such convictions have been sustained. *U. S. v. Foye*, 1 Curt. 364, 1854; *U. S. v. Cottingham*, 2 Blatch. 470, 1854; *Regina v. Rathbone*, Moody's C. C. 310; s. c. C. & M. 220, 1841; *Regina v. Gardner*, 1 C. & K. 628, 1845; *Regina v. Williams*, Ibid. 195, 1843; *Regina v. Mence*, C. & M. 234, 1841." *Dillon, J.*, *U. S. v. Whittier*, 5 Dill. 35, 1878. Compare *O'Brien v. State*, 6 Tex. App. 665, 1879.

⁴ See cases cited in Whart. Cr. Ev. 9th ed. § 440; and see in addition, *Com. v. Downing*, 4 Gray, 29, 1855; *Price v. People*, 109 Ill. 109, 1883; *Johnson v. State*, 3 Tex. App. 590, 1878.

§ 150. Consent obtained by fraud, as a general rule, is to be treated as a nullity.¹ Thus, consent to a sexual offence, if fraudulently obtained, does not bar a prosecution for such offence;² nor does consent to entering a house, if fraudulently obtained, bar a prosecution for burglary;³ nor does consent, when there is any deception as to the thing to be taken, bar a prosecution for larceny.⁴ And consent obtained from a drunken man does not bar a prosecution for kidnapping.⁵ Consent obtained by coercion is also no defence.⁶

One of the most nefarious and infamous conspiracies ever known in this country—that of the “Molly Maguires,” in 1876, to coerce by assassination the coal proprietors of the Pennsylvania anthracite region—was exploded, and the chief perpetrators brought to justice by the sagacity and courage of a detective who attended the meetings of the conspirators, and thus became possessed not only of their plans for the future, but of their exploits in the past. The fact is, there is no crime that is not committed under the influences of some sort of decoy; and to acquit in all cases where the offender is incited to the crime by some instigation of this kind would

leave few cases in which there could be a conviction. *Campbell v. Com.*, 84 Pa. 187, 1877, cited *infra*, §§ 231, 238, 381, 529.

¹ *Infra*, §§ 557, 856. See 2 East P. C. 486; *R. v. Williams*, 8 C. & P. 286, 1838; *R. v. Hopkins*, C. & M. 254, 1842; *R. v. Woodhurst*, 12 Cox C. C. 443, 1873; *Huber v. State*, 57 Ind. 341, 1877.

² See *infra*, §§ 559, 561.

³ *Infra*, § 765.

⁴ *Infra*, § 915.

⁵ *Hadden v. People*, 25 N. Y. 373, 1862; *infra*, § 590.

⁶ See *infra*, §§ 557, 772; *Lewis v. State*, 19 Kans. 260, 1878.

CHAPTER VII.

CAUSAL CONNECTION BETWEEN OFFENDER AND OFFENCE.

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| The will causes whatever effect it co-operates in producing, § 152. | Causation not broken by irresponsible intermediate agent, § 161. |
| A cause is that which turns the balance, § 153. | Concurrent negligence of another no defence, § 162. |
| Other conditions co-operating do not affect the responsibility of one who operates with these conditions, § 154. | Injured party's contributory negligence may break causal connection, § 163. |
| Otherwise when subsequent conditions occur to vary result, § 155. | Contributory negligence no defence when the result of fright caused by defendant's misconduct, § 164. |
| Accelerating death of dying is homicide, § 155 <i>a</i> . | Prior negligence of party injured no defence if defendant by proper caution could have avoided injury, § 165. |
| Omission to perform a legal duty indictable; and so of exposure of helpless dependents, § 156. | Persons leaving dangerous agencies where they are likely to be unconsciously meddled with responsible for the consequences, § 166. |
| When death is negligently induced by a physician's misconduct, assailant is not responsible, § 157. | Causation not necessarily physical, § 167. |
| Medical man may be in such cases responsible, § 158. | To negligent causation not necessary that damage should have been foreseen, § 168. |
| No defence that death was caused by disease induced by wound, § 159. | Responsibility ceases when <i>casus</i> intervenes, § 169. |
| Interposition of responsible will breaks causal connection, § 160. | |

§ 152. THE consequences of an act of the will can never be absolutely predicted. A thousand contingencies may intervene to defeat the most resolute purpose. Responsibility, therefore, at least for attempting a wrong, is not diverted because this wrong was arrested before consummation. Nor, as we have seen, is it necessary, to establish causation, that the effect should correspond with the conception. No purpose was ever completed as it was designed, and even should we suppose such a case, innumerable other agencies are concerned in the undertaking. It is not necessary, therefore, in order to establish a causal relation between the will and the effect, that the

The will causes whatever effect it co-operates in producing.

effect should be precisely what the party willed. Nor is it necessary that it should have been the primary object the offender had in view, as it is sufficient if the object in view was one which could not be obtained without law-breaking.¹ Nor need such act of law-breaking be necessary to the execution of the purpose. It may be only incidentally involved in such purpose, yet if the will be to effect the purpose, lawfully or unlawfully, the will is to be regarded as causing the illegal act.² Thus, a party selling liquor recklessly to a crowd has been held responsible for their disorderly conduct;³ a person wilfully firing his own house is indictable for the wilful firing of any adjacent houses which become involved in the conflagration;⁴ a person contributing to a nuisance, for the incidents of the nuisance.⁵

§ 153. Assuming a cause to be that impulse which turns the balance between forces previously in equilibrium, many of the speculations of the old jurists in this relation become obsolete. Thus it used to be said that absolute lethality (*absoluter Letalität*) existed when a wound, apart from all other conditions, produced death; and abstract lethality existed when a wound would be fatal with persons of all kinds; and many refined distinctions were taken in cases where, if superior skill had been applied, the wound might not have been fatal, or where the death was attributable eminently to some idiosyncrasies of the deceased. Of course, when after a wound a new and independent causation intervenes, producing death, this relieves parties to whom such new causation is not imputable. But the co-operation of other contemporaneous or prior conditions does not relieve the party charged. He who turns the scale is chargeable with the result. In other words, a cause is, in this sense, that condition which determines the final result. It is the *preponderating* (*überwiegende*) condition.⁶

¹ *Supra*, § 119. See on this topic, 1 *suchungen*, 3d ed. p. 184; Meyer, Steph. Hist. Crim. Law, 5. § 34.

² See *R. v. Whithorne*, 3 C. & P. 394, 1828; *R. v. Howell*, 9 C. & P. 437, 1839; *U. S. v. Jones*, 3 Wash. C. 209, 1821; and see *supra*, § 119. The cause of a change, so speaks another high German authority, is identical with a change of the equilibrium between forces producing and forces resisting the change. These forces may be balanced. The impetus, however slight, that disturbs the balance is the cause of the movement.

³ *State v. Burchinal*, 4 Harring. 572, 1848.

⁴ *Supra*, § 120; *infra*, § 830.

⁵ *Infra*, § 1430.

⁶ Trendelenburg, *Logische Unter-Binding, Normen* (1872), p. 42.

§ 154. A free moral agent (and none other can be a cause in the eye of jurisprudence) does not cease to be responsible for an alteration effected by him in the ordinary course of events, because there were other conditions which were, in addition to his action, co-antecedents of the same result. Thus, in a case where the death of a child proceeded from suffocation, caused by the defendant, it was held, that when the primary cause of the suffocation was forcing moss into the throat of the child, the defendant's liability was not relieved by the existence of an intermediate process, namely, the swelling up of the passage of the throat, which occasioned the suffocation, such swelling having arisen by forcing the moss into the throat.¹ In this case, while the swelling of the throat was a *condition* of the death, the *cause* was the forcing the moss into the throat. The susceptibility of the human body to poison, to take another illustration, is a *condition* of poisoning; the administering of the poison is the *cause*.²

Other conditions co-operating do not affect the responsibility of one who co-operates with those conditions.

Again: Iron is dug from a mine; is melted in a furnace; is shaped in a factory; is sold, as a weapon, by a tradesman; is used to inflict a fatal blow by an assassin. Now the mining, the melting, the shaping, the selling, are all *conditions* of the murder, without which it could not, in the line in which it was effected, have taken place; but none of these acts is a *cause* of the murder, unless the particular act was done in concert with the murderer, to aid him in effecting his purpose. So a workman places on the roof of a house a tile which a stranger maliciously tears up and throws into a crowded street, killing a passer-by. Now the workman is a condition of the killing, but not its juridical cause, unless the tile was placed so negligently on the roof as to make its dislodgment

¹ R. v. Tye, R. & R. 345, 1812. See that her death would be the probable result of child-birth, intending and hoping to cause her death, actually caused it in the manner supposed." 3 *infra*, § 535. Sir J. F. Stephen illustrates as follows the position in the text:

"A woman dies in her confinement. Steph. Hist. Crim. Law, 9. It can hardly be said that the father of her child has killed her, though the connection between his act and her death is perfectly distinct. Even if the connection which caused the birth of the child was a rape, I do not think that the death would amount to murder; nor would it be so if a husband, tired of his wife, and being warned

That in prosecutions for false pretences it is not necessary to show that the false pretences used were the sole motive operating on the defendant will be hereafter seen. *Infra*, § 116.

² R. v. Webb, 2 Lew. C. C. 196; 1 M. & Rob. 405, 1843. See, also, Com. v. Costley, 118 Mass. 1, 1875; Tabler v. State, 34 Ohio St. 127, 1877.

a result of natural laws, or the stranger who threw it down acted in concert with the workman.¹

¹ Sir J. F. Stephen, in his Digest of Cr. Law, art. 240 (5th ed.), says: "Dr. Wharton's work on Homicide contains an interesting and elaborate chapter (chapter xii. §§ 358-389), entitled 'Causal Connection,' into which some discussion is introduced on the distinction between causes and conditions—a distinction of which Dr. Wharton maintains, and of which Mr. Mill (see his Logic, vol. i. p. 398, etc.) denies, the solidity. For practical purposes, I think the article in the text is sufficient. And if this were the proper place, I should be disposed to discuss some of Dr. Wharton's positions."

In the text of the present work, I have somewhat modified the positions to which Sir J. F. Stephen refers; and the conclusion is substantially the same as that reached by himself in the following paragraph:

"Killing is causing the death of a person by an act or omission, but for which the person killed would not have died when he did, and which is directly and immediately connected with his death. The question whether a given act or omission is directly and immediately connected with the death of any person is a question of degree, dependent upon the circumstances of each particular case."

"(SUBMITTED.) But the conduct of one person is not deemed, for the purposes of this article, to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other."

"This article is subject to the provisions contained in the next two articles."

Illustrations.

"(1) A. substitutes poison for medicine which is to be administered to C. by B. B. innocently administers the poison to C., who dies of it. A. has killed C. Donellan's Case. See my Gen. View, Cr. L. 338."

"(2) A. gives a poisoned apple to his wife, B., intending to poison her. B., in A.'s presence, and with his knowledge, gives the apple to C., their child, whom A. did not intend to poison. A. not interfering, C. eats the apple and dies. A. has killed C. Saunders's Case, 1 Hale P. C. 436."

"(3) A., an iron-founder, ordered to melt down a saluting cannon which had burst, repairs it with lead, in a dangerous manner. Being fired with an ordinary charge, it burst and kills B. A. has killed B. R. v. Carr, 8 C. & P. 163, 1837. See *infra*, §§ 337, 343, 369."

"(4) A., B., and C., road trustees under an act of parliament, and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and D. passing along it is killed. A., B., and C. have not killed D. R. v. Pocock, 17 Q. B. (N. S.) 34. See *infra*, § 339."

"(5) A., by his servants, makes fire-works in a house in London, contrary to the provisions of an act of parliament (9 & 10 Wm. III. c. 77). Through the negligence of his servants, and without any act of his, a rocket explodes and sets fire to another house, whereby B. is killed. A. has not killed B. R. v. Bennett, Bell C. C. 1, 1858; 8 Cox C. C. 74. See *infra*, §§ 246 *et seq.*

"(6) A. tells B. facts about C. in the hope that the knowledge of those

§ 155. Suppose that A. maliciously aimed a blow at B., which stuns B., and A., thinking B. to be dead, buries B., and B. dies from being buried alive. Several cases of this kind (*e. g.*, one of infanticide) have arisen in Germany, and have been the subject of much learned discussion, and the better opinion, as is argued by Bar in his authoritative work on Causal Connection, is that A. is guilty, so far as concerns the first blow, not of murder, but of an attempt to murder. Such would be the result in our own law, should the case come up on indictment charging murder by the first blow, for as the evidence would not sustain the allegation that the blow killed the deceased, the indictment would fall, and the only redress for the first blow would be to prosecute the defendant for attempt to kill. But how would it be with the death by the burying? Supposing this was the cause of the death, then the defendant is chargeable with manslaughter in killing the deceased, but would not be chargeable with murder, as there was no malice. Hence the defendant, in such a case, is chargeable, first with attempt to murder, and then with manslaughter. In a late English case, where this question is approached, the evidence left it doubtful whether the death was caused by beating or by subsequent exposure. In either case the result, owing to want of malice, would have been only manslaughter; and as the indictment contained counts fitted to either alternative, the court told the jury that if the death was caused either by the blows or the exposure, they were to convict of manslaughter.¹

Otherwise when a subsequent condition occurs to vary a result.

In a case of earlier date, the indictment charged the death of a child to have been occasioned by exposure to cold. The evidence was that the child was found in a field, alive, with a contusion on the head, and that it died a few hours afterward. The medical witnesses stated that the contusion was in itself sufficient to occasion death, and that the exposure might have accelerated it. It was submitted on behalf of the prisoner, that supposing the death to

facts will induce B. to murder C., and reasonable cause to believe that the in order that C. may be murdered; probable consequence of doing so but A. does not advise B. to murder will be to endanger human life, cause C. B. murders C. accordingly. A. grievous bodily injury, or expose valuable property to destruction, shall be meaning of this article." guilty of a misdemeanor.

By § 673 of the N. Y. Penal Code of 1882, it is provided that any person, who breaks a contract of labor, having

¹ R. v. Martin, 11 Cox C. C. 136, 1869.

have been only accelerated by the exposure, the count which charged it as the cause could not be supported, and of this opinion was the judge who tried the case.¹

But this cannot be sustained. Supposing that the exposure accelerated the death, it "caused" the death. The contusion did not kill. The fact that it might have killed had the deceased lived long enough, could not support an indictment for killing: 1. Because the averment of death from the wound could not be sustained; 2. Because to allow a conviction for an act that was not committed, simply because it might have been committed, would allow convictions for the murder of men still alive.

When two causes unite simultaneously in producing the same result, either may be legally regarded as the efficient cause. In a remarkable case decided in New Mexico in 1883, it was held that where A. and B. shot at the same time C., they could be indicted together as principals.² This is no doubt good law if A. and B. were confederates. But suppose they were not, and that it should be proved that the two at the same moment fired shots each of which was fatal. In such case A. and B. should be indicted separately.

Where, however, there is any appreciable distance of time between two mortal wounds inflicted by different persons, then he who inflicted the last wound is guilty of the homicide, while he who inflicted the first wound may be indicted for an assault with intent to kill.³

§ 155 *a*. Hence to accelerate the death of a person already mortally wounded or diseased is homicide.⁴

Accelerat-
ing death
of dying is
homicide.

Omissions
to perform
a legal
duty in-
dictable,
and so of
exposure
of depend-
ents.

§ 156. Omission to help may be an indictable offence, when such help is a legal duty. We have already seen that, as a rule, an omission to perform any link in a chain of duty is a breach of such duty.⁵ It has also been noticed⁶ that a mere omission to help is not indictable unless such help is a legal duty. An officer of a railroad, for instance, whose duty it is to protect trains from accidents, is indictable if from his neglect to render such protection hurt ensues;⁷ a parent whose legal duty it is to

¹ *R. v. Stockdale*, 2 Lew. 220, 1843. 1881; *State v. Scates*, 5 Jones, (N. C.)

² *Territory v. Yarberry*, 2 New Mex. 420, 1857; *People v. Ah Fat*, 48 Cal. 391, 1883. 61, 1878. *Supra*, § 153; *infra*, §§ 157,

³ *Fisher v. State*, 10 Lea, 15, 1882. 160, 309, 310.

⁴ *R. v. Martin*, 5 C. & P. 128, 1832; ⁵ See *supra*, § 130.

R. v. Johnson, 1 Lew. C. C. 164, 1824; ⁶ *Supra*, § 132.

R. v. Fletcher, 1 Russ. on Cr. 676, ⁷ *Supra*, § 133; *infra*, § 349.
1841; *State v. Wood*, 53 Vt. 560,

nourish a child is reponsible for an omission in this respect by which the child is injured, and so of a husband's neglect to render necessary assistance to his wife when such is his legal duty.¹ Hence, *a fortiori*, it is indictable to put a helpless person in a position of which hurt is a natural consequence. This principle has been applied to cases where a boy, having been beaten by the defendant, was left by him in a country lane during a frosty night in January;² where a lame person, incapable of moving, and without voice to cry for help, was forced out of a wagon, in a place where he froze to death;³ where a person carried his sick father against his will, in a severe season, from one town to another, by reason whereof he died;⁴ where a woman being delivered of a child left it in an exposed place covered only with leaves, in which condition it was killed by a kite;⁵ or by cold;⁶ where a child was placed in a hogsty, where it was devoured,⁷ and where a child was shifted by parish officers from parish to parish till it died for want of care and sustenance.⁸ And such was held to be the law where a master, knowing a seaman's debility and incapacity to hold on, forced him to go aloft, whereupon the seaman fell to the deck, and was killed;⁹ and where the captain of a vessel omitted to lower a life boat so as to save a seaman.¹⁰ But the injury must be the natural or probable consequence of the defendant's act to make him responsible for it.¹¹

How far a parent is indictable for not obtaining sufficient medical attendance for a child will be hereafter considered.¹²

§ 157. We have next to consider cases of homicide in which, after the deceased receives the wound, he is placed under the charge of a medical man, who, in probing the wound or otherwise operating on the patient immediately causes his death. If the medical man acts negligently or maliciously, and so introduces a new responsible cause be-

When death is negligently induced by a physician's or

¹ *Infra*, § 1563.

⁶ *R. v. Walters*, C. & M. 164, 1841;

² *R. v. Martin*, 11 Cox C. C. 136, 1869; if the exposure had been malicious, the offence would have been murder. *R. v. Donovan*, 4 Cox C. C. 399, 1851. See *infra*, § 358.

Stockdale's Case, 2 Lew. 220, 1843. *Infra*, §§ 335, 336, 459.

⁷ 1 East P. C. c. 5, s. 13, p. 226.

⁸ Palm. 545.

⁹ *U. S. v. Freeman*, 4 Mason, 505, 1827. *Infra*, §§ 164, 337.

Infra, § 358.

¹⁰ *U. S. v. Knowles*, 4 Sawyer, 517, 1864.

⁴ 1 Hawk. P. C. c. 13, s. 4; 1 Hale, 431, 432.

¹¹ *Infra*, § 169.

⁵ 1 Hale, 431; 1 Hawk. P. C. c. 13, s. 6.

¹² *Infra*, § 336.

surgeon's
miscon-
duct assail-
ant is not
responsi-
ble.

tween the wound and the death, this, on the principle just stated, breaks the causal connection between the wound and the death. The medical man in such case is indictable for the homicide; the original assailant only for an attempt. But if the medical man, following the usual course of practice which good practitioners under the circumstances are accustomed to adopt, occasions death when endeavoring to heal the wound, then the person inflicting the wound is chargeable with the death. For he who does an unlawful act is responsible, as we have just seen, for all the consequences that in the ordinary course of events proceed from the unlawful act. Now it is one of the ordinary consequences of a wound that a medical man should be called in to treat it; and it is one of the probable incidents of medical practice that the patient should die under treatment. And the person inflicting the wound is responsible for this, as one of the consequences which, in the natural course of events, result from his unlawful act.¹ It is no defence, in cases in which the deceased's death is not shown to have been produced by his own negligence or that of his medical attendant, that he might have recovered had a higher degree of professional skill been employed. The law does not exact from physicians the highest degree of professional skill,² but only such skill as men of their profession are, under the circumstances, accustomed to apply; and if we should convict only in cases where it is possible to conceive of recovery under another mode of treatment, we would convict in few cases in which death did not immediately follow the wound. The true test is, whether the deceased's death followed as an ordinary and natural result from the misconduct of the defendant. If so, it is no defence that the deceased, under another form of treatment, might have recovered.³

¹ *Infra*, § 163; *Com. v. M'Pike*, 3 Cush. 181, 1849; *Com. v. Green*, 1 Ash. 289, 1826; *People v. Cook*, 39, Mich. 236, 1878; *McAllister v. State*, 17 Ala. 434, 1849; *Parsons v. State*, 21 Ala. 300, 1851; *State v. Barnes*, 34 La. An. 395, 1882; *Brown v. State*, 38 Tex. 482, 1873; *Powell v. State*, 13 Tex. App. 244, 1882. See *infra*, §§ 362 *et seq.*

² *Whart. Neg.* § 735; *supra*, § 153; *infra*, §§ 362 *et seq.*

³ *Infra*, § 163; 1 Hale P. C. 428; *R. v. Holland*, 2 M. & Rob. 357, 1843; *R. v. Johnson*, 1 Lew. C. C. 164, 1834; *R. v. Lee*, 4 F. & F. 63, 1862; *R. v. Minnock*, 1 Cr. & Dix, Ir. C. R. 45, 1841; *Com. v. M'Pike*, 3 Cush. 181, 1849; *Com. v. Hackett*, 2 Allen, 136, 1861; *State v. Bantley*, 44 Conn. 537, 1876; *Com. v. Green*, 1 Ash. 289, 1826; *U. S. v. Warner*, 4 McLean, 463, 1850; *Coffman v. Com.*, 10 Bush, 495, 1875; *Bush v. Com.*, 78 Ky. 268, 1880; *State v.*

§ 158. But the physician, not the assailant, is responsible where the defendant inflicted on the deceased a slight wound, in itself not dangerous, which wound, by the maltreatment of the physician, became mortal.¹ If, in consequence of some physical idiosyncrasies of the deceased, the wound, which in ordinary cases would not be fatal, produces death, then the defendant is chargeable with the homicide, for the result flowed from the defendant through the agency of natural laws. But if the result is caused by the malpractice of the physician, the wound not being in itself mortal, and the physician not acting in concert with the defendant, then the defendant is not responsible, for the wound, though a condition of the killing, is not its juridical cause.² And where death of the deceased was accelerated by the want of the due skill and competency of his physician, then the latter cannot defend himself on the ground that the deceased was at the time laboring under a mortal disease.³

Medical man may be in such cases responsible.

§ 159. Where a wound, in its regular course, induces a fever which leads to death, the party inflicting the wound is responsible for the consequences. Even if a man is laboring under a mortal disease, those who hasten his death are responsible for the homicide. Nor is it any defence that the constitution, age, or habits of the deceased made him peculiarly susceptible to such disease as the wound inflicted would probably engender.⁴ But it is easy to imagine a

No defence that death was caused by disease induced by wound.

Baker, 1 Jones, (N. C.) 267, 1854; ceased might have recovered if he had McAllister v. State, 17 Ala. 434, 1849; taken proper care of himself, or that Bowles v. State, 58 Ala. 335, 1878; unskilful or improper treatment aggravated the wound and contributed to State v. Scott, 12 La. An. 274, 1857; his death." Pardee, J., State v. Bant-Brown v. State, 38 Tex. 482, 1873; ley, 44 Conn. 537, 1876. See People Kee v. State, 28 Ark. 155, 1879. As v. Cook, 39 Mich. 236, 1878; Kelley to physicians' liability, see *infra*, § v. State, 53 Ind. 311, 1876; Williams 362; and see Parsons v. State, 21 Ala. v. State, 2 Tex. App. 271, 1877; People 300, 1851. v. Ah Fat, 48 Cal. 61, 1875.

"If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offence either of manslaughter or murder, as the case may be, and he is none the less responsible for the result, although it may appear that the de-

¹ Harvey v. State, 40 Ind. 516, 1871.

² R. v. Cheverton, 2 F. & F. 833, 1861.

³ *Supra*, § 153; *infra*, § 362; R. v. Webb, 1 M. & R. 405, 1855; People v. Ah Fat, 48 Cal. 61, 1875.

⁴ 1 Hale P. C. 428; R. v. Martin, 5 C. & P. 128, 1832; R. v. Webb, 1 M. & R. 405, 1835; R. v. Murton, 3 F. &

case in which a slight scratch, by producing local inflammation, might terminate in death; and in such case it would seem hard, at the first view, to charge the defendant with a result which would not under ordinary circumstances follow from such a wound. Yet if the defendant intended to take life, and in shooting, for instance, inflicted a wound which, though not ordinarily dangerous, in the particular case produced lock-jaw, we cannot say that the deceased's death did not ensue in the ordinary course of events from the shooting. The difficulty arises where a scratch is negligently given by a non-lethal instrument. Here we can truly say that as the death was not an ordinary consequence of the negligence, there is no imputability of murder. Supposing, however, a person negligently uses a dangerous instrument, then we must hold he is liable for the consequences, peculiar as they may be, which wounds from this instrument produce. For it is in accordance with the ordinary course of events that a dangerous instrument, if negligently used, should produce dangerous results.¹

Interposi-
tion of
independ-
ent re-
sponsible
will breaks
causal
connec-
tion. § 160. The interposition of concurrent wills, in pursuance of a common plan, makes each confederate liable for the action of his associates. It is otherwise, however, when responsibility is based, not on intentional, but on negligent injuries.² As to these the rule is that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent in a particular subject-matter. Another person moving independently comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the per-

F. 492, 1862; R. v. Martin, 11 Cox C. evidence of the deceased's prior C. 136, 1869; Com. v. Fox, 7 Gray, health is admissible on the question 585, 1857; Com. v. Hackett, 2 Allen, of causation, see Phillips v. State, 68 136, 1861; State v. Bantley, 44 Conn. Ala. 469, 1881.

537, 1876; Com. v. Green, 1 Ashm. ¹ This is the case where the death 289, 1826; Com. v. Warner, 4 McLean, was by erysipelas, induced by the 463, 1850; Kelley v. State, 53 Ind. wound. Denman v. State, 15 Nebr. 311, 1876; People v. Cook, 39 Mich. 138, 1883.

236, 1878; McAllister v. State, 17 Ala. ² *Infra*, § 247. See R. v. Bennett, 434, 1849. And see Harvey v. State, Bell C. C. 1; 8 Cox C. C. 74, 1858. 40 Ind. 516, 1871; Brown v. State, 38 As to liability of confederate for col- Tex. 482, 1873; People v. Ah Fat, 48 lateral crimes of his associates, see Cal. 61, 1874; Powell v. State, 13 Tex. *infra*, § 214.

App. 244, 1882. *Infra*, § 340. That

son so intervening directly produces. He is the one who is liable to the person injured. I may be liable to the party whom my negligence leads into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative. We may expand this rule still further, and hold that a defendant, no matter how wrongful may have been his conduct, is not responsible for the acts of independent parties performed on the objects of the crime without his concert.¹ Thus, as we have just seen, is it with regard to a death produced by a physician attending a wound not in itself dangerous. So is it also when the wounded person indulges in excesses which destroy his life, or when he refuses to call in a physician, or to submit to any dressing of the wound.² Or, in a case of greater complication, the defendant wounds another so desperately that the latter can only live a few hours, when a third party comes in and kills the wounded man by a blow that acts instantaneously. Who is the cause of the death? Certainly the last assailant;³ for the particular death which occurred was produced, not by the defendant, or within the range of his action, but by the interposition of a foreign independent will.⁴ And so a rioter cannot be held responsible for a homicide by persons engaged in suppressing a riot.⁵

The following case is reported by Bar, in the able treatise on causal connection already referred to. The defendant left a loaded gun in a place where, it was assumed, damage would ensue from its negligent or ignorant use. A stranger, playing with the gun, killed inadvertently, and by misadventure, the deceased. By the Supreme Court (Obertribunal) of Prussia, it was held that the defendant's negligence made him criminally responsible for the death of the deceased; and the reason given was that a person dealing negligently with dangerous mechanical agencies is responsible for all the consequences which might be reasonably contemplated as the result of such negligence. Now if this is limited to merely mechanical or natural results, the statement is true. If a loaded gun is placed

¹ *R. v. Hilton*, 2 Lew. C. C. 214, Cal. 61, 1824. The same rule exists 1842; *infra*, §§ 337, 370; *R. v. Ledger*, where a person dying by disease is 2 F. & F. 857, 1862. See Whart. on killed by a blow from an assailant. Neg. § 134. *Com. v. Fox*, 7 Gray, 585, 1856.

² See *Harvey v. State*, 40 Ind. 516, 1871. ⁴ *State v. Scates*, 5 Jones, (N. C.) 420, 1857; and see *supra*, § 155 a.

³ *Supra*, § 155 a; *State v. Wood*, 53 Vt. 560, 1881; *People v. Ah Fat*, 48 1863. *Infra*, § 166. ⁵ *Com. v. Campbell*, 7 Allen, 541,

in a position where on a mere touch it will be likely to explode, then the party so placing it is liable for the consequences. But when the gun is loaded in the usual way, and the casualty occurs through the independent voluntary action of a stranger taking the gun from its resting-place and negligently playing with it in a different position and aimed in a new direction, then the causal connection is broken by this interposition of an independent, self-determining will. If the decision above given is correct, then there would be no limit to the responsibility which a single act of negligence would bring. A man, for instance, who owns a vicious horse, will be responsible if he does not exclude the possibility of trespassers mounting the horse and having thereby their necks broken. A host who places on his table rich but indigestible delicacies, would be responsible for an apoplexy caused by one of his guests overeating such delicacies. The manufacturer of such delicacies would be responsible for the improvident action of the host. No adventurous enterprise, no matter how beneficial to society; no powerful mechanical agent; could be put in motion without attaching to its originators all the calamities which the rash advance of such enterprise, or the imprudent use of such power, might generate. Another objection to this extension of such responsibilities is, that it would be in the power of any subsequent intruder to throw back criminal responsibility on the original projector or organizer, by simply carelessly meddling with his machinery. Thus, for instance, a mischief-maker by taking up and recklessly using a loaded gun could bring down a criminal prosecution on him who left the gun exposed; and so a trespasser, maliciously tampering with machinery, could designedly make the mill-owner responsible if it be shown that the machinery itself was not so constructed as to bar all such casualties. One man's malice or mischief would thus create another man's guilt.¹

§ 161. It is otherwise, however, when the agent so interposing is irresponsible. An explosive compound, for instance, negligently packed, is put into the hands of a carrier to deliver, the carrier being ignorant of its contents. Who, in case of the package being left at the place of delivery, and there exploding, is liable for the injury produced by the explosion? Had the carrier known, or had he been in a posi-

Causation
not broken
by irre-
sponsible
intermedi-
ate agent.

¹ On this point compare observations in *Snow v. R. R.*, 8 Allen, 441, and see *Whart. on Neg.* §§ 854-856; 1864.

tion in which it was his duty to know, that the package was in this dangerous condition, then he would become liable, on the principle that he who negligently meddles with a dangerous agency is liable for the damage. But if he was non-negligently ignorant of the contents of the package, he is no more liable than is the car by which they are carried. No matter how numerous may be the agencies through which such a package is transmitted, the original forwarder continues liable, while the carriers, in case of their being ignorant and innocent, are free from liability.¹ Thus a person who is guilty of negligence in manufacturing a dangerously inflammable oil is liable for the damage done by it, no matter how numerous may be the agents by whom it is innocently passed. "Certainly one who knowingly makes and puts on the market for domestic and other use such a death-dealing fluid cannot claim immunity because he has sent it through many hands."² When, however, a vendee or agent knows the explosive or otherwise perilous character of a compound, and then negligently gives it to a third person, who is thereby injured, the causal connection between the first vendor's act and the injury is broken.³

So with regard to the negligent sale of poison. If B. negligently sells poison, under the guise of a beneficial drug, to A., he is liable for the injury done to A.; or to those to whom A. innocently gives the poison.⁴ He is not liable for the negligent act of a person to whom he gives the poison, advising him of its properties.⁵

The same distinctions apply to the giving of a loaded gun to another. If the gun be given by B. with due warning to A., a person experienced in the use of fire-arms, who so negligently handles the gun that it explodes and injures C., then A., and not B., is liable. But if the loaded gun be given to an unconscious child, and the child not knowing what the gun is, handles it so that it explodes, and injures a third person, then the liability is attached, not to the child, but to the person giving the loaded gun.⁶

That a person committing a crime through the agency of an insane medium is responsible, we will hereafter have occasion fully to see.⁷ The same rule exists when the agent is compelled to commit the crime.⁸

¹ *Infra*, § 617.

² Agnew, C. J., *Elkins v. McKean*, 79 Pa. 493, 1875.

³ See *infra*, § 206.

⁴ *Supra*, § 133; *infra*, §§ 166, 346.

⁵ *Infra*, § 226.

⁶ *Infra*, § 344.

⁷ As to indictment for action through an irresponsible agent, see *infra*, § 522.

As to liability of principal for irresponsible agent, *infra*, § 207. And see, as to dangerous agencies, *infra*, §§ 343 *et seq.*

⁸ *Blackburn v. State*, 23 Ohio St. 146, 1872. *Infra*, § 216.

§ 162. *The fact that another person contributed either before the defendant's interposition or concurrently with such interposition in producing the damage is no defence.*¹ Indeed, this proposition, instead of conflicting with the last, goes to sustain it. A. negligently leaves certain articles in a particular place. B. negligently meddles with them. Supposing B.'s negligence to be made out, and he be a responsible person under the limitations above expressed, he cannot set up A.'s prior negligence as a defence. *A fortiori*, he cannot set up the concurrent negligence of D., a third person, who may simultaneously join him in the final negligent act.²

§ 163. It has been said that contributory negligence is no defence to a criminal prosecution.³ This, however, is not correct, since a person who negligently rushes into danger, such action not being incident to a lawful business, cannot afterward prosecute, either criminally or civilly, the person producing the danger.⁴ A common illustration of this principle will be found in the cases, elsewhere noticed, of prosecutions for malpractice, in which it is held a defence that the patient's misconduct was the immediate cause of his injury.⁵ On the one side, we can conceive of cases where a party, after his wound, commits suicide; and in which, as the death was caused by the suicide, and not by the wound, the allegation in the indictment, that the deceased died of the wound, could not be sustained. On the other side, cases constantly occur in which a wounded person neglects some precaution which might have contributed toward his recovery, but in which no one doubts but that the death is chargeable to the wound. The true line is this: if the

¹ See *infra*, § 363.

² Whart. on Neg. § 144. *Infra*, § 363. See *R. v. Pym*, 1 Cox C. C. 339, 1846; 1 Russ. Cr. 675; *Com. v. M'Pike*, 3 Cush. 181, 1849; *State v. Bantley*, 44 Conn. 537, 1876.

³ *R. v. Swindall*, 2 C. & K. 230, 1846; *R. v. Walker*, 1 C. & P. 320, 1824; *R. v. Longbottom*, 3 Cox C. C. 439, 1849; *R. v. Hutchinson*, 9 Cox C. C. 555, 1863; *Com. v. Boston & Lowell R. R.*, 134 Mass. 211, 1883.

⁴ *Supra*, § 147. See *R. v. William-*

son, 1 Cox C. C. 97, 1846; *R. v. Longbottom*, 3 Cox C. C. 439, 1849. Compare *infra*, §§ 358, 1188; *State v. Preslar*, 3 Jones Law, (N. C.) 421, 1856; *State v. Weaver*, Busbee, 9, 1852; *Parsons v. State*, 21 Ala. 301, 1851.

⁵ See *supra*, §§ 157-9; *infra*, § 363.

In *R. v. Burchall*, 4 F. & F. 1077, decided in 1866, Willes, J., who must have been familiar with the prior cases above cited, said: "Deceased contributed to the fatal result by not getting out of the way, and

deceased, in full possession of his senses, caused either deliberately or negligently his own death, then he and not the person inflicting the wound is chargeable with the death, though the latter is indictable for an attempt to kill.¹ But where the deceased's negligence contributed to his death, such negligence is no defence, when either (1) it was one of the ordinary incidents of the conduct of a person in his situation ; or (2) when the wound would otherwise have been fatal.² And so, under similar circumstances, the negligence of an attendant physician or surgeon is no defence.³ It is enough if the wound induced the death.⁴ The same distinction may be followed in other cases of negligence. A carriage is driven recklessly along a road and kills a drunken man, who, if he were sober, could have got out of the way. The deceased's drunkenness is in this case no defence,⁵ because the defendant had no right to drive recklessly along the road. But if, though there may have been some negligence on the defendant's part (*e. g.*, in the equipment of his car-

until I see a decision to the contrary (by which it is presumed the learned judge meant a decision of the Court of Criminal Appeal) I shall hold that a man is not criminally responsible for negligence for which he could not be responsible in an action."

In *R. v. Kew*, 12 Cox C. C. 355, 1872, Byles, J., said he would reserve the question if required ; but the case never came before the Court for Crown Cases Reserved. It was subsequently held by Denman, J., in *R. v. Desvignes* (*Law Times*, vol. lxx. p. 76), that the current of authority was that in criminal cases contributory negligence is no defence. But this case, also, never came before the judges as a body ; and it is not to be supposed that it will be ultimately held that the mere fact that there was some antecedent negligence on the defendant's part will make him liable for manslaughter when the death was brought about by the reckless misconduct of the deceased.

¹ *Supra*, §§ 157-9. *Com. v. Boston & Me. R. R.*, 129 Mass. 800, 1881 ; *infra*, § 350 ; *Parsons v. State*, 21 Ala.

301, 1851 ; *Brown v. State*, 38 Tex. 482, 1873 ; *Williams v. State*, 2 Tex. App. 271, 1877 ; *State v. Smith*, 10 Nev. 106, 1875.

² *Supra*, § 157. See *infra*, §§ 340, 363 ; *R. v. Rew*, J. Kel. 26 ; *McAllister v. State*, 17 Ala. 434, 1849. In *R. v. Holland*, 2 M. & R. 357, 1843, the deceased had been severely cut with an iron instrument across one of his fingers, and had refused to have it amputated, and at the end of a fortnight lock-jaw came on, and the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon expressed the opinion that early amputation would probably have saved his life. Maule, J., held that a party inflicting a wound which ultimately becomes the cause of death, is guilty of murder, though life might have been preserved if the deceased had not refused relief.

³ *Supra*, § 157.

⁴ *Supra*, § 157 ; *Com. v. Fox*, 7 Gray, 585, 1856 ; *Bowles v. State*, 58 Ala. 335, 1877.

⁵ Whart. on Neg. §§ 300 *et seq.*

riage) the injury was primarily due to the deceased having flung himself recklessly in the defendant's path, such contributory negligence is a defence.

§ 164. At the same time it is an equally familiar rule that a party cannot shield himself by setting up as a defence contributory negligence, the result of fright or paralysis, caused by his own misconduct. The same rule applies *mutatis mutandis* to neglect by physicians.¹ He, therefore, who causes another, under influence of fright, to run into a river, from which drowning ensues, is responsible for the death.² He who by like processes causes another to leave the house and to die in the frozen fields on a stormy night is in like manner responsible.³ He who causes another, under the effect of fright, to open his safe, cannot set up this submission as a defence.⁴ And the same distinction applies to the numerous cases already cited, in which a party, under fright, submits to spoliation or assault.⁵

On the other hand, it may be argued that an indictment does not lie against A. for killing B. when the death was the result of fright produced by mere threats, there being no such physical lesion as may be implied from any subsequent catastrophe or concussion induced by the fright. And so, although A. may die of a broken heart caused by the unkindness of B., B. is not on this ground indictable

¹ Bowles v. State, 58 Ala. 335, 1877. L. 5. § 7. D. ad Leg. Aquil. And if a

² See *infra*, § 521; R. v. Pitts, C. & M. 284, 1841; R. v. Evans, 1 Russ. Cr. 651, 1812; R. v. Wager, cited Steph. Dig. C. L. art. 241 (5th ed.), 1864. and hence is frozen to death, the assailant is as liable for his death

³ Nixon v. People, 2 Scam. 267, 1840. See, also, R. v. Williamson, 1 Cox C. C. 97, 1846. Where the defendant chased with an axe a boy, who, in his fright, ran unconsciously against a cask of wine and broke it, the defendant was held liable for the injury thus incidentally produced. Vandenburg v. Truax, 4 Denio, 464, 1847. So a person thrown from a bridge into a rapid river may be able to swim, and if in full possession of his faculties to save himself; but if in the confusion and terror of the moment he loses his self-command and is drowned, the person throwing him in the water is liable. through freezing as he would be if the deceased had been tied to a stake in the open air in such a way that escape was impossible. L. 14. § 1. D. 19. 5. See R. v. Martin, 11 Cox C. C. 136, 1869. The same rule was held to apply where a seaman, forced aloft when unfit for the work, falls from the mast and is drowned. U. S. v. Freeman, 4 Mason C. C. 505, 1825. As to indictment, see *infra*, § 521.

⁴ U. S. v. Jones, 3 Wash. C. C. 209, 1821.

⁵ See *supra*, §§ 146-50; and see State v. Hardie, 47 Iowa, 647, 1877.

for killing A. Undoubtedly there is moral guilt in such cases proportionate to the degree of malice. But there is no technical guilt which the law can punish, for the reason that the law has no test to measure the relation of cause and effect in matters purely psychological. How much of the terror or "broken-heartedness," for instance, was due to the patient's own folly or wrong? What legal proof is possible of such terror or "broken-heartedness? How can the death be, beyond reasonable doubt, traced to either? Hence it is that the law, when the case consists of these bald elements, declines to interpose.¹

¹ Suppose A., when on a coach, jumps off to avoid danger, acting unwisely in so doing, yet from confusion of mind produced by B.'s reckless driving? Or suppose that A., on a railway track, loses his presence of mind through the unexpected and irregular course of a train which is negligently driven; and suppose that, when thus confused, he unwisely but unintentionally runs into instead of out of danger? Is A., in either of these cases, the juridical cause of an injury thus produced, or is B., the negligent driver or engineer, the cause? Certainly the latter; for A., on the assumption that he is at the time incapable of judging, is not a responsible independent agent, capable of breaking the causal connection between the defendant's negligence and the injury. It was B.'s negligence that put A. in this dangerous position, and thus forced him to make a choice between perilous alternatives when he was in a condition incapable of cool judgment; and B. is liable for the consequences. Whart. on Neg. § 377; *R. v. Longbottom*, 3 Cox C. C. 439, 1849; *Buel v. N. Y. Cent. R. R.*, 31 N. Y. 314, 1865; *Frink v. Potter*, 17 Ill. 406, 1856; *Sears v. Dennis*, 105 Mass. 310, 1870; *Stevens v. Boxford*, 10 Allen, 25, 1865; *Babson v. Rockport*, 101 Mass. 93, 1869; *Indianapolis R. v. Carr*, 35 Ind. 510, 1871; Green-

leaf *v. Illinois Cent. R. R.*, 29 Iowa, 14, 1869; *Snow v. Housatonic Co.*, 8 Allen, 441, 1863. See, to same effect, *R. v. Evans*, O. B. Sept. 1812—MS. Bayley, J.; 1 Russ. on Cr. 651; *R. v. Hickman*, 5 C. & P. 151, 1831; *R. v. Pitts*, C. & M. 284, 1842, cited in Whart. on Hom. § 374.

So where the defendant carelessly overloaded a ferry-boat, and where the passengers, in a sudden fright, rushed to one side and upset the boat, in consequence of which A. was drowned, it was held that the carelessness of A. and the other passengers was no defence to an indictment for the manslaughter of A. *R. v. Williamson*, 1 Cox C. C. 97, 1846.

Yet we must remember that if the deceased, in encountering the danger, acted, not convulsively, but deliberately, and if, at the same time, the danger was not a natural and probable consequence of the defendant's misconduct, then the causal connection is broken. This view has been properly held to govern where a woman, not convulsively, or in fear, or through force, but of her own will, leaves her husband's house at night and is frozen to death; *State v. Preslar*, 3 Jones Law, (N. C.) 421, 1856; where a traveller voluntarily or negligently, and not in fear caused by the defendant, collides with a railway car; see Whart. on Neg. § 382; and where A.,

§ 165. If I intrude negligently in a place where a dangerous but lawful business is conducted, I must bear the consequences if I am injured by machinery there placed. On the other hand, even against trespassers, no one can with impunity put in operation dangerous agencies without exerting in the control of such agencies the care usual to good business men under the circumstances. Thus, if A. is negligently on a road, B. cannot excuse himself for running A. down if by due diligence the collision could have been avoided by B.¹ So, generally, it is no defence that the deceased or his companions by their own negligence contributed to the result, if that result was precipitated by the malicious or reckless misconduct of the defendant.²

Prior negligence of party injured no defence if defendant by proper caution could have avoided injury.

Contributory negligence, it is to be added, is to be determined from the stand-point of the party to whom it is imputed.³

§ 166. A party who places poison in such a position that in the ordinary course of things it is likely to be unconsciously and non-negligently taken by passers-by is liable for the consequences.⁴ But he is not responsible for the acts of an assassin, who, independently of him, takes and administers the poison to the deceased; for here again, though the preparing of the poison is a condition of the killing, it is not its juridical cause.⁵

Persons leaving dangerous agencies where they are likely to be unconsciously meddled with are responsible for the consequences.

The master of a house who leaves powder unlawfully and carelessly on his premises is not liable for its negligent misuse by his servants, who are capable of judging as to the danger,⁶ though it would be otherwise if the powder were

on board of a ship, to get rid of B., with whom he was disputing about the payment of money, pushed away B.'s boat with his foot, and B., reaching out to lay hold of a barge to prevent his boat from drifting away, overbalanced himself and was drowned, A. was acquitted. *R. v. Waters*, 6 C. & P. 328, 1834.

¹ *R. v. Longbottom*, 3 Cox C. C. 439, 1849; *R. v. Swindall*, 2 C. & K. 230, 1846. See *R. v. Walker*, 1 C. & P. 320, 1824; Whart. on Neg. § 355.

² See *R. v. Kew*, 12 Cox C. C. 355, 1872; 1 Green's C. R. 95; *R. v. Longbottom*, 3 Cox C. C. 439, 1849; *R. v.*

Swindall, 2 C. & K. 230, 1846; *R. v. Walker*, 1 C. & P. 320, 1824; *R. v. Haines*, 2 C. & K. 368, 1847; *R. v. Murton*, 3 F. & F. 492.

³ *Infra*, § 488.

⁴ *Supra*, §§ 133, 161; *infra*, §§ 206, 226, 346. See *R. v. Cheverton*, 2 F. & F. 833, 1840; *R. v. Michael*, 9 C. & P. 356, 1861; 2 M. C. C. 120; *R. v. Chamberlain*, 10 Cox C. C. 486, 1866; *Harvey v. State*, 40 Ind. 516, 1871.

⁵ See *Com. v. Campbell*, 7 Allen, 541, 1863; *State v. Scates*, 5 Jones, (N. C.) 420, 1857. *Supra*, § 160.

⁶ *R. v. Bennett*, Bell C. C. 1; 8 Cox C. C. 74, 1858.

left in a place frequented by children, who ignorantly meddled with it, and thereby produce damage;¹ or if it were left in such a disguised state that a person of ordinary intelligence would not be able to detect its character;² or if a dangerous substance were given to a party compulsorily.³

¹ Whart. on Neg. § 161.

² See 1 Hale, 431. *Infra*, § 346.

³ Blackburn v. State, 23 Ohio St. 146, 1872. See *infra*, §§ 216, 226.

"If B.," as is argued in another work (Whart. on Neg. § 91), "negligently sells poison, under the guise of a beneficial drug, to A., he is liable for the injury done to A.; or to those to whom A. innocently gives the poison. But suppose that A. has ground to suspect that the drug is poisonous, and then, instead of testing it, sells it or gives it to C.? Now, in such a case there can be no question that A. is liable for the damage caused by his negligence. But if A. is unconscious of the mistake, and acts merely as the unconscious agent of B., then there is no causal connection between A.'s agency and the injury, and B. is directly liable to C. Norton v. Sewall, 106 Mass. 143, 1870. Beyond this it is not safe to go. It is true that in a New York case, Thomas v. Winchester, 2 Selden, (6 N. Y.) 397, 1852, the liability was pushed still further; but wherever an intelligent third party comes in, and negligently passes the poison to another, this breaks the causal connection, and makes such intervening negligence the juridical cause."

A more difficult question arises when poison intended to kill A. is voluntarily taken by B., who has notice that the drink is suspected to be poisonous. Agnes Gore, in an old case (9 Co. 11; 1 Hale P. C. 50; Plowd. Com. 574), was proved to have mixed poison in an electuary, of which her husband and her father and another took part

and fell sick. Martin, the apothecary who had made the electuary, on being questioned about it, to clear himself took part of it and died. On this evidence a question arose whether Agnes Gore had committed murder; and the doubt was because Martin, of his own will, without invitation or procurement of any, had not only eaten of the electuary, but had, by stirring it, so incorporated the poison with the electuary that it was the occasion of his death. The judges resolved that the prisoner was guilty of the murder of Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband with the event which thence ensued: *Quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt*; and the stirring of the electuary by Martin, without putting in the poison by Agnes, could not have been the cause of his death. If Martin's trying the electuary was a natural and probable sequence of the prisoner's conduct, then she could properly have been convicted, though certainly not for the reason given by the judges. It makes no matter, however, whether this sequence be long or short. Poison, for instance, is introduced into a reservoir of water. The reservoir freezes, and remains frozen during winter. In the spring the ice melts, and the water flows through a series of channels until it is drunk by a child, who is killed. Here there is a continuous natural sequence which, however long, presents an unbroken chain. See, also, *infra*, § 346.

§ 167. The old English lawyers went great lengths in assigning responsibility to magical, or as it might now be called spiritualistic, causation.¹ Even Lord Hale gave his high authority to the position that a witch can produce death by incantations, and if so, is to be convicted of murder. But in 1750 the statutes against witchcraft were swept away, and in 1765 Blackstone, in his Commentaries, rejects the hypothesis as absurd. At the beginning of the present century we have the current opinion, expressed in the following passage in Mr. Edward Livingston's Penal Code:

Causation
not neces-
sarily
physical.

"It [homicide] must be operated by some act; therefore, death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce, and do produce, some act which is the immediate cause of death, it is homicide. *A blind man or a stranger in the dark directed by words only to a precipice where he falls and is killed*; a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule." In this line may be cited a Massachu-

Suppose A., in exercise of a moral (as distinguished from physical) power over B., constrains B. to take poison, whereof B. dies; is A. responsible as principal in B.'s murder? If B.'s free agency is at the time extinguished, either by terror or by mental disease, then in such case A. is principal in the first degree. *Blackburn v. State*, 23 Ohio St. 146, 1872. If B.'s free agency is not extinguished, but he voluntarily commits suicide, then A., under the English common law, is indictable as principal in the second degree to B.'s self-murder. See *infra*, § 216.

¹ See an article on spiritualism and jurisprudence in Lippincott's Magazine for 1875, p. 423.

Bacon, in the *Preparation for the Union of Laws*, or, as we should call it, Draft of a Proposed Code, introduces the following clauses:

"Where a man doth use or practise any manner of witchcraft, whereby any person shall be killed, wasted, or lamed in his body, it is felony.

"Where a man practiseth any witchcraft to discover treasure hid, or to discover stolen goods, or to provoke unlawful love, or to impair or hurt any man's cattle or goods, the second time, having been once before convicted of like offence, it is felony."

Coke's authority is to the same purport. Indeed, by statute 33 Hen. VIII. c. 8, all witchcraft or sorcery was made felony; and by 1 Jac. I. c. 12, this was extended so as to include the "hurting any person" by the "infernal arts" of "witchcraft, sorcery, charm, or enchantment." Under this statute occurred the trial of Mary Smith, in 1616, for witchcraft. She was convicted and executed, confessing her guilt. The evidence against her was chiefly to the effect that by some occult power of will she brought sickness and death upon certain persons who had incurred her enmity. This was held murder.

That "love powder" is not to be regarded as a cause, see *State v. Trice*, 88 N. C. 627, 1883, cited *infra*, § 1340.

setts case,¹ in which it was held that a person who shoots a gun at a wild fowl, with knowledge and warning that the report will affect injuriously the health of a sick person in the neighborhood, and such effect is produced by the discharge, is guilty of an indictable offence.² And in New York it has been held that a death from fright produced by the defendant standing over the deceased with a deadly weapon, which he threatened to use, is imputable to the defendant as murder.³

¹ *Com. v. Wing*, 9 Pick. 1, 1829.

² In this case Parker, C. J., said: "Now the facts proved in this case, namely, the defendant's previous knowledge that the woman was so affected by the report of a gun as to be thrown into fits, the knowledge he had that she was in hearing, the earnest request made to him not to discharge his gun, show such a disregard to the safety or even the life of the afflicted party, as makes the firing a wanton and deliberate act of mischief." Compare *Com. v. Taylor*, 5 Binn. 277, 1812.

Lord Macaulay, in his Report on the Indian Code, goes further:

"There is, undoubtedly, a great difference," he says, "between acts which cause death immediately and acts which cause death remotely, between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effect of the evidence in a particular case, not by the legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person

who did it as likely to cause death.

But if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide.

"Mr. Livingston, we observe, excepts from the definition of homicide cases in which death is produced by the effect of words on the imagination or the passions. The reasoning of that distinguished jurist has by no means convinced us that the distinction which he makes is well founded. Indeed, there are few parts of his Code which appear to us to have been less happily executed than this. His words are these: 'The destruction must be by the act of another; therefore, self-destruction is excluded from the definition. It must be operated by some act; therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce, and do produce, some act which is the immediate cause of death, it is homicide. A blind man or a stranger in the dark directed by words only to a precipice where he falls and is killed; a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule.'

³ *Cox v. People*, 80 N. Y. 600, 1880.

§ 168. It is not necessary, to constitute negligence, that the specific damage should have been foreseen as probable. If it were, and if the offending party resorted to the inculpatory act to produce the particular end, then the case is one of malice, not of negligence.¹ On the other hand, it is of the essence of negligence that the injury caused by it should not have been foreseen as likely to arise in the immediate

To negligent causation not necessary that damage should have been foreseen.

“This appears to us altogether incoherent. A. verbally directs Z. to swallow a poisonous drug; Z. swallows it, and dies; and this, says Mr. Livingston, is homicide in A. It certainly ought to be so considered. But how, on Mr. Livingston’s principle, it can be so considered we do not understand. ‘Homicide,’ he says, ‘must be operated by an act.’ Where, then, is the act in this case? Is it the speaking of A.? Clearly not, for Mr. Livingston lays down the doctrine that speaking is not an act. Is it the swallowing by Z.? Clearly not, for the destruction of life, according to Mr. Livingston, is not homicide unless it be by the act of another, and this swallowing is an act performed by Z. himself.

“The reasonable course, in our opinion, is to consider speaking as an act, and to treat A. as guilty of voluntary culpable homicide if by speaking he has voluntarily caused Z.’s death, whether his words operated circuitously by inducing Z. to swallow poison, or directly by throwing Z. into convulsions.”

Sir James F. Stephen, in his testimony in 1874, before the Homicide Committee of the English House of Commons, proposed the following additional illustrations:

“Suppose a man wants to murder his wife, and suppose that she is ill, and the doctor says to him, ‘She is in a very critical state; she has gone to sleep, and if she is suddenly disturbed

she will die, and you must keep her quiet.’ Suppose he is overheard repeating this to another man, and saying, ‘I want to murder her, and I will go and make all the noise I possibly can for the purpose of killing her.’ You may imagine the evidence to be quite conclusive on that point: he goes into the room, makes a noise, and wakes her up with a sudden start, and frightens her, and she does die according to his wish. It seems to me that that act is as much murder as if he had cut her throat. Or suppose a case like this: a man has got aneurism of the heart, and his heir, knowing that, and knowing that any sudden shock is likely to kill him, suddenly goes and shouts in his ear, and does so with the intent to kill him, and does so kill him. It seems to me that if that man is not punished it is a very great scandal, for the act is just as bad as if he had killed him in any other manner. The fact is, that the objection to treating such cases as either murder or manslaughter arises from this, that in a general way, in such a case as unkindness, or many other cases of the same kind, you could never prove that the man intended either to kill or cause harm, or that it was common knowledge that there would be harm or death caused; and therefore in all those cases in which you would not wish to punish, the person would escape on account of the difficulty of proof. The only cases in

¹ See Whart. on Neg. § 74.

case. The consequences of negligence are almost invariably surprises. A man may be negligent in a particular matter a thousand

which you would ever want to punish would be cases in which the difficulty of proof, by some such means as I have suggested, would be got over." See, however, *Fairlee v. People*, 11 Ill. 1, 1849.

"With this we may consider the remarks of Judge Erskine (a son of Lord Chancellor Erskine) some years since, when charging a jury in a homicide trial: 'A man may throw himself into a river under such circumstances as render it not a voluntary act—by reason of force applied either to the body or the mind. It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take.' *R. v. Pitts*, C. & M. 284, 1842. But the last qualification cannot be sustained. No one can doubt that it would be murder to entice an insane man over a precipice, and thus to kill him. Indeed, as we shall see, what is done through an insane agent is regarded as done directly by the principal."

The doctrine of nervous causation was advanced to a questionable extreme in an English case, tried before Denman, J., in the Northern Circuit, in February, 1874. *R. v. Towers*, 12 Cox C. C. 530, 1874. The evidence was that T., the defendant, unlawfully and violently assaulted G., a young girl, having in her arms H., the deceased, a child four months and a half old. The child, which was previously very healthy, was greatly alarmed at the defendant's violence, accompanied

as it was by the screams of G., its nurse; and it became "black in the face, and ever since that day it had convulsions, and was ailing generally from a shock to the nervous system." It died thirty-two days after the assault. Medical testimony was adduced to show that the death was traceable to the sudden fright. Denman, J., said that he "should leave it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be of the nature of accident. The case was different from other cases of manslaughter, for here the child was not a rational agent, and it was so connected with the girl that an injury to the girl became almost in itself an injury to the child." In charging the jury, he said: "Mere intimidation, causing a person to die from fright, by working on his fancy, was not murder. But there were cases in which intimidations have been held to be murder. If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe his life was in danger, and he were then to back away from them and tumble down a precipice to avoid them, then murder would be committed. Then, did or did not this principle of law apply to the case of such tender years as the child in question? For the purposes of this case he would assume it did not; for the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question which would be for them to decide, whether the death was directly the result of the prisoner's unlawful act—whether they thought that the prisoner might

times without mischief; yet, though the chances of mischief is only one to a thousand, we would rightly hold that the mischief, when it

be held to be the actual cause of the child's death, or whether they were left in doubt upon that under all the circumstances of the case. . . . *If the man's act brought on the convulsions, or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter.*" The verdict was not guilty, so that the case was not subjected to further judicial consideration. But in harmony with the views heretofore expressed on this topic, I must come to a conclusion different from that expressed by Judge Denman on both the points raised by him.

1. I can see no difference between an infant and an adult so far as concerns physical injury self-inflicted in consequence of fright. If the child, frightened by the attack, convulsively jumped from the nurse's arms and was killed, then the defendant was as much responsible for the child's death as he would have been for the death of the nurse, if, in the terror of the shock, she had jumped convulsively from a window, and had been killed. In either case the question would be whether the deceased's death was a natural consequence of the defendant's violence. And the inference that it was would be stronger in the child's case than in the nurse's.

2. If, however, the child's death was produced by merely nervous causes—*e. g.*, fright, operating at a period long subsequent to the shock, then there should have been a verdict of not guilty, for the reason that the law has no means of determining the causal connection between a shock purely nervous, and physical death. It would have been otherwise, however, had a blow struck at the nurse been communicated through the nurse's body to

the child's, as a blow to the nearest in a series of attached balls communicates itself to the furthest. Then, if this blow threw the child into convulsions, causing its death, the case was one of manslaughter.

3. If the convulsions were caused by the nurse's screams, then, if these screams were not the natural results of the defendant's violence, the causal connection between that violence and the death, even supposing such connection existed, was broken.

In *Kirland v. State*, 43 Ind. 146, 1875, it was held that the beating by the defendant of a horse which the prosecutor was driving was not assault and battery on the prosecutor. But see *infra*, §§ 609, 615.

On the topic in the text, Sir J. F. Stephen thus writes, Dig. C. L. art. 242, 5th ed.: "Lord Hale's reason is that 'secret things belong to God; and hence it was that before 1 Jas. I. c. 12, witchcraft or fascination was not felony, because it wanted a trial' (*i. e.*, I suppose, because of the difficulty of proof). I suspect that the fear of encouraging prosecutions for witchcraft was the real reason of this rule. Dr. Wharton rationalizes the rule thus: 'Death from nervous causes does not involve penal consequences.' This appears to me to substitute an arbitrary *quasi*-scientific rule for a bad rule founded on ignorance now dispelled. Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him; might not this be murder? Suppose a man kills a sick man, intentionally, by making a loud noise which wakes him when sleep gives him a chance of life; or suppose, knowing that a man has aneurism of the heart, his heir rushes into his

occurs, is imputable to the negligence. Hence it has been properly held, that it is no defence that a particular injurious consequence is "improbable," and "not to be reasonably expected," if it really appear that it naturally followed from the negligence under examination.¹ The term "reasonably to be expected" is to be treated, therefore, as convertible with "likely in the long run to ensue."

As improbability does not divest responsibility, responsibility is not always imposed by probability. The miner, the manufacturer, and the merchant may regard it not only as possible but probable that their staples may be used for guilty purposes, but neither miner, manufacturer, nor merchant becomes thereby penally responsible. Even a high probability of injury does not in all cases confer penal responsibility. A sick man, for instance, is suffering from a disease which will cause his death in a few days unless he submits to an operation, which, if it does not cure, will cause death in a few hours. The patient is incapable of expressing his will as to the operation. The operation is undertaken by a surgeon, skilfully, but unsuccessfully. The patient dies, not of the disease, but of the operation. The surgeon foresaw that it was highly probable that the operation would not succeed. But he is nevertheless to be regarded as irresponsible when we assume that his conduct was in conformity with the rules of science and the maxims of prudent practice. If bold operations are never to be attempted, then the advance of surgery is impossible; and it is reasonable, and in harmony with sound rules of life, that a few days of unconsciousness, or of agonizing pain, should be risked for even a faint probability of recovery.

room and roars in his ear, 'Your wife is dead!' intending to kill and killing him; why are not these acts murder? They are no more 'secret things belonging to God' than the operation of arsenic. As to the fear that by admitting that such acts are murder, people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct, gradually 'breaking a man's heart,' could never be the 'direct or immediate' cause of death. If it was, and it was intended to have that effect, why should it not be mur-

der? In *R. v. Towers*, 12 Cox C. C. 530, 1874, a man was convicted before Denman, J., of manslaughter, for frightening a child to death. See Whart. on Hom. § 372, on this case.

"Lord Hale doubts whether voluntarily and maliciously infecting a person of the plague, and so causing his death, would be murder, i. 432. It is hard to see why. He says that 'infection is God's arrow.' A different view was taken in the analogous case of *R. v. Greenwood*, 1 Russ. Cr. 673; 7 Cox C. O. 404, 1857."

¹ *Supra*, § 108.

§ 169. Responsibility (*imputatio*) ceases where *casus*, or, as we term it, the act of God, intervenes. If in the act producing the damage there is nothing to be imputed to the defendant, there is nothing with which he is chargeable. “Ac ne is quidem hac lege tenetur, qui casu occidit (the action being, in this case, for damages under the Aquilian law), si modo culpa ejus nulla inveniatur.”¹ “In hac actione, quae ex hoc capitulo oritur, dolus et culpa punitur. Ideoque si quis in stipulam suam, vel spinam, comburendae ejus causa, ignem immiserit, et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit *requiramus num imperitia ejus aut negligentia id accidit*. Nam si die ventoso id fecit, culpa reus est; nam et qui occasionem praestat, damnum fecisse videtur. In eodem crimine est, et qui non observavit, ne ignis longius est procederit. *At si omnia quae oportuit observavit, vel subita vis venti longius ignem produxit caret culpa.*”² But *casus* is no defence if it was provoked by the defendant. He who exposes a helpless person in a cold night when a storm intervenes cannot set up as a defence that it was a storm that did the hurt.³ It is otherwise, however, when the injury was not a probable or natural consequence of the defendant’s act. Hence, where A. knocked B. down, and B., when down, received a mortal blow from a kick from a horse jumping on him, it was held that A. was not indictable for killing B.⁴

¹ L. 39. § 3. D. de Leg. Aq.² *Supra*, § 166.³ L. 39. § 3. D. de Leg. Aq.; Paulus, lib. 22. ad. edict. See fully Whart. on Neg. § 116.⁴ *People v. Rockwell*, 39 Mich. 503,

CHAPTER VIII.

ATTEMPTS.

I. OFFENCE GENERALLY.

An attempt is an unfinished crime and is indictable at common law, § 173.

Mere words do not constitute an attempt, § 174.

Not an offence to attempt to commit a non-indictable offence: attempts to commit suicide when indictable, § 175.

Attempt at negligence not indictable: intent is necessary to offence, § 176.

And so of attempts at police offences, § 177.

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I. OFFENCE GENERALLY.

§ 173. AN attempt is an intended apparent unfinished crime. It must be intended, since it is of its nature that it should be com-

mitted in order to effect a specific criminal result. It must be apparent, since if it be obviously not likely to effect the result at which it aims (*e. g.*, where a popgun is levelled at a ship, or a witch is employed to use enchantments), it is not indictable.¹ It must be unfinished, as otherwise the indictment would be for the complete crime, but there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attemptor.² On the other hand, there can be no attempt at negligence, because negligence precludes the idea of intention, which is essential to attempt.³

By the English common law it is a misdemeanor to attempt to commit either a felony,⁴ or a malicious misdemeanor, whether common law or statutory.⁵ Hence it is an indictable attempt falsely to accuse another of crime, if any step be taken which, in the usual

¹ The word "apparent," it should be observed, has been the subject of much controversy. On the one side it is maintained that unless the attempt is one capable of success it is not indictable; and by those who urge this view the word "apparent," which covers cases where the means are apparently fit but are really unfit, is rejected. On the other side it is insisted that as we can never predicate infallible success of any attempt, the most we can say in any case is that the attempt is apparent, and that to say that merely apparent attempts should not be indictable would be to say that there should be no indictable attempts. See *infra*, §§ 182 *et seq.*

² *Infra*, § 181. *Sipple v. State*, 17 Vroom, 197.

³ *R. v. Boyce*, 1 Mood. C. C. 29, 1825; *State v. Keyes*, 8 Vt. 57, 1836; *Com. v. Martin*, 17 Mass. 359, 1820; *McKay v. State*, 44 Tex. 43, 1875; *infra*, § 176.

⁴ 1 Hawk. P. C. 55; *R. v. Higgins*, 2 East R. 5, 1801; *R. v. Kinnersley*, 1 Strange, 196, 1718; *Com. v. Barlow*, 4 Mass. 439, 1808; *State v. Danforth*, 3

Conn. 112, 1819; *Hackett v. Com.*, 15 Pa. 95, 1850; *State v. Boyden*, 13 Ired. 505, 1853; *State v. Jordan*, 75 N. C. 27, 1876; *Griffin v. State*, 26 Ga. 493, 1859. In Wisconsin it was held that conviction could not be had for an attempt to commit adultery. *State v. Goodrich*, 84 Wis. 359, 1893.

⁵ *R. v. Higgins*, 2 East R. 5, 1801; *R. v. Phillips*, 6 East R. 464, 1805; *R. v. Chapman*, 2 C. & K. 846, 1849; 1 Den. C. C. 432; *R. v. Williams*, 1 Den. C. C. 39, 1844; *R. v. Butler*, 6 C. & P. 368, 1834; *R. v. Roderick*, 7 C. & P. 795, 1837; *R. v. Goff*, 9 Up. Can. C. P. 438; *R. v. Roberts*, Dears. 539, 1855; 33 Eng. Law & Eq. 553; *State v. Keyes*, 8 Vt. 57, 1836; *Com. v. Kingsbury*, 5 Mass. 106, 1809; *State v. Murray*, 15 Me. 100, 1837; *Com. v. Harrington*, 3 Pick. 26, 1824; *Demarest v. Haring*, 6 Cow. 76, 1826; *Com. v. Smith*, 54 Pa. 209, 1867; *State v. Maner*, 2 Hill, (S. C.) 453, 1834; *Berdeaux v. Davis*, 58 Ala. 611, 1878; *Ross v. Com.*, 2 B. Mon. 417, 1841; *Nicholson v. State*, 9 Baxt. 258, 1878; *State v. Montgomery*, 109 Mo. 645, 1892.

course of events, would lead to a conviction, even though the accusation take not the form of libel. In this view, the fabrication of mechanical inculpatory evidence is a substantive misdemeanor,¹ and *a fortiori*, the attempt to bribe a witness.² But to make an attempt indictable it must be to commit a consummated not an inchoate offence. Hence no indictment lies for an attempt to commit an attempt or assault.³

§ 174. Mere words, unless they are libellous, seditious, obscene, or provocative of breaches of the public peace, are not the subject of penal judicial action. Even when they express illegal purposes, they are often merely speculative; are uttered often by weak men as braggadocio; and always belong to a domain which criminal courts cannot invade without peril to individual freedom, and to the just and liberal progress of society. This liberty to express thought is recognized in all systems of civilized jurisprudence. “*Cogitationis poenam nemo patitur*,” was a maxim of the Roman law,⁴ which is now accepted as part of the judicial system of all Christendom, and is adopted in the codes of the most arbitrary nations of Europe.⁵ And by the Roman common law, even *talking* about a criminal intent, and thus giving to it public expression, does not constitute, unless there be treason, an attempt.⁶

¹ *R. v. Simmons*, 1 Wils. 329.

² *Infra*, § 1332.

According to Sir J. F. Stephen (Dig. art. 50, 5th ed.), “an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.” This definition has two defects. In the first place, it does not include attempts with unsuitable and yet apparently effective means, which would not, even if uninterrupted, result in a consummated crime. *Infra*, § 182. In the second place, it includes attempts voluntarily abandoned.

³ *Brown v. State*, 7 Tex. App. 569, 1880; *R. v. King*, 14 Cox C. C. 434, 1879. See *Taylor v. State*, 50 Ga. 79, 1873; *infra*, § 611.

⁴ L. 18. D. de Poenis, xlviii. 19.

⁵ See this shown in Holzendorff's Ency. “Versuch.”

⁶ Very curious citations on this point are given by Geib, Lehrbuch, etc., § 99, among which are the following: Romagnosi *Genesi del diritto penale*, pp. 221, 222. Tentare un delitto, non è soltanto pensarlo, o deliberarlo; o vero dire di averlo pensato, o deliberato; ma bensì egli è porre in opera tutto quello che ne può ottenere l'esecuzione. . . . Dunque il palesare il pensiero e la deliberazione di un delitto, cui però si è desistito di mandare ad esecuzione, ovvero la jattanza di volerlo effettuare, senza però che s'intraprenda nulla in fatto colle azioni fisiche ed esterne, sono cose che non si possono veramente riguardare come attentati, nè si potrebbero punire come tali. Filangieri *Scienza della legislazione*, iii. 37. (T. iii. pp. 326,

§ 175. Where a statute makes indictable attempts to commit indictable offences, this has been held not to include an attempt to commit suicide, consummated suicide being beyond the jurisdiction of the courts.¹ But at common law an attempt to commit suicide is indictable.²

Not an offence to attempt to commit a non-indictable offence. Attempts at suicide, when indictable.

Intent necessary.

§ 176. To constitute an attempt, it is essential that there should be an unlawful coincident intention to do the thing attempted, which intention must be logically inferrible from the facts.³ On the other hand, as we have seen,⁴ there can be no indictment for an attempt at negligence, for, from the nature of things, the attempt to neglect a duty is in itself, if successful, a malicious offence, and ceases to be a neglect. Hence comes the just principle of the Roman law, that where there is no *dolus* there can be no attempt.⁵

There is, however, no arbitrary measure of intent to be inferred from any particular act. Thus an attempted killing may be an attempt to commit murder or an attempt to commit manslaughter. The attempt to kill in hot blood, but not in self-defence, is an attempt to commit manslaughter; to attempt to kill coolly on an old grudge is an attempt to commit murder.⁶ An attempt to kill an officer, also, knowing him to be such, may be an attempt to commit murder; an attempt to kill him, not knowing who he is, may be only an attempt to commit manslaughter.⁷

Intention formed subsequent to the attempt will not be enough, as where a party having in his possession indecent prints (not pro-

327.) Carmignani Teoria delle leggi ii. pp. 302-304. Boehmer, Meditt. in C. C. C. art. 178, § 3. Wintgens Diss. cit. pp. 19-24, 81. Lelièvre Comm. cit. pp. 7-13, 26-28. The same view is expressed by Willes, J., in *Mulcahy v. R. L. R.*, 3 H. L. 306, 1868.

¹ *Com. v. Dennis*, 105 Mass. 162, 1870. *Infra*, § 216.

² *Infra*, § 454; *R. v. Doody*, 6 Cox C. C. 463, 1854; *R. v. Burgess, L. & C.* 258, 1862; 9 Cox C. C. 247. *Approved in Com. v. Mink*, 123 Mass. 422, 1877.

³ See *Infra*, § 196. *R. v. Donovan*, 4 Cox C. C. 399, 1850; *R. v. Ryan*, 2 M. & R. 213, 1843; *R. v. Lallement*, 6 Cox C. C. 204, 1854; *R. v. Cheeseman, L. & C.* 140, 1862; *Com. v. Har-*

ney, 10 Metc. 422, 1845; *State v. Davis*, 2 Ired. 153, 1841; *Griffin v. State*, 26 Ga. 493, 1859; *Jeff v. State*, 39 Miss. 593, 1867; *Weaver v. People*, 132 Ill. 536, 1890; *State v. Vosburg*, 82 Wis. 168, 1892; and cases cited *infra*, §§ 182, 190, 196.

⁴ See *supra*, § 176, for cases.

⁵ See *supra*, §§ 125-129.

⁶ *Infra*, §§ 455 *et seq.*

⁷ *Infra*, §§ 413 *et seq.* See, generally, *State v. Nichols*, 8 Conn. 496, 1830; *People v. Shaw*, 1 Park. C. R. 327, 1854; *State v. White*, 45 Iowa, 325, 1877; *Conner v. State*, 59 Iowa, 357, 1882; *Bonfanti v. State*, 2 Minn. 132, 1858; *Meredith v. State*, 60 Ala. 441, 1879; and cases cited *infra*, § 641.

cured for publication) takes it into his head to publish them, but does not actually publish.¹

§ 177. It has been further held that an attempt to commit a mere police offence, involving no malice, is not indictable.² And this principle covers the attempting to sell liquor in illegal measures.³ When an attempt is made maliciously to violate the law in this respect, and when the attempt is put into such a shape as, by the natural course of events, to produce a violation of such law, then the attempt is indictable. But when between the attempt and the execution is interposed the volition of both buyer and seller, then, by stress of the definition just given, an indictable attempt is not made out.

And so as to attempts at police offences.

§ 178. The distinction between *conditions* and *causes* has been already largely discussed;⁴ but a recurrence to the principles heretofore expressed is essential to the elucidation of this branch of jurisprudence. To enable a gunshot wound to be inflicted, an almost innumerable series of conditions is necessary. It is necessary that the gun should

The attempt must have causal relation with act.

¹ Jervis, C. J., Robert's Case, Dears. C. C. 553, 1854.

It is otherwise, however, so is it argued, with the *aberratio ictus*, in which, through some extrinsic agency, the blow falls upon a person other than the one intended. A. shoots at B., and C. passes in the line of the shot and is wounded. Here the will and the act do not coincide. The offence, it is argued, is an attempt as to B., and a negligent wounding as to C. *Supra*, §§ 120, 128.

While there can be no such thing as a purely negligent attempt, since an attempt cannot exist without design, it is argued that there may be a concurrence in a single act of a negligent offence and of an attempt. A common illustration offered of this is where A. strikes B., conceiving B. to be C. Here it is said the offence is an attempt as to C., and negligence as to B. But to this it is answered that at the moment of the injury A.'s intention to hurt was actually directed against B., and that if we allow his mistake as to B.'s person to change the offence from malicious to negligent, we must allow the same effect to other mistakes he might make as to B., in which case there could be scarcely any conviction of a malicious crime. The case is that of the *aberratio delicti a persona in personam*, or *a re in rem*, which has been already discussed; and in which it is plain that the party offending is responsible for the malicious injury of the person whom he strikes.

² Com. v. Willard, 22 Pick. 476, 1839; Dobkins v. State, 2 Humph. 424, 1841; Pulse v. State, 5 Humph. 108, 1844; Ross v. Com., 2 B. Mon. 417, 1841; Hill v. State, 53 Ga. 125, 1874. See R. v. Upton, 2 Stra. 816, 1754; R. v. Bryan, 2 Stra. 866, 1754. See Whitesides v. State, 11 Lea, 474, 1883.

³ *Infra*, § 1529. See Pulse v. State, 5 Humph. 108, 1844. In Taylor v. State, 11 Lea, 708, 1883, this is extended to statutory misdemeanors; but unless under the peculiar terms of the applicatory statute, this cannot be sustained.

⁴ *Supra*, §§ 152 et seq.

be procured by the assailant. It is necessary that the gun should have been made by the manufacturer. It is necessary that the steel of the gun should have been properly tempered; that the bullet should have been properly cast; that the materials from which bullet, tube, and trigger were made should have been dug from the mine and duly fashioned in the factory. It is necessary that the assailed should be in a position to be shot, and that the assailant should be in a position to take aim. All these are necessary conditions to the shooting, without which the shooting could not take place. No one of them, however, is in the eye of the law the cause. A juridical cause is such an act, by a moral agent, as will apparently result, in the usual course of natural events, unless interrupted by circumstances independent of the actor, in the consequence under investigation.¹ Hence preparations, as will presently be more fully seen,² unless they are put in such a shape as by the usual course of events to produce the consequence in question, are not attempts.³

§ 179. Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses.⁴ They are also indictable when their object is interference with public justice: as where a resistance to the execution of a judicial writ is counselled;⁵ or perjury is advised;⁶ or the escape of a prisoner is encouraged;⁷ or the corruption of a public officer or a witness is sought,⁸ or invited by the officer himself.⁹ They are indictable, also, when they are in themselves offences against public decency,

¹ *R. v. Meredith*, 8 C. & P. 589, 1838. attempt, though it was not shown whether the defendant intended to use the key himself. But this was a matter of inference for the jury. See *infra*, § 186; *State v. Colvin*, 90 N. C. 717, 1883.

² *Infra*, § 180.

³ In *R. v. Cheeseman*, 1 L. & C. 140, 1862, Blackburn, J., said: "There is no doubt a difference between the preparation antecedent to an offence and the actual attempt; but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime." In *State v. Griffin*, 26 Ga. 493, 1859, it was held that taking an impression of the lock of a warehouse, and having a key made to fit it, was an indictable

infra, §§ 181, 195.

⁴ *Infra*, § 1773; *Cox v. People*, 82 Ill. 191, 1876; *State v. Farrier*, 1 Hawks, 487, 1822; *State v. Taylor*, 3 Brev. 243, 1814.

⁵ *State v. Caldwell*, 2 Tyler, 212.

⁶ See *infra*, §§ 1328, 1329 *et seq.*

⁷ *State v. Taylor*, 44 La. An. 967, 1892.

⁸ *Infra*, § 1857.

⁹ *Walsh v. People*, 65 Ill. 58, 1872; *contra*, *Hutchinson v. State*, 36 Tex. 293, 1872.

as is the case with solicitations to commit sodomy,¹ and they are indictable, also, when they constitute accessoryship before the fact.² But is a solicitation indictable when it is not either (1) a substantive indictable offence, as in the instances just named, or (2) a stage toward an independent consummated offence? And the better opinion is that, where the solicitation is not in itself a substantive offence, or where there has been no progress made toward the consummation of the independent offence attempted,³ the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative.⁴ For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed. It would be hard, also, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers of Byron's "Don Juan," of Rousseau's "Emile," or of Goethe's "Elective Affinities." Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women; Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery. Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances or as libels. But to make bare solicitations or allurements indictable as *attempts*, not only unduly and perilously extends the scope of penal adjudication, but forces on the courts psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land. What human judge can determine that there is such a necessary connection between one man's advice and another man's actions, as to make the former the cause of the latter? An *attempt*, as has been stated, is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events,

¹ *R. v. Ransford*, 13 Cox C. C. 9; 6 C. & P. 368, 1834, where soliciting 31 L. T. (N. S.) 488, 1874, cited *infra*. an engraver to engrave a plate for

² *Infra*, § 225.

³ See *Higgins's Case*, 2 East, 5, 1802; being actually begun.

R. v. Schofield, Cald. 397, 1794; *R. v. Gregory*, L. R. 1 C. C. 77, 1867; 10 Cox C. C. 459; *R. v. Quail*, 4 F. & F. 1076, 1864. *Infra*, § 225. Under this head falls the anonymous case reported

⁴ See *Cox v. People*, 82 Ill. 191, 1876; *Rivers v. State*, 97 Ala. 72, 1894. Solicitation to commit adultery is not an attempt. *State v. Butler*, 8 Wash. 194, 1894.

if not hindered by extraneous causes, in the commission of a deliberate crime. But this cannot be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject. Following such reasoning, several eminent European jurists have declined to regard solicitations as indictable, when there is interposed between the bare solicitation, on the one hand, and the proposed illegal act on the other, the resisting will of another person, which other person refuses assent and co-operation.¹ To this effect are decisions that indictments do not lie in our own law for solicitations to commit adultery,² and solicitations to commit incest.³ It has also been held that a mere effort, by persuasion, to produce a condition of mind consenting to incest, without any act done toward actual consummation, is not an attempt.⁴ To the same purport is the reasoning of other tribunals in reference to soliciting to sell liquor.⁵ On the other hand, we have from the Supreme Court of Connecticut a direct decision to the contrary, on the question of soliciting adultery, which in that State is a statutory felony.⁶ We must, however, remember that such solicitations, when in any way attacking the body politic, either by way of treason, scandal, or nuisance, are, as has already been seen, under any view of the case, indictable as independent offences. And we must also keep in mind that if the solicitation involves the employment of illegal means to effect the illegal end, it may become substantively indictable.⁷

¹ Mittermaier, in note iii. to Feuerbach, 42; Berner, *Strafrecht*, 1871, § 102; Schwarze, *Commentar*. §§ 43-46. See, also, the elaborate argument by Bar, *Zur Lehre vom Versuch*. And see *infra*, § 1738.

² *Smith v. Com.*, 54 Pa. 209, 1867; *State v. Butler*, 8 Wash. 194, 1894. See, also, *Kelly v. Com.*, 1 Grant, (Pa.) 484, 1858, and *infra*, § 1738. In *Stabler v. Com.*, 95 Pa. 318, 1880, it was held that A.'s handing poison to B., and soliciting him to put it in C.'s spring, is not an "attempt to administer poison" under the statute.

³ *Cox v. People*, 82 Ill. 191, 1876.

⁴ *Cox v. People*, 82 Ill. 191, 1876.

⁵ *Com. v. Willard*, 22 Pick. 476, 1839. *Infra*, § 1529. In *Com. v. Flagg*, 135 Mass. 145, 1883, it was held that solicitation to arson is indictable; but in

this case money was paid to the solicited agent in order to fix and prepare him for the work, and the mode of execution explained. The case was, therefore, one not of bare solicitation but of preparation.

⁶ *State v. Avery*, 7 Conn. 266, 1829. See *U. S. v. Lyles*, 4 Cranch C. C. 469, 1836, where it was held by one judge that a solicitation to commit a battery is indictable. As maintaining the indictability of solicitation, see opinion of court in *State v. Hayes*, 78 Mo. 307, 1883, relying on *Com. v. Jacobs*, 9 Allen, 274, 1864, where, however, the question was adequacy of preparations.

⁷ *Collins v. State*, 3 Heisk. 14, 1870; *R. v. Hickman*, 1 Moody, 34, 1835; *R. v. Clayton*, 1 C. & K. 128, 1843; *Penns. v. McGill*, Addis. 21, 1792; *In re Lloyd*,

§ 180. In answering the interesting question whether the mere preparations for a crime are indictable, we must first put aside those preparations which by statute or otherwise are substantive crimes (*delicta sui generis*); among which we may mention the carrying of concealed weapons, the unlawful concoction or secreting of poison or powder, and the collection of materials for forging.¹ These acts, when prosecuted, should be charged as consummated offences. Their punishability is independent of the existence of any subsequent conditions. For instance, the carrying of concealed weapons, under the statutes, is equally indictable, whether or no the weapons were used for unlawful purposes. So, also, as to the possession of implements of forgery, and preparations for treasonable acts.

Mere preparations
not indictable.

But if the preparation is not of itself indictable, or will not of itself, if uninterrupted extraneously, result in crime, the weight of reasoning is that it cannot be made *per se* indictable as an attempt.²

51 Kans. 501, 1893. It has, however, been ruled that to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. But here the word "inciting" implied accessoryship before the fact. Higgins's Case, 2 East R. 5.

R. v. Ransford, 31 L. T. (N. S.) 488; 13 Cox C. C. 9, 1874, was a case of solicitation of a man to a boy to commit sodomy, and Kelly, C. B., affirming a conviction, said: "I am of opinion that to incite or even solicit another to commit a felony, or to do any act with intent to induce another person to commit such offence, is a misdemeanor." Brett, J., said: "The inciting a person to commit a felony is a misdemeanor. The case in 2d East's R. is an authority for that point." But in this case the person solicited was a boy of twelve, and there was the overt act of the publication of a scandalous letter, which publication is in itself an indictable offence.

R. v. Most, L. R. 7 Q. B. D. 244, 1881; 44 L. T. (N. S.) 823; 14 Cox C. C. 583, affirming a conviction in a case where the defendant was charged with "encouraging" and "persuading" in a newspaper the murder of a foreign sovereign, was under the stat. 24 and 25 Vict. c. 100. Such publications may be indictable at common law when seditious or disturbing domestic or international peace. But they are not indictable as common law attempts.

¹ Com. v. Newell, 7 Mass. 245, 1810. Peculiarly is this the case with the procuring and retaining dies and other machinery for counterfeiting. It is on this ground we may sustain both the conclusion and the reasoning in R. v. Roberts, 33 Eng. Law & Eq. 539; Dears. 553, 1854; in which it was held that the procuring of dies wherewith to forge coin is an indictable offence. It undoubtedly is; but it is so because it is an independent misdemeanor, and not an attempt.

² R. v. Eagleton, Dears. 515, 1855; R. v. Meredith, 8 C. & P. 589, 1838; R. v. Heath, R. & R. 184, 1812; R. v.

For, *first*, there is no evidence, as a general rule, that can prove that a particular preparation was designed for a particular end. Thus a gun may be bought as well for hunting as for homicide. Nor can we lay down any intelligible line between preparations which betray more clearly and those which betray less clearly a felonious purpose.¹ *Secondly*, between preparation and execution there is a gap which criminal jurisprudence cannot fill up so as to make one continuous offence. There may be a change of purpose, or the preparation may be a vague precautionary measure, to which the law cannot append a positive criminal intent, ready to ripen into guilty act.

Yet we must again recur to the fact that some preparations for crime are of themselves of such a character, from their inherent illegal perniciousness, as to afford the subject-matter for independent indictment,² such, for instance, as the procuring of dies for the purpose of coining bad money,³ and procuring indecent prints with intent to publish them.⁴ And eminently is this the case when, as has been said, the preparations in question, by themselves, by force of ordinary natural laws, will, if undisturbed, result in crime.⁵ When such an attempt, if not interrupted by extraordinary natural occurrences, or by collateral human intervention, is likely to result in crime, then the defendant is indictable.

§ 181. Certainly mere preliminary preparations, in character indiffer-
The at-
tempt
must have
gone so far
that the
 tent, cannot, as has been seen, be regarded as guilty attempts. Thus, walking down a street to a druggist's where poison is sold would not be indictable as an attempt to poison; but purchasing the poison and putting

Woodrow, 15 M. & W. 404; R. v. Renshaw, 2 Cox C. C. 285, 1848; U. S. v. Stephens, 8 Sawyer, 116, 1883; 3 Crim. Law Mag. 536; Bruce v. State, 24 Me. 71, 1844; Com. v. Morse, 2 Mass. 138, 1807; Randolph v. Com., 6 S. & R. 398, 1821; People v. Brockway, 2 Hill, (N. Y.) 558, 1842; People v. Lawton, 56 Barb. 126, 1867; Cox v. People, 82 Ill. 191, 1876; Uhl v. Com., 6 Gratt. 706, 1849; Clarke's Case, 6 Gratt. 675, 1849; State v. Colvin, 90 N. C. 717, 1883; Cunningham v. State, 49 Miss. 685, 1874; People v. Hope, 62 Cal. 291, 1881. In U. S. v. Stephens, *ut sup.*, it was held that purchasing liquor in

a place where the sale is legal for the purpose of introducing it into another place where the sale is illegal, is not an indictable attempt in the latter place.

¹ See Rossi, *Traité de droit pénal*, 1855, t. ii. 121.

² *Supra*, § 179.

³ Roberts's Case, Dears. C. C. 553, 1854.

⁴ Dugdale v. R., 1 E. & B. 435, 1853; R. v. Dugdale, Dears. C. C. 64, 1853; R. v. Roberts, *ut supra*.

⁵ To this must be limited Lord Denman's expressions in R. v. Chapman, 1 Den. C. C. 432, 1846.

it in the way of other human beings would be so indictable.¹ So purchasing a gun is not indictable as an attempt,² but aiming it is.³ So owning a false weight is not itself indictable, but using it as a means of cheating is evidence, when connected directly with the proposed wrong, of an attempt to cheat.⁴ So to purchase iron to use in making false keys is not an attempt at a particular larceny ; but it is otherwise when an impression is taken of a particular warehouse key, and a key, counterfeiting it, is made, with the intent to steal from such warehouse.⁵ In other words, to make the act an indictable attempt, it must be a *cause* as distinguished from a *condition*.⁶ And it must go so far that it would result in the crime unless frustrated by extraneous circumstances.⁷

§ 182. If the means are *apparently* adapted to the end, then the public peace, so far as the attempt is concerned, is as much disturbed as if they should be so actually ; and hence the indictment for the attempt on such evidence can be sus-

crime
would
have been
completed
but for
extraneous
interven-
tion.

Means
must be
apparently
suitable.

¹ Mullen v. State, 45 Ala. 43, 1871. See R. v. Dale, 6 Cox C. C. 14, 1852 ; R. v. Bain, L. & C. 129 ; 9 Cox C. C. 98, 1862.

R. v. Meredith, 8 C. & P. 589, 1838 ; R. v. Simmons, 1 Wils. 329 ; R. v. Roberts, 33 Eng. Law & Eq. 539, 1854 ; Dears. 553 ; People v. Thomas, 63 Cal. 48, 1883. ² It would be otherwise if the gun was put in process of use for purposes prohibited by law. Roberts's Case, Dears. C. C. 539, 1854.

"If a man intends to commit murder," says Jervis, C. J., in the last cited case, "the walking to the place where he intends to commit it would not be a sufficient act to make it an indictable offence." So also said Lord Abinger, in R. v. Meredith, 8 C. & P. 589, 1838 : "Suppose a man intended to carnally abuse a child, and was to take his horse and ride to the place where the child was, that would be a step toward the commission of the offence, but would not be indictable." See an interesting extension of this principle in R. v. McCann, cited *infra*, § 187 ; R. v. Taylor, 1 F. & F. 511, 1859. See Stat v. Lung, 21 Nev. 209, 1891.

See argument of Chief Justice Field, in People v. Murray, 14 Cal. 159, 160, 1859 ; a case, however, in which sending for a magistrate to contract an incestuous marriage, followed by elopement, was held, by an undue extension of the above doctrine, not to constitute an attempt to contract such marriage.

³ See R. v. Brown, 48 L. T. (N. S.) 270, 1882.

⁴ R. v. Cheeseman, L. & C. 140, 1862, stated *supra*, § 178.

⁵ Griffin v. State, 26 Ga. 493, 1859. See R. v. Roberts, 7 Cox C. C. 39, 1855 ; Dears. C. C. 559.

⁶ *Supra*, § 178.

⁷ Sipple v. State, 17 Vroom, 197, 1883. In R. v. Taylor, 1 F. & F. 511, 1859, cited *infra*, § 187, Pollock, C. B., said : "It is clear that every act com-

Under a statute prohibiting entering a building, the climbing up a roof, and then making a hole, is an attempt.

tained.¹ Were it otherwise, we would be forced to penetrate to regions beyond the range of practical jurisprudence. For how can we say that any particular means will certainly effect any particular end? The best laid plans, we all know, are frustrated. The best of rifles loaded, capped, primed, and well aimed, may miss fire; or the party shot at may wear a coat of impervious mail, or, as was once suggested by Chief Justice Gibson, when discussing a parallel point, may fall down and die of apoplexy from fright before the ball pierces his heart. How can we under any circumstances

mitted by a person with the view of committing the felonies therein mentioned is not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." On the other hand, in *R. v. St. George*, 9 C. & P. 483, 1840, the prisoner was indicted under the 7 Will. IV., and 1 Vict. c. 85, s. 4, for an attempt to shoot; and the proof was that he had put his finger on the trigger of a loaded fire-arm with the intention of shooting, but was prevented from doing so. This was held by Parke, B., not to be an attempt to shoot within the statute. But however this may be under the peculiar statute, the ruling cannot be sustained at common law.

See *People v. Stiles*, 75 Cal. 570, 1888.

That applying a match which goes out before fire is communicated may be an attempt at arson, see *R. v. Good-*

man, 22 U. C. C. P. 338. That the least charring is burning, see *infra*, § 826.

That it is no defence to an indictment for carrying concealed weapons that the weapon carried could not be used, see *Williams v. State*, 61 Ga. 417, 1878; *Hutchinson v. State*, 62 Ala. 3, 1878.

Preparations, which, unless made substantive crimes by statute, are not indictable as attempts, have been classified by a high authority as follows:

1. Acts whose object is to ward off contingent discovery, or to secure to the perpetrator the undisturbed enjoyment of the fruits of the crime.

2. Acts undertaken by the perpetrator as experiments to determine the possibility of the crime, or to arrange an opportunity for its commission.

3. Acts consisting in securing the agencies necessary for the execution of the crime.

4. Acts conducing to the perpetrators' physical and mental training for the offence. *Zachariae in Meyer*, § 39.

¹ See Schwarze's essay on "Versuch und Vollendung," incorporated in Holtzendorff's *Strafrecht*, i. 270, where we have an elaborate examination of the objective and of the subjective theories of attempt. There is a condensed translation of this essay, published by me in the *Central Law Journal* for July 18, 1879.

do more than say of any particular agency, that it is “apparently” adapted to produce the end? If so, the application of an agency apparently adapted to produce a crime is an indictable attempt, which, as we have seen, is a deliberate crime begun, but, *through circumstances independent of the will of the actor*, left unfinished. If the means employed appear both to assailant and assailed adequate, then the offence is complete. Indeed, the very fact that a man when assaulted is entitled to ward off by blows an attempt at violence, which is apparent only, but not real, is decisive of the issue. A. levels an unloaded gun at B.; and B. is justified in using violence to prevent an injury to himself, which after all is unreal though apparent.¹ But why? Simply because the levelling of an unloaded gun at another person in such a way as to produce terror in the latter is a breach of the public peace, as well as an invasion of the rights of the individual. The law, therefore, declares the attempt which is the subject of legal intervention to include that which is made with means apparently adequate, whether or no these means are actually such as to be necessarily successful if employed.² On the other hand, the offence is not an attempt if

¹ See fully, *infra*, §§ 606, 642; and 1869; *State v. Hinson*, 82 N. C. 597, see *Com. v. White*, 110 Mass. 407, 1880; *People v. Yslas*, 27 Cal. 630, 1872; *U. S. v. Fullhart*, 47 Fed. Rep. 1865. See, also, *infra*, § 606. We have 802, 1892.

² As sustaining the argument of the text, see *R. v. St. George*, 9 C. & P. 483, 1840; *R. v. Lallemont*, 6 Cox C. C. 204, 1854; *R. v. Cluderoy*, 1 Den. C. C. 515; 2 C. & K. 907, 1850; *U. S. v. Bott*, 11 Blatch. 346, 1871; *Com. v. McDonald*, 5 Cush. 365, 1850; *Com. v. Jacobs*, 9 Allen, 274, 1864; *O’Leary v. People*, 4 Parker C. R. 187, 1857; *Slatterly v. People*, 58 N. Y. 354, 1874; *People v. Lawton*, 56 Barb. 126, 1868; *Mullen v. State*, 45 Ala. 43, 1871; *Tarver v. State*, 43 Ala. 354, 1870; *Henry v. State*, 18 Ohio, 32, 1849; *Kunkle v. State*, 32 Ind. 220, 1870, (overruling *State v. Swails*, 8 Ind. 524); *State v. Shephard*, 10 Iowa, 126, 1860; *Allen v. State*, 28 Ga. 395, 1859; *Tyra v. Com.*, 2 Metc. (Ky.) 1, 1859; *State v. Hampton*, 63 N. C. 13, 1868; *State v. Rawles*, 65 N. C. 334, 1869; *State v. Hinson*, 82 N. C. 597, 1880; *People v. Yslas*, 27 Cal. 630, 1872; *U. S. v. Fullhart*, 47 Fed. Rep. 1865. See, also, *infra*, § 606. We have a parallel rule laid down in cases of forgery. *Infra*, §§ 700 *et seq.* In apparent conflict with the text is a group of English cases on statutes. In one of these it was held that “*shooting at another person*” does not take place when the “other person” is not in the place shot at; *R. v. Lovel*, 2 M. & R. 39; and that there can be no shooting with “*loaded arms*” when a gun is so stuffed that it cannot be fired. *R. v. Harris*, 5 C. & P. 159, 1831. See *R. v. Lewis*, 9 C. & P. 523, 1843; or when it does not contain an efficient charge; *R. v. Whitley*, 1 Lew. C. C. 123, 1835; *R. v. James*, 1 C. & K. 530, 1844; *R. v. Gamble*, 10 Cox C. C. 545, 1867. These decisions may be right; but they do not touch indictments for attempts to kill, as the ground on which they rest is that the statute uses terms (*e. g.*, “loaded

the party threatened knew the gun was unloaded and incapable of doing harm.¹ The same distinction is applicable on principle to indictments for attempts to poison,² and attempts to administer drugs with intent to produce an abortion.³ And in forgery, as will be hereafter seen, analogous principles are laid down.⁴

§ 183. But if the means are both absolutely and apparently inadequate, as where a man threatens another with magic, or aims at him a child's pop-gun, then it is plain that an attempt, in the sense of an apparant invasion of another's rights, does not exist.⁵ For to constitute such an attempt there must be such a preliminary overt act as may, by the course of usual natural laws, apparently result, if not interrupted, in crime. It is the *appearance* of such connection between the attempt and the consummation that palliates violence on the party assailed in arresting the assailant before he goes further; and it is this *appearance* which the law, when there is guilty intent, makes indictable, in order to prevent breaches of the peace. But when the means used are so preposterous that there is not even *apparent* danger, then an indictable attempt is not made out. This

arms") which are incorporated in the indictment, and the averment of which must be substantially proved. *Infra*, § 645 *a*. See, as open to more general exception, *R. v. Sheppard*, 11 Cox C. C. 302, 1870; *Vaughan v. State*, 3 Sm. & M. 553, 1844.

¹ *Crumbley v. State*, 61 Ga. 582, 1878; *infra*, §§ 606, 642.

² See *R. v. Clauderoy*, 1 Den. C. C. 515; 2 C. & K. 907, 1850; *State v. Clarissa*, 11 Ala. 57, 1847. In *R. v. Hennah*, *ut sup.*, "noxious drug" was held to mean a drug noxious in its essence, and not merely noxious when taken in excess. In *People v. Van De Leer*, 53 Cal. 147, 1878, it was held that a "noxious substance or liquid" is not such as might, when administered, be hurtful or injurious, but, like a poison, it must be capable of destroying life. As to "noxious," see *infra*, § 596.

³ *U. S. v. Bott*, 11 Blatch. 346, 1871; *Bates v. U. S.*, 11 Biss. 70, 1882; *infra*, §§ 596, 1831. In *R. v. Coe*, 6 C.

& P. 403, 1834, the question came up under a statute making it indictable to administer medicine or "other thing" with intent to produce an abortion, and it was held to be immaterial what the thing was. Had the statute used the term "deleterious medicine," the nature of the medicine might become material. *R. v. Hennah*, 13 Cox C. C. 547, 1877. See *infra*, § 596. Under the penal code of Texas, where it is stated that an attempt to commit abortion was made by the use of means calculated to produce the same, the indictment need not state the means used. *Cave v. State*, (Tex.) 26 S. W. Rep. 503, 1894. As to statutes of New Jersey and other States, see *infra*, § 596.

⁴ *Infra*, §§ 680, 696.

⁵ *Blake v. Barnard*, 9 C. & P. 626, 1840; *R. v. James*, 1 C. & K. 530, 1844; *Tarver v. State*, 43 Ala. 354, 1870; *Robinson v. State*, 31 Tex. 170, 1868; *Smith v. State*, 32 Ibid. 593, 1869.

distinction is apprehended by several thoughtful German commentators,¹ who held that *absolute* inadequacy of means is a defence, while *relative* inadequacy is only a plea in mitigation of sentence.²

§ 184. Whether there must be physical ability to complete the attempt on the part of the attemptor is a question which has already been touched upon in its general relations. It is enough now to view it simply in relation to *rape*. If there be *juridical* incapacity for the consummated offence (e. g., infancy), there can be no conviction of the attempt; and therefore, a boy under fourteen cannot, according to the prevalent opinion, be convicted of an attempt to commit a rape, as principal, in the first degree.³ It is otherwise when the incapacity is merely nervous or physical. A man may fail in consummating a rape from some nervous or physical incapacity intervening between attempt and execution. But this failure would be no defence to the indictment for the attempt. At the same time there must be *apparent capacity*.⁴

§ 185. That capability of success is essential to an attempt was proclaimed by high English authority,⁵ Lord Chief Justice Cockburn saying "that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party

Must be
apparent
physical
capacity.

Need not
be capability
of success.

¹ See summary in Geib, *ut supra*, § 102; *State v. Napper*, 6 Nev. 113, 1870. As to what constitutes a "noxious" drug, see further *infra*, § 596.

² See the following from an eminent French jurist: Rossi, *Traité*, ii. pp. 310-313: D'ailleurs où est le danger pour la société où est le mal matériel? Que lui importe qu'on essaie des actes impossibles? Ces actes prouvent, dira-t-on, une perversité qui est à craindre. On veut donc franchir les bornes de la justice pénale, poursuivre et punir la perversité en général, sous le prétexte d'une acte qui n'a produit aucun mal matériel, pas même une danger, une alarme raisonnable? Dès lors, il y aurait plus de raison encore à punir les hommes notoirement vicieux et livrés à de funestes habitudes. Ils

³ *Infra*, § 551; *R. v. Eldershaw*, 3 C. & P. 396, 1828; *R. v. Philips*, 8 C. & P. 736, 1839; *State v. Handy*, 4 Harring. 566, 1845. See, however, *Com. v. Green*, 2 Pick. 380, 1823; *People v. Randolph*, 2 Parker C. R. 213, 1854; *Williams v. State*, 14 Ohio, 222, 1846; *Smith v. State*, 12 Ohio St. 466, 1861. And see *supra*, §§ 69, 175; *infra*, § 551.

⁴ *Infra*, § 554; *State v. Elick*, 7 Jones, (N. C.) 68, 1859; *Lewis v. State*, 35 Ala. 380, 1862. See *Kunkle v. State*, 32 Ind. 220, 1875; *State v. Swails*, 3 Ind. 524, 1852; *supra*, § 182; *infra*, §§ 501, 606.

⁵ *R. v. Collins*, L. & C. 471, 1864.

is charged." This limitation, however, has already been shown to be erroneous,¹ it being clear that apparent adaptation may constitute the attempt.² This decision in *R. v. Collins* has been expressly overruled in a subsequent case, and the question may now be regarded as settled.³ Certainly an attempt to suborn a witness would be indictable, though such witness was of a character so high as to make success impossible, or though the witness was incompetent.⁴ And so has it been ruled expressly that the taking a null false oath before an incompetent officer is an indictable attempt,⁵ and that it is no defence to an indictment for mailing drugs with the intent of producing abortion, that the drugs were harmless.⁶ It has also been held that destroying a ship with intent to defraud the insurers is indictable, though the vessel was not insured.⁷ And in forgery, which is in the nature of an attempt, absolute potency in the forged instrument is not necessary to sustain the indictment. It is enough if there is a possibility of fraud.⁸ If there be no possibility of success, and this was at the time known to the party attempting, it has been argued that no indictment lies.⁹ Yet this is not an absolute principle. A man may throw himself, from sense

¹ *Supra*, § 182.

² *Infra*, § 596; *R. v. Goodall*, 2 Cox C. C. 40, 1846; s. c. 1 Den. C. C. 187, and under name *R. v. Goodchild*, 2 Car. & K. 293, 1846. See, to same effect, *Com. v. Taylor*, 132 Mass. 261, 1882; *Wilson v. State*, 2 Ohio St. 319, 1853; *State v. Fitzgerald*, 49 Iowa, 260, 1878; though see *Com. v. Wood*, 11 Gray, 85, 1857.

³ *R. v. Brown*, 24 Q. B. D. 357, 1889. See, also, *R. v. Ring*, 61 L. J. M. C. 116, 1892.

⁴ *Infra*, §§ 1254, 1271.

⁵ *Infra*, § 1328.

In New York, on the trial of an indictment under the statute for an attempt to commit arson, it was shown that the prisoner solicited one K. to set fire to a barn, and gave him materials for the purpose. This was held sufficient to warrant a conviction, though the prisoner did not mean to be present at the commission of the offence, and K. never intended to commit it; *People v. Bush*, 4 Hill,

(N. Y.) 133, 1843. The New York statute, however, goes beyond those of England and Pennsylvania in incorporating the words: "and in such attempt shall do any act toward the commission of such offence." See criticism in *Stabler v. Com.*, 95 Pa. 318, 1880. The intent to do bodily harm may be inferred from the fact that the prisoner intended to do harm, but in another portion of the body of the person assaulted. *People v. Miller*, 91 Mich. 639, 1892.

⁶ *Infra*, § 1831. See *State v. Fitzgerald*, 49 Iowa, 260, 1878.

⁷ *U. S. v. Cole*, 5 McLean, 513, 1851. That it is no defence to an assault to commit rape on a child, that the child was put in a position in which rape was impossible; see *Com. v. Shaw*, 134 Mass. 221, 1883, cited *infra*, § 576. As to analogous rulings in forgery, see *infra*, §§ 680-696.

⁸ *Infra*, 695.

⁹ See *R. v. Edwards*, 6 C. & P. 515, 1834.

of duty, right or wrong, into an unlawful enterprise, which he knows must fail; but which does not cease to be indictable, because it never ceased to be desperate.

§ 186. We turn next from the actor to the object in view, and take up the question whether it is essential to an attempt that the object really exists.¹ In England in 1864, in a case just noticed, it was held that it was error to convict of an attempt to steal from the pocket, without proof that there was something in the pocket to steal;² but this decision is not in accordance with the line of American authority,³ and has been overruled,⁴ nor with the reason of the thing, for the offence is not private simply, against merely the person whose goods are imperilled; but public, indictable as a scandal and breach of public peace, irrespective of the question of personal loss. Independently of this consideration who can say that the object of the thief was *exclusively* to take one particular article? If the pleading indeed, so put it to the court, as was the case in *R. v. Collins*,⁵ and if it appear that the object thus stated is wanting, then this argument fails; but in ordinary cases, when a thief attempts to go to a place to steal, then the presumption is that if he cannot get the object primarily in view, he will content himself with another. This presumption was invoked in a German case, in which the assumption was that the object the thieves had in view, in an attempted entrance in a building, was some grain they believed to be stored there, which grain had been previously removed. It was held, however, that the attempt was to *steal*, and that when there is such an attempt the thief would look forward to taking whatever he could get.⁶

¹ See *supra*, § 136.

1871; *People v. Moran*, 123 N. Y. 254,

² *R. v. Collins*, L. & C. 471, 1864; overruled by *R. v. Ring*, 61 L. J. M. C. 116, 1892, and *R. v. Brown*, 24 Q. B. D. 357, 1887.

1890.

⁴ *R. v. Brown*, 24 Q. B. D. 357, 1889.

⁵ Compare *R. v. Collins*, L. & C. 471, 1864; *Roscoe's Cr. Ev.* § 364;

People v. Jones, 46 Mich. 441, 1881. In

As to attempts to steal, see *R. v. Sutton*, 2 Mood. 29; 8 C. & P. 291, 1838; *R. v. Cheeseman*, L. & C. 140, 1862; 9 Cox C. C. 100; *State v. Beal*, 37 Ohio St. 108, 1881; *Wolf v. State*, 41 Ala. 412, 1868; *State v. Utley*, 82 N. C. 556, 1882.

State v. Beal, 37 Ohio St. 108, 1881, the question in the text was discussed, and it was held that an indictment for burglary with intent to steal from a safe could not be defeated by proof that the safe was not used as a place of deposit

³ *Com. v. McDonald*, 5 Cush. 365, 1850; *State v. Wilson*, 30 Conn. 500, 1861; *Rogers v. Com.*, 5 S. & R. 463, 1819; *Hamilton v. State*, 36 Ind. 280,

for valuables. The distinction taken in *McPherson's Case* was disapproved. See *infra*, § 820.

⁶ See *Schwarze, ut supra*; and see

But more difficult questions arise when the object is absolutely non-existent. Suppose a man takes aim at a shadow or a tree, imagining it to be an enemy. The guilty intent here exists; but is there such an overt act as to make up an attempt? According to the definition of attempt heretofore given (a deliberate crime which is begun, but through circumstances independent of the will of the actor is left unfinished), we must answer this question in the negative.¹ To shoot at a shadow or a tree is not an indictable offence, unless under circumstances disturbing public peace.²

This reasoning, however, does not apply where there is an actual injury attempted to the person or property of another, though, from circumstances exterior to the actor's will, this injury does not produce its immediate contemplated result. Thus, as has been seen, an attempt at miscarriage may be proved, though it turns out the woman was not actually pregnant;³ and so, no doubt, an attempt at forgery could be sustained, although the forged paper attempted to be made could not by any possibility defraud.⁴ And so, if the

remarks of Coleridge, J., in *R. v. French lace*, which she hid, concealing it from Lord Eldon in one of the pockets of the coach. The package was brought to light by a custom officer at Dover. The lace turned out to be an English manufactured article, of little value, but of course not subject to duty. Lady Eldon had bought it at a price vastly above its value, believing it to be genuine, intending to smuggle it into England. Here was an attempt to smuggle, though the object was one not susceptible of being smuggled.

¹ See *R. v. Lovel*, 2 M. & R. 39, 1839, cited *supra*, § 182. See *supra*, §§ 107–111.

In *R. v. McPherson*, D. & B. 201, 1857, Bramwell, B., argued that if A. mistakes a log of wood for B., and intending to murder B. strikes the log with an axe, this is not an attempt to murder B. This is adopted by Sir J. F. Stephen. Dig. Cr. Law, art. 50, 5th ed. But how if A. had *shot* at the log. See, for criticisms on the conclusions in the text, Cent. Law Journ. July 18, 1879.

² An analogy may be found in cases of forgery, which ceases to be indictable when the person whose paper is forged is absolutely and notoriously non-existent. *Infra*, §§ 693–696.

Lady Eldon, when travelling with her husband on the Continent, bought what she supposed to be a quantity of

French lace, which she hid, concealing it from Lord Eldon in one of the pockets of the coach. The package was brought to light by a custom officer at Dover. The lace turned out to be an English manufactured article, of little value, but of course not subject to duty. Lady Eldon had bought it at a price vastly above its value, believing it to be genuine, intending to smuggle it into England. Here was an attempt to smuggle, though the object was one not susceptible of being smuggled.

In *Res. v. Malin*, 1 Dall. 33 (*infra*, § 1802), it was held that it was not treason when a subject, who starts to join the enemy, joins by mistake a troop of his own country. Though treason is in the nature of attempt, the statute makes an actual adhering to an enemy essential.

³ *R. v. Goodall*, 2 Cox C. C. 40; 1 Den. C. C. 187; 2 C. & K. 293, 1846; *Com. v. Taylor*, 132 Mass. 261, 1882. See 2 Steph. Hist. Crim. Law, 225.

⁴ *R. v. Nash*, 2 Den. C. C. 493, 1851; *R. v. Dodd*, 18 Law Times, N. S. 89, 1868.

shooting be at a shadow sufficiently near another person as to put the latter in peril; or if the shooting be at an empty carriage, the offender supposing it to be occupied, then the attempt is made out, on the ground that it is a misdemeanor to shoot into any place usually frequented by human beings.¹ It need scarcely be added that where a person shoots at a crowd generally, intending to hurt any one who may be hit, he may be indicted for an attempt to hurt A., one of the crowd.² So where A. shoots at B., mistaking him for C., if there is an actual assault on B., though under a mistake as to who he is, A. may be indicted for attempting to kill B.,³ or for wounding B. with intent to kill.⁴

§ 187. Of abandoned attempts we have, in our criminal practice, few illustrations, unless it be in cases of attempts at treason, of which the English state trials give instances, where the defence was that the defendant withdrew from the traitorous conspiracy before an overt act. This defence, however, has been more than once overruled, for though it constitutes an appeal to clemency, it is no defence to the charge of traitorous combination.⁵

The true line of distinction is this: If an attempt be voluntarily and freely abandoned before the act is put in process of final execution, there being no outside cause prompting such abandonment, then this is a defence; but it is otherwise when the process of execution is in such a condition

Aban-
doned at-
tempts not
indictable.

¹ See *supra*, § 120; *infra*, §§ 319, 820. An indictment for attempt to commit extortion cannot be sustained where all the elements of the crime were present except one, namely, that A. was induced by fear to pay defendant the money. *People v. Gardner*, 73 Hun, 66, 1893. dictated under the last-mentioned section for attempting to administer poison. It appeared that he had delivered poison to V., and desired him to put it into B.'s beer; V. delivered the poison to B. and told him what had passed. It was held that the prisoner could not be convicted on this indictment. But *quære*, if this is not an attempt indictable at common law. See the case of *R. v. Higgins*, *supra*." Roscoe's Cr. Ev. 303. *R. v. Williams* is approved in *Stabler v. Com.*, 95 Pa. 318, 1880. The difficulty in such case, at common law, would be removed by averring the attempt to be to induce such third person to administer poison.

² *R. v. Fretwell*, L. & C. 443, 1862; 9 Cox C. C. 471. See *supra*, § 111; *infra*, § 319.

³ *R. v. Holt*, 7 C. & P. 518, 1836. See *R. v. Lallament*, 6 Cox C. C. 204, 1854. See *infra*, §§ 317, 318, and particularly *supra*, §§ 107-111.

An interesting question arises whether an indictment lies when the capability of success depends upon the intervention of an independent third person. "In *R. v. Williams*, 1 Den. C. C. 39, the prisoner was in-

⁴ *Supra*, §§ 107, 120; *infra*, §§ 641, 645 a.

⁵ *Stephens v. Myers*, 4 C. & P. 349,

that it proceeds in its natural course, without the attemptor's agency, until it either succeeds or miscarries.¹ In such a case, no abandonment of the attempt, and no withdrawal from its superintendence, can screen the guilty party from the results.²

1830; though see *R. v. Mulcahy*, L. R. 3 H. L. Ap. 306, 1868; *R. v. McCann*, 28 Up. Can. Q. B. 516; *Goff v. Prime*, 26 Ind. 196, 1866. *Infra*, § 228.

¹ *State v. Allen*, 47 Conn. 121, 1878; *State v. McDaniel*, Winst. 249, 1864; *Lewis v. State*, 35 Ala. 380, 1862; *State v. Hayes*, 78 Mo. 307, 1883. See *infra*, § 214. See, also, *State v. Elick*, 7 Jones, (N. C.) 68, 1859; *Pinkard v. State*, 30 Ga. 757, 1860, and other cases cited *infra*, §§ 576 *et seq.*

In the issue of voluntariness we may consider the following contingencies:

Suppose that a burglar finds that the window he expected to enter has been blocked up during the night. Or suppose, as was the case in one of the attempts on the life of William III., the assassins, as they approach, see in the distance a regiment of cavalry encircling their intended victim. Or suppose that the pickpocket, just as he is inserting his hand, is arrested by a police officer. No one would doubt that in all these cases the consummation of the offence was hindered by causes outside of the will of the offender. He was physically prevented from effecting the purpose. He could not have penetrated the wall, or broken through the line of cavalry, or picked the pocket when in the policeman's grasp.

But a much more difficult question arises when the attempt is not *physically* interrupted by extraneous conditions, but where these conditions are such as to induce the offender to withdraw. Suppose that instead of finding the window walled up he sees some slight disarrangement in the premises which leads him to suspect that he is

watched. Suppose that instead of seeing the line of cavalry in his way, he finds a change has taken place in the appointments of the palace, from which he infers that the plot has been discovered. Suppose that instead of being caught by the policeman he sees somebody in the distance, a good deal like a detective, curiously inspecting him. Certainly we cannot consider his withdrawal under such circumstances voluntary. And so speak the cases cited.

But suppose the hindrance which caused the offender to back out was imaginary. It was not a cause outside of himself. It was a cause inside of himself. Here, again, we are entangled in a metaphysical discussion. Are what we see in any case real existences, or can our impressions of them be at the utmost anything more than mirrors within ourselves? But if all abandonment is voluntary when produced by impressions within ourselves, there can be no involuntary abandonments, since there are no abandonments not so produced. Such is the reply we may make, taking even the most realistic metaphysical theorists as our guides, to those who argue that an unreal impression of danger is not an effective condition. It is enough, however, to say that as in other cases (*e. g.*, self-defence) unreal impressions are regarded as effective conditions, they may be so regarded in this case.

² See *R. v. Taylor*, 1 F. & F. 511, 1859; *R. v. Sharpe*, 3 Cox C. C. 288, 1849; *Com. v. Tobin*, 108 Mass. 426, 1872; *State v. Blair*, 13 Rich. 93. Thus in treason, which is a high grade of attempt, where the attempt is frus-

But how, if in addition to abandoning the attempt, the guilty party takes means to cause it to effectually miscarry, as when he informs a person to whom a poisoned dish has been sent that the dish is poisoned; and the mischief is stopped? Here, so far as concerns the actor, the attempt is abandoned before it has been virtually put in process of final execution; and hence this abandonment is a defence.¹ The offender has retreated in such a way as to render it impossible for evil consequences to ensue.

For the doctrine that abandonment of an attempt not yet put in process of final execution is a defence, two reasons are given.² First, the character of an attempt is lost when its execution is voluntarily abandoned. There is no conceivable overt act to which the abandoned purpose could be attached. Secondly, the policy of the law requires that the offender, so long as he is capable of arresting an evil plan, should be encouraged to do so, by saving him harmless in case of such retreat before it is possible for any evil consequences to ensue. Neither society, nor any private person, has been injured by his act. There is no damage, therefore, to redress. To punish him after retreat and abandonment, would be to destroy the motive for retreat and abandonment.³

It is to be noticed, however, that as the *attempt* is only provable by some overt act, so the *abandonment* of the attempt cannot be proved by mere conjectural tests or by declarations of mental change. As declaring an intention to do a thing is not an indictable attempt, so declaring an intention to give up an attempt is not

trated by extraneous interruption, then such frustration is no defence.

U. S. v. Pryor, 3 Wash. C. C. 234, 1821. But in such case (*e. g.*, an abortive attempt to communicate intelligence, or to furnish supplies to an enemy) the proper course is to indict for the attempt. But see *contra*, U. S. v. Pryor, *supra*, in which it was held that such attempt was treason; compare R. v. Hensey, 2 Ld. Kenyon, 366; 1 Burr. 642; and see *infra*, § 225. So an attempt to commit rape may be abandoned after the first approach, yet nevertheless such attempt is indictable. See Lewis v. State, 35 Ala. 380, 1862, cited *infra*, and see, also, *infra*, § 576 a.

¹ See 1 Hale, 618; Goff v. Prime, 26 Ind. 196, 1866.

² Berner, Lehrbuch d. Strafrechts, p. 176. As to assaults, see *infra*, § 605.

³ The Roman law strikes at the same distinction: Gloss. ad L. 67. D. de furt. (47, 2.) Si processum est ad actum: si quidem consummatum est et perfectum, non potest postea poenitere ut evitet poenam. Si autem actum non consummatum est nec perfectum: si quidem quia noluit, sed potuit, licet poenitere, et non incidit in poenam. See, also, Seneca Agamem. v. 242 sq. Nam sera nunquam est ad bonos mores via: Quem poenitet peccasse, paene est innocens. See *infra*, § 225.

an abandonment of the attempt. If it were otherwise, criminal attempts, especially political, would cease to be indictable, for there are few cases in which such criminal attempts, when in process of execution, are not disavowed. There must be substantive acts showing that the abandonment was real, just as there must be substantive acts showing the attempt was real.

It should be remembered, also, that if such abandonment is caused by fear of detection it is no defence, if the attempt progress sufficiently toward execution to be *per se* indictable before such abandonment. Thus if a thief, when moving his hand toward a pocket, desists on seeing a detective, the offence is made out. To the same effect, perhaps, may be cited American decisions, in which attempts at rape, abandoned before consummation, were held indictable.¹ It is true that it may be observed that in these cases the offence of felonious assault was complete, prior to the period of abandonment. More exactly illustrative of the principle is an English case tried before Chief Baron Pollock, in which it appeared that the defendant, having lighted a lucifer match to set fire to a stack, desisted on discovering he was watched. It was held, and properly, that this abandonment of purpose was no defence.² It must also be remembered that if an attempt—*e. g.*, an assault—is frustrated by force, such frustration is no defence.³

¹ *Lewis v. State*, 35 Ala. 380, 1862; *State v. Elick*, 7 Jones, (N. C.) 68, 1859; *People v. Stewart*, 97 Cal. 238, 1894. See, also, *State v. McDaniel*, 1 Winston, 249, 1864. And see, as qualifying above, *Kelly v. Com.*, 1 Grant, (Pa.) 484, 1854. See *infra*, § 779.

² *R. v. Taylor*, 1 F. & F. 511, 1859. See *supra*, § 181.

³ *Stephen v. Meyers*, 4 C. & P. 349, 1830. *Infra*, § 604.

In an Upper Canada prosecution for an attempt to commit burglary, it was proved that two defendants agreed to commit the offence on a certain night, together with C., who, however, was detained at home by his father, who suspected the design. The defendants were seen about midnight entering a gate fifty feet from the house; they came toward the house to a picket fence in front, in which there was a

small gate, but there was no proof that they came nearer the house than twelve or thirteen feet, nor did they pass the picket gate. They went, as it was supposed, to the rear of the house, and were not seen afterward. It was held by the Queen's Bench that there was not sufficient establishment of a persistence in the attempt to justify a conviction, the attempt appearing to have been voluntarily abandoned before any mischief was done. It was added, however, that if it appeared that such abandonment was not voluntary, but caused by surprise and interruption from others, and that but for such surprise and interruption they would have carried out their burglarious design, there was ground for a conviction. *R. v. McCann*, 28 Up. Can. Q. B. 517.

§ 188. Where the attempt is resisted at first, but the consummation of the crime is assented to, the offender may be indicted for the attempt. In rape and robbery we can conceive of cases of this class. A man assaults a woman with intent to ravish. She resists; but ultimately yields. Here, if his intention was to use force to the end, he is indictable for the attempt,¹ though it is otherwise where he did not intend to use force.²

When attempt is resisted it may be independently tried, though consummation is yielded to.

§ 189. Where the attempt is acquiesced in by the party injured, through fraud or incapacity, the acquiescence does not bar the prosecution.³

Acquiescence through fraud or incapacity no bar.

It is clear that when the person injured is incapable of giving assent, such assent cannot be set up as a defence.⁴

II. INDICTMENTS.

§ 190. In indictments for attempts the laxity permitted in assaults will not be maintained. No doubt it is enough to charge that A. did "make an assault" on B. But the reason is that "assault" is a term which describes an act easily defined; which asserts a consummated offence; and which is always indictable, no matter in what sense the term may be used. But "attempt" is a term peculiarly indefinite. It has no prescribed legal meaning. It relates from its nature to an unconsummated offence. It covers acts some of which are indictable and some of which are not.

In indictment, the laxity permitted in assaults does not hold good.

§ 191. Nor do decisions under statutes rule the question at common law. It is within the power of the English parliament and, as it has frequently been ruled,⁵ of the legislatures of our American States, to pass statutes declaring a particular act to be indictable, and providing that it shall be enough to describe such act in the statutory terms.

Nor do statutory rulings affect question at common law.

When this is done by direction or implication, it is proper for the courts to hold, as has been done, that an indictment, charging that

¹ See *infra*, § 577; *State v. Hartigan*, 32 Vt. 607, 1860. For other cases, see *supra*, § 141.

² *Ibid.*; *Taylor v. State*, 50 Ga. 79, 1873.

³ See *supra*, § 146. That the attempt may be indicted even though the

woman after first resisting ultimately yields, see *People v. Bransby*, 32 N. Y. 525, 1865; *State v. Cross*, 12 Iowa, 66, 1861; *infra*, §§ 558, 577.

⁴ *R. v. Mayers*, 12 Cox C. C. 311, 1872. *Supra*, § 146.

⁵ See Whart. Cr. Pl. & Pr. § 90.

the defendant did "attempt" to feloniously steal from the house of A. B.,¹ or "to commit a rape" on A. B.,² is good. But this does not touch the question at common law.

§ 192. At common law such facts must be set forth as show that the attempt is criminal in itself.³ Attempts may be merely in conception, or in preparation, with no causal connection between the attempt and any particular crime; in which case, as has been seen, such attempts are not cognizable by the penal law. On the other hand, when an attempt stands in such connection with a projected, deliberate crime, that the crime, according to the usual and likely course of events, will follow from the attempt, then the attempt is an offence for which an indictment lies. Now it is a familiar principle of criminal pleading, that when an act is only indictable under certain conditions, then these conditions must be stated in the indictment in order to show that the act is indictable. Nor does it make any difference that the offence is made so by statute.⁴ Thus statutes make indictable revolts and obtaining goods by false pretences; yet an indictment, charging simply that the defendant "made a revolt," or "obtained goods under false pretences," would be scouted out of court.⁵ On the same reasoning, in an indictment for an attempt to commit a crime, it is essential to aver that the defendant did some act, which, directed by a particular intent, to be averred, would have apparently resulted, in the ordinary and likely course of things, in a particular crime.⁶

¹ *R. v. Johnson*, 1 L. & C. 489, 1880; *State v. Brannan*, 3 Nev. 238, 1862.

² See *Lewis v. State*, 35 Ala. 380, 1882; *Anthony v. State*, 29 Ala. 27, 1856; *Beasley v. State*, 18 Ala. 535, 1850; *Trexler v. State*, 19 Ala. 21, 1851; *Lewis v. State*, 35 Ala. 380, 1862 (under a special statute); *State v. Johnston*, 11 Tex. 22, 1853; *Kin- ningham v. State*, 120 Ind. 322, 1890.

³ Cumulation of incidents in this relation does not vitiate. *State v. Hayes*, 78 Mo. 243, 1883; *State v. Thomas*, 63 Cal. 544, 1882.

⁴ Whart. Cr. Pl. & Pr. § 151.

⁵ Ibid. §§ 151-2. *Infra*, § 1227.

⁶ See, as sustaining the conclusions of the text, *R. v. Marsh*, 1 Den. C. C. 505; *R. v. Powles*, 4 C. & P. 571, 1831; *U. S. v. Ulrici*, 3 Dill. 532, 1875; *State v. Wilson*, 30 Conn. 500, 1860; *Randolph v. Com.*, 6 S. & R. 398, 1821; *Clark's Case*, 6 Gratt. 675, 1849; *Thompson v. People*, 96 Ill. 158, 1869; *State v. Colvin*, 90 N. C. 190, 1869; *Anthony v. State*, 29 Ala. 27, 1856; *Beasley v. State*, 18 Ala. 535, 1850; *Trexler v. State*, 19 Ala. 21, 1851; *Lewis v. State*, 35 Ala. 380, 1862 (under a special statute); *State v. Johnston*, 11 Tex. 22, 1853; *Kin- ningham v. State*, 120 Ind. 322, 1890. The question, it should be remembered, depends largely on the construction of the statute. In Massachusetts, it is not necessary, in an indictment for an attempt to commit a crime, within the Rev. Stat. c. 133, § 12, that it should be directly charged that the act attempted was a crime punishable by law, provided it appear

§ 193. The cumulation of facts, therefore, to show the criminal character of the intent, is not duplicity. Thus a Massachusetts indictment under Rev. Stat. 133, § 12, is not bad for duplicity, when, besides setting forth an "attempt" to set fire to a building, it avers a breaking and entering

Cumulation of facts not duplicity.

to be so from the fact alleged. In an indictment for an attempt to burn a building, it is not necessary to describe the combustible materials used for the purpose. *Com. v. Flynn*, 3 Cush. 529, 1849. See *Com. v. McDonald*, 5 Cush. 365, 1850; *Com. v. Sherman*, 105 Mass. 169, 1870. An indictment has been sustained which charged that the defendant, with intent to steal the personal property of a certain woman, the property "being in her pocket and on her person," did "thrust, insert, put, and place his hand upon the dress, near and into the pocket of the said woman, without her knowledge, and against her will," etc. *Com. v. Bonner*, 97 Mass. 587, 1867. And the Supreme Court of the United States (*U. S. v. Simmons*, 96 U. S. 360, 1877) has held that in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in its commission, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. Harlan, J., citing Whart. C. L. 7th ed. § 292; *U. S. v. Gooding*, 12 Wheat. 460, 1827; *U. S. v. Ulrici*, 3 Dill. 535, 1875. See, to same effect, *State v. Dent*, 3 Gill & J. 8, 1830.

In Virginia, an indictment simply averring that the defendant "did attempt feloniously to maim," etc., C. R., was held to be not sufficiently precise. *Clark's Case*, 6 Gratt. 675, 1849. The indictment "should allege," said Leigh, J., "some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment." See *Ridenour v. State*, 38 Ohio St. 292,

1882, cited *infra*, § 582. In Pennsylvania, the same rule exists in reference to common law indictments for attempts. *Randolph v. Com.*, 6 S. & R. 398, 1821. In the same State, an indictment charging that S. A., on, etc., "in the night-time of the said day aforesaid, at, etc., did attempt to commit an offence prohibited by law, to wit, with force and arms, with an axe, etc., with a wicked intent on the dwelling-house of D. H., etc., in the night-time, feloniously and burglariously did break and enter, and with the intent with the said axe to open and enter," etc., and steal, "but said S. H. did then and there fail in the perpetration of said offence," was held good as an indictment for an attempt to commit burglary at common law. *Hackett v. Com.*, 15 Pa. 95, 1850. But see *Mears v. Com.*, 2 Grant, 385, 1863.

In England an indictment stated that the prisoner "did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain from the Agricultural Cattle Insurance Company a large sum of money, to wit, the sum of £22 10s., with intent thereby then and there to cheat and defraud the said company," etc. It was held: 1st. That the nature of the attempt was not sufficiently set forth; 2d. That the indictment did not contain facts amounting to a statement of a misdemeanor, as the money was not laid to be the property of any one. *R. v. Marsh*, 1 Den. C. C. 505, 1848. See, also, *R. v. Cartwright*, R. & R. 106, 1810.

It is enough in England to charge that the defendant "the goods and chattels of C. D., in the dwelling-

of the building.¹ Hence the attempt may be alleged to be to commit more offences than one.²

III. JURISDICTION.

§ 195. The question of jurisdiction, when an attempt is pursued through two or more distinct sovereignties, is elsewhere discussed.³

Attempts
cognizable
in place
of con-
summa-
tion. It is clear that such attempt is cognizable in the place where, if not interrupted, it would have been executed;⁴ and from the very nature of things, it must be cognizable in the place where the preliminary overt acts constituting the attempt are committed.⁵

IV. EVIDENCE.

§ 196. As in consummated crimes the intent, which is here essential, may be inferred by the jury from facts.⁶ Thus when an indictment alleges that a party attempted to set fire to a dwelling-house, with intent to burn it, by attempting to set fire to another building, the jury are authorized to infer the alleged intent from the evidence of the attempt to set fire to the other building.⁷ It has been ruled, however, where a⁸ prisoner burned a hole in the guard-house where he was confined, in order to escape, and with no intent to consume or generally injure the building, that this was not an attempt to burn the house.⁹ And it is settled that

house of the said C. D., situate in the borough of B., did attempt feloniously to steal, take, and carry away." *R. v. Johnson*, 1 L. & C. 489, 1862. See *R. v. Bullock*, Dears. 653, 1855; *R. v. Marsh*, 1 Den. C. C. 505, 1848; 3 Cox C. C. 570. So also in New York and North Carolina. *People v. Bush*, 4 Hill, 133, 1843; *State v. Utley*, 82 N. C. 556, 1883. And so in Missouri. *State v. Hughes*, 76 Mo. 323, 1882. *Contra*, *State v. Wilson*, 30 Conn. 500, 1861; *Clark's Case*, 6 Gratt. 675, 1849. In *State v. Womack*, 31 La. An. 635, 1879, it was held not enough to aver that the defendant "attempted" to commit a larceny.

¹ *Com. v. Harney*, 10 Metc. 422, 1873. 1845.

² *Ibid.*; *R. v. Fuller*, 1 B. & P. 180; *State v. Graham*, 51 Iowa, 72, 1879.

³ See *infra*, § 288.

⁴ *R. v. Collins*, L. & C. 471; 9 Cox C. C. 497, 1864.

⁵ *Griffin v. People*, 26 Ga. 493, 1860.

⁶ See *supra*, § 176; *R. v. Howlett*, 7 C. & P. 274, 1836; *R. v. Jones*, 9 C. & P. 258, 1840; *People v. Scott*, 6 Mich. 287, 1859; *Bell v. Com.*, 88 Va. 365, 1892; *Rafferty v. State*, 91 Tenn. 655, 1891.

⁷ *Com. v. Harney*, 10 Metc. 422, 1845.

⁸ *Jenkins v. State*, 53 Ga. 33, 1874.

⁹ But see *Luke v. State*, 49 Ala. 30,

there can be conviction of an attempt to murder, unless an intent to kill be specifically shown.¹

Whether when the intention is to hurt B., and the hurt falls on C., the defendant is indictable for an attempt to hurt C., has been already incidentally noticed.² But whatever may be said on this difficult question, we may regard it as settled, that when the indictment avers an attempt to do a particular act, there is a fatal variance if the act proved does not logically fall within the range of the act laid.³

§ 197. If the instrument by which an attempt is effected is apparently adapted to the end (*e. g.*, a gun to shooting), this is a sufficient *prima facie* case. The defendant must prove that the gun was not loaded and known not to be so.⁴

Adaptation makes a *prima facie* case.

V. PRINCIPALS AND ACCESSARIES.

§ 198. All confederates in the attempt, whether present or absent at the overt acts, are responsible as principals, when the attempt is a misdemeanor.⁵

All confederates are principals.

Hence an averment that three joint defendants, in an indictment for an attempt at larceny, "put their hands" into the prosecutor's pocket, may be sustained by evidence that while all participated in the act, only one put his hand in the pocket.⁶

¹ *State v. Neal*, 37 Me. 468, 1854; *Reed v. Com.*, 22 Gratt. 924, 1872; *Kelly*, 1 C. & Dix, 186, 1841; *R. v. Seitz v. State*, 23 Ala. 42, 1853; *Simpson v. State*, 59 Ala. 1, 1878; *Morman v. State*, 24 Miss. 54, 1852; *State v. Stewart*, 29 Mo. 519, 1859; *Wilson v. State*, 4 Tex. App. 637, 1879; *infra*, § 641.

This point is further illustrated under the statutes making specific intents necessary to murder in the first degree, *infra*, § 384. There is no such offence as assault with intent to commit involuntary manslaughter. *Stevens v. State*, 91 Tenn. 726, 1894.

² *Supra*, §§ 109-120, on indictment for assault with intent to murder. Where the evidence showed a wound in the knee there is no presumption that defendant aimed at the knee, so as to reduce the grade of the offence. *State v. Postal*, 83 Iowa, 460, 1891. *Infra*, § 645 a.

³ *R. v. Sullivan*, C. & M. 209; *R. v. Mogg*, 4 C. & P. 364, 1830; *State v. Boyden*, 13 Ired. 505, 1853; *Ogletree v. State*, 28 Ala. 693, 1856; *People v. Woody*, 48 Cal. 80, 1874; *State v. Fallon*, 2 N. D. 510, 1892.

⁴ *Caldwell v. State*, 5 Tex. 18, 1849. *Supra*, § 182. It is for the jury to determine whether the instrument used (*e. g.*, a stone) was a dangerous weapon under the circumstances in which it was used. *Regan v. State*, 46 Wis. 256, 1879.

⁵ *R. v. Wyatt*, 39 L. J. M. C. 83; *R. v. Hapgood*, L. R. 1 C. C. 221, 1869; *Uhl v. Com.*, 6 Gratt. 706, 1849. *Infra*, § 223.

⁶ *Com. v. Fortune*, 105 Mass. 592, 1870.

If the attempt is a felony, co-defendants are responsible according to the laws of principal and accessory.¹

VI. VERDICT.

§ 199. The topic of verdict, in cases where an assault or attempt is proved on an indictment for a greater offence (*e. g.*, felony), is elsewhere noticed.² It may now be specially stated, that while by the old common law there can be technically no conviction of an attempt on a count for felony, this power is given to juries in many jurisdictions by statute.³ But unless the *attempt* be averred in the indictment, there can be no conviction of the attempt on statutes which simply give power to convict of minor offences inclosed in major.⁴

It has been held in England, that under an indictment charging H. with rape, and U. with aiding and abetting, H. could be convicted under the stat. 32 & 33 Vict. c. 29 of attempting to commit the rape, and U. of aiding him in the attempt.⁵

Whether an attempt merges in a consummated crime is hereafter considered.⁶

VII. PUNISHMENT OF ATTEMPT.

§ 200. For the reasons heretofore given, the punishment of an attempt should be less than that of the consummated crime. The attempt involves neither the duration of pre-meditation nor the obduracy of purpose, which belong to the crime when complete. And the policy of the law is, by assigning more lenient punishment to the incomplete offence, to arrest offences in the process of completion. This view, so long neglected in English law, and which English and American judges, acting on what is called the preventive policy, even now sometimes lose sight of,⁷ is essential to a sound ethical jurisprudence.⁸

¹ See *R. v. Hapgood*, L. R. 1 C. C. 221, 1869.

² Whart. Cr. Pl. & Pr. § 261.

³ Whart. Cr. Pl. & Ev. §§ 249-50, 465-7. So in N. Y. by Penal Code of 1882, § 36. See *R. v. Bird*, 2 Den. C. C. 94, 1850; *R. v. Reid*, 2 Den. C. C. 89, 1850; *State v. Wilson*, 30 Conn. 500, 1861; *Hill v. State*, 53 Ga. 125, 1874; *Wolf v. State*, 41 Ala. 412, 1868; *State v. Frank*, 103 Mo. 120, 1891.

⁴ Whart. Cr. Pl. & Pr. §§ 249-50; *Turner v. Muskegon*, 88 Mich. 359, 1891.

⁵ *R. v. Hapgood*, L. R. 1 C. C. 221, 1869.

⁶ *Infra*, §§ 641 a, 1345. In New York by the Penal Code of 1882, there is no acquittal from merger of attempt, § 685.

⁷ *Supra*, § 10.

⁸ See Geib, *ut supra*, § 99.

CHAPTER IX.

ACCESSARYSHIP, AGENCY, MISPRISION.

I. STATUTORY CHANGES.

Common law recently modified by statutes, § 205.

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Meresympathy not confederacy, § 211 *d.*

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Confederacy with constructive presence may constitute principal, § 213.

But act must result from confederacy, § 214.

In duels all are principals, § 215.

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Persons executing parts of crime separately are principals, § 217.

Persons outside keeping watch are principals, § 218.

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 Where the agent acts directly under principal's commands, principal liable, § 246.
 So when agent is in line of principal's business, § 247.
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 VI. MISPRISION.
 Misprision of felony is concealment of felony, § 249.

I. STATUTORY CHANGES.

§ 205. By the English common law, whenever there is a statutory distinction of punishment between principals in the first and principals in the second degree, a party charged as principal in the first degree cannot be convicted on evidence showing him to be principal in the second degree. By the same common law, there can be no conviction of an accessory on an indictment charging him as principal. The obstructions of justice caused by these subtleties have long been deplored; and while in several of the States of the American Union it is already provided by statute that accessories before the fact are to be proceeded against as principals;¹ in other States, and in England, the change will probably not be long delayed. So far as concerns principals in the first and principals in the second degree, the dis-

¹ In New York, by the Penal Code of 1882, § 30, accessories before the fact are made principals, while accessories after the fact include, in addition to the common law definition, one who harbors an offender having reasonable ground to believe such of-

fender is liable to arrest, or has been arrested, is indicted or convicted, or has committed a felony. So in Kansas. *State v. Mosley*, 31 Kan. 355, 1883. And Alabama. *Wicks v. State*, 44 Ala. 398, 1870.

inction is now almost universally obliterated.¹ In the present chapter, however, in view of those jurisdictions in which the common law in this relation remains, the topic will be discussed as at common law.

II. PRINCIPALS.

§ 206. A principal in the first degree, at common law, is one who is the actual perpetrator of the criminal act.²

Principal in first degree is actual perpetrator.

§ 207. To constitute, however, this grade of offence, it is not necessary that the party should have committed the act with his own hands, or be actually present when the offence is consummated;³ for if one lay poison purposely for another, who takes it and is killed, he who lays the poison, though absent when it is taken, is a principal in the first degree.⁴ Such, also, is the case with a party who maliciously turns out a wild beast intending to kill any one whom the animal may attack.⁵ A party, also, who acts through the medium of an innocent⁶ or insane medium,⁷ or a slave,⁸ is guilty, though absent, as principal in the first degree;⁹

Presence not necessary when causal connection is immediate, *e. g.*, when agent is irresponsible.

¹ According to Sir J. F. Stephen, "there was (by the old law) no distinction between principals and accessories in treason and misdemeanor, and the distinction in felony made little difference, because all alike, principals and accessories, were felons, and as such punishable with death." 2 Hist. Crim. Law, 231.

When the distinction between accessories before the fact and principals has been abolished, an indictment is not bad which charges an accessory as principal. *State v. Stacy*, 103 Mo. 11, 1891.

² 1 Hale, 233, 615; Stephen's Dig. art. 36 (5th ed.); *Rountree v. State*, 10 Tex. App. 110, 1880; *Cook v. State*, 14 Ibid. 96, 1883.

³ See *Pinkard v. State*, 30 Ga. 757, 1860; *Berry v. State*, 4 Tex. App. 492, 1878; *Sharp v. State*, 6 Ibid. 650, 1879; *Smith v. State*, 37 Ark. 274, 1880. *Infra*, § 219.

⁴ *Vaux's Case*, 4 Co. 44 *b*; Stephen's Dig. art. 36 (5th ed.); *Fost.* 349; *R. v. Harley*, 4 C. & P. 369, 1830; *R. v. Kelly*, 2 C. & K. 379, 1847; *R. v. Holway*, 2 Den. 287, 1870; *People v. Bush*, 4 Hill, 133, 1833. See *Pinkard v. State*, 30 Ga. 757, 1860; *Green v. State*, 13 Mo. 382, 1850.

⁵ *Fost.* 349; 1 Hale, 514.

⁶ *Supra*, § 161; *R. v. Mazeau*, 9 C. & P. 676; *R. v. Michael*, 9 C. & P. 356, 1840; *s. c.* 2 Mood. C. C. 163; *R. v. Clifford*, 2 C. & K. 201, 1845; *R. v. Bleesdale*, 2 C. & K. 764, 1846; *Com. v. Hill*, 11 Mass. 36, 1814; *Adams v. People*, 1 Comst. 173, 1848; *State v. Fulkerson, Phillip*, (N. C.) 233, 1867.

⁷ 1 Hale, 19; 4 Bla. Com. 23; *R. v. Giles*, 1 Mood. C. C. 166, 1835; *R. v. Tyler*, 8 C. & P. 616, 1838; *Blackburn v. State*, 23 Ohio St. 146, 1872.

⁸ *Berry v. State*, 10 Ga. 511, 1851.

⁹ *Supra*, § 161.

while he would be guilty only as accessory before the fact at common law were the agent a responsible and conscious confederate.¹ Thus, in Sir William Courtney's case, Lord Denman, C. J., charged the jury: "You will say whether you find that Courtney was a dangerous and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and conferring in his acts; and if you do, you will find them guilty, for they are then liable as principals for what was done by his hand."² If, therefore, a child under the age of discretion,³ or any other person excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the incitor, though absent when the act was committed, is *ex necessitate* liable for the act of his agent, and a principal in the first degree.⁴

So if A., by letter, desire B., an innocent agent, to write the name of "W. S." to a receipt on a post-office order, and the innocent agent do it, believing that he is authorized so to do, A. is a principal in the forgery; and it makes no difference that by the letter A. says to B. that he is "at liberty" to sign the name of W. S., and does not in express words direct him to do so.⁵ But if the agent be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the act is committed, is an accessory before the fact.⁶

§ 208. At common law, one indicted as principal cannot be con-

¹ *Infra*, § 280.

² 1 Hawk. c. 1, s. 7; *R. v. Mears*, 1 Boston Law Rep. 205.

³ *State v. Learned*, 41 Vt. 585, 1869; *Blackburn v. State*, 23 Ohio St. 146, 1872; *People v. Miller*, 5 W. Coast R. (Cal.) 598, 1885.

⁴ Fost. 340; 1 East P. C. 118; 1 Hawk. c. 13, s. 7; *R. v. Palmer*, 1 N. R. 96; 2 Leach, 978, 1804; *R. v. Giles*, 1 Mood. C. C. 166, 1835; *R. v. Michael*, 2 Mood. C. C. 87, 1835; 9 C. & P. 356, 1840; *R. v. Manley*, 1 Cox C. C. 104, 1844; *Com. v. Hill*, 11 Mass. 136, 1814; *Collins v. State*, 3 Heisk. 14, 1870. *Supra*, § 161.

⁵ *R. v. Clifford*, 2 C. & K. 201,

1845. See, also, *R. v. Palmer*, 1 Russ. Cr. 160, 1804; Stephen Crim. Law, art. 37 (5th ed.).

⁶ *R. v. Soares*, R. & R. 25, 1802; *R. v. Stewart*, R. & R. 363, 1818; *Wixon v. People*, 5 Park. C. R. 119, 1860; or, if he be present, a principal in the second degree. Fost. 349. See *R. v. Manley*, 1 Cox C. C. 104, 1844; *Montague v. State*, 17 Fla. 662, 1880. One who assists in the commission of a crime is not relieved because his acts were done under threats, unless the danger be to life or member and be immediate. *Burns v. State*, 89 Ga. 527, 1892.

victed on proof showing him to be only an accessory before the fact,¹ nor the converse.²

Accessory before the fact cannot be convicted as principal.

§ 209. A non-resident party, though at the time an inhabitant of a foreign State, may be at common law responsible as principal for his agent's criminal acts not amounting to felonies, in a particular jurisdiction,³ while as to felonies he would be an accessory before the fact. And a party who, thirty miles off, and in another county, signals to another, by fire on a mountain, when to commit a highway robbery, is principal in the robbery.⁴

Non-resident party may be liable for agent's acts.

§ 210. If a husband and wife commit a murder jointly, they may be regarded, so it has been held, as co-principals, on the ground that the doctrine of presumed coercion does not apply to murder.⁵ And so a wife may be convicted, it is said, as an accessory before the fact to the husband.⁶ But the weight of opinion is to require proof of independent consent on part of the wife.⁷

Wife not ordinarily co-principal with husband.

III. PRINCIPALS IN THE SECOND DEGREE.

§ 211. Principals in the second degree are those who are present aiding and abetting the commission of the offence.⁸ As has been elsewhere shown, the assistant (principal⁹ in the second degree) is distinguished from the principal in the first degree in this, that the latter *directs* the unlawful act, the former *assists* it; the action of the latter is primary, that of the former is subsidiary. Hence the principal in the first degree is spoken of by the old writers as *causa principalis*, while the principal in the second degree is spoken of as *causa secundaria*, or secondary cause. The principal in the second degree, or assistant, is distinguished from the accessory before the fact, not merely because the former is present, and the latter absent,

Principals in second degree are those present actively aiding and encouraging.

¹ R. v. Fallon, 9 Cox C. C. 242, 1862; State v. Wyckoff, 2 Vroom, 65, 1866; Hughes v. State, 12 Ala. 458, 1848; Josephine v. State, 39 Miss. 613, 1866; Walrath v. State, 8 Nebr. 80, 1878. See for other cases *infra*, §§ 238-245.

² *Infra*, §§ 278-280.

³ State v. Hamilton, 13 Nev. 386, 1878. *Infra*, § 218.

⁴ R. v. Manning, 2 C. & K. 887, 1849.

⁵ *Ibid.*

⁶ 1 Leach, 515; 1 East P. C. 352; Smith, 8 Cox C. C. 27, 1858; R. v. State v. Larkin, 49 N. H. 39, 1868. Wardroper, *Ibid.* 284, 1860.

⁷ *Supra*, §§ 78 *et seq.* See R. v.

See State v. Dewer, 65 N. C. 572, 1871; Hatley v. State, 15 Ga. 346, 1854.

⁸ Com. v. Lowry, 158 Mass. 18, 1893.

⁹ 9 Cent. L. J. 205.

at the commission of the offence, but because the accessory before the fact, or instigator, acts deliberately ; and so with premeditation, though it may be not so cool and long, does the principal in the first degree ; while the idea of such extended premeditation is not necessary to the principal in the second degree, or assistant, who is not supposed, as is the instigator, to exercise an organizing influence on the principal in the first degree, and who may be employed or induced to assist the latter without any previous conception of what the criminal act is intended to be. But unless the distinction is imposed by statute, it has ceased to be of practical interest, since principals in the second degree may be convicted on indictments charging them in the first degree.¹

§ 211 a. Merely witnessing a crime, without intervention, does not make a person a party to its commission, unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime ; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator.² A person, for instance, in order to produce a collision on a railroad, starts a car on the top of a high grade. A switch-tender, appointed to watch and adjust a particular switch, could avoid a collision by turning the switch, but intentionally refuses to do so. In such case

¹ *Infra*, § 221.

² *Infra*, § 214 ; 1 Hale P. C. 439 ; Fost. 350.

As to how far presence at a prize fight involves complicity, see *R. v. Orton*, and *R. v. Coney*, cited *infra*, § 372, and remarks in *London Law Times*, Dec. 17, 1881. That a woman assisting in a rape may be principal, see *infra*, § 553 a.

A distinction is taken between physical and intellectual help, the latter being supposed to be help purely in words, or signs of encouragement. It should be observed, however, that all physical help is intellectual. A participant in a fight, for instance, to take an extreme case, sees a weapon offered to him by a person who is invisible. Here is physical aid and in its most naked shape, since the person offering the

aid is not even seen. But it is at the same time intellectual aid (or psychical, to take the German term), since it gives the combatant reason to believe that he has a friend near ready to see him through. It is encouragement as well as assistance. 9 Cent. L. J. 206 ; *U. S. v. Neverson*, 1 Mack. 152, 1881 ; *U. S. v. Jones*, 3 Wash. C. C. 209, 1821 ; *State v. Hildreth*, 5 Ired. 440, 1844 ; *State v. Farr*, 33 Iowa, 573, 1871 ; *Butler v. State*, 2 Duv. 435, 1875 ; *Jones v. State*, 64 Ga. 697, 1880 ; *Laurence v. State*, 68 Ga. 289, 1881 ; *Smith v. State*, 37 Ala. 472, 1864 ; *Cohea v. State*, 9 Tex. App. 173, 1880 ; *Hancock v. State*, 14 Ibid. 393, 1883 ; *People v. Woodward*, 45 Cal. 293, 1873 ; *State v. Douglass*, 44 Kans. 618, 1891 ; *State v. Miller*, 100 Mo. 606, 1890.

he is an assistant in the homicide, if a homicide ensue.¹ A watchman appointed to guard a bank sees burglars approach, and lets them pursue their work without interruption. By so doing he becomes assistant in the felony. But unless this abstention from interference removes a check which would otherwise prevent the commission of the crime, and is therefore equivalent to a positive act of assistance, the person so abstaining does not become a party to the crime. He may be indicted for his neglect in not assisting the officers of the law in arresting the offenders. But he is not indictable as concerned in the offence which the offender in question commits.² Hence, although a man be present while a felony is committed, yet if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony or apprehend the felon.³ Something must be shown in the conduct of the bystander which indicates a design to encourage, incite, or in some manner afford aid or consent to the particular act; though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.⁴ "Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental, it is evidence, but no more than evidence, for the jury."⁵ It is not necessary, therefore, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a con-

¹ *Supra*, § 131; *infra*, § 348.

² "It is no criminal offence to stand by a mere passive spectator of a crime, even of a murder." Hawkins, J., R. v. Coney, cited *infra*. See Washington v. State, 68 Ga. 570, 1881.

³ 1 Hale, 439; Fost. 350; Connaught v. State, 1 Wis. 169, 1852; Butler v. Com., 2 Duv. 435, 1875; Plummer v. Com., 1 Bush, 76, 1866; Hilmes v. Strobel, (Ky.) 18 S. W. Rep. 126, 1884; People v. Ah Ping, 27 Cal. 489, 1865.

⁴ R. v. Taylor, L. R. 2 C. C. 147, 1873; R. v. Cruse, 8 C. & P. 541, 1838; R. v. Atkinson, 11 Cox C. C. 330, 1870; King v. State, 21 Ga. 220,

1855; Wright v. State, 42 Ark. 94.

1881. See White v. People, 81 Ill. 333, 1876; Clem v. State, 33 Ind. 418, 1870; State v. Farr, 33 Iowa, 553, 1871; Walrath v. State, 8 Nebr. 80, 1878; Connaught v. State, 1 Wis. 159, 1863; People v. Woodward, 45 Cal. 293, 1873; Savage v. State, 18 Fla. 909, 1882.

⁵ Cave, J., (after citing Foster, 350) in R. v. Coney, L. R. 46 L. T. N. S. 307; L. R. 8 Q. B. D. 534, 1882; 15 Cox C. C. 46; *infra*, § 372. See R. v.

Young, 8 C. & P. 644, 1838; R. v. Perkins, 4 C. & P. 537, 1831; R. v. Taylor, cited *infra*, § 227.

venient distance in order to favor their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting.¹

§ 211 b. Nor is it necessary that the principal in the second degree should be personally capable of committing the offence.² Thus a person incapable of rape may be principal in the second degree to rape;³ an unmarried man may be principal in the second degree to bigamy;⁴ a cripple decoying into a trap one whom he could not even strike, may be guilty of homicide; and one who cannot write, but supplies knowingly the materials, may be guilty of forgery.⁵

§ 211 c. The confederacy must be real. Thus if one of the parties to a proposed burglary enter the house, not in order to steal, but to entrap the other party, the latter, who has not entered the house, is not indictable for burglary,⁶ and as has been just seen, mere presence at the commission of a crime does not imply complicity.⁷

§ 211 d. Mere sympathy, also, even by a bystander, does not by itself constitute confederacy.⁸ Hence mere consent to a crime, when no aid is given, and no encouragement rendered, does not amount to participation.⁹ It is otherwise in respect to such silent assent to a statement of another to a third party as amounts to an approval.¹⁰

¹ Jerv. Arch. 4; Thompson v. Com., 1 Metc. (Ky.) 13, 1858; State v. Douglass, 34 La. An. 523, 1882.

² R. v. Potts, R. & R. 353, 1818; U. S. v. Snyder, 4 McCr. 618, 1882; U. S. v. Bayer, 4 Dill. 407, 1876; 13 Bank. Reg. 403; *infra*, § 1340 a. As to suicide, see *infra*, § 216.

³ Audley's Case, 3 How. St. Tr. 401. See as to an infant co-defendant, Law. v. Com., 75 Va. 885, 1880.

⁴ Boggus v. State, 34 Ga. 275, 1865. *Supra*, § 69.

⁵ *Infra*, § 217.

⁶ People v. Collins, 53 Cal. 185, 1878. That a detective is not a confederate, see *supra*, § 149; Price v. People, 109 Ill. 109, 1883.

⁷ *Supra*, § 211.

⁸ *Infra*, §§ 227, 1402; R. v. Taylor, L. R. 2 C. C. 147, 1875; 13 Cox C. C. 681; Com. v. Cooley, 6 Gray, 350, 1856; Plummer v. Com., 11 Bush, 76, 1876; Clem v. State, 33 Ind. 418, 1870; Connaughty v. State, 1 Wis. 159, 1853; Guilford v. State, 24 Ga. 315, 1857; Martin v. State, 25 Ibid. 315, 1858; State v. Cox, 65 Mo. 29, 1877; People v. Leith, 52 Cal. 521, 1877. As to sympathetic spectators at prize fights, see *infra*, §§ 372, 373, 1465 a. As to sympathetic neutrals, *infra*, § 1902.

⁹ White v. People, 81 Ill. 333, 1876; Tullis v. State, 41 Tex. 598, 1874.

¹⁰ *Infra*, § 1170.

§ 212. We have already seen that he who acts through an irresponsible agent is liable as principal.¹ It follows, therefore, that a person so acting is not liable as principal in the second, but as principal in the first degree. Hence, if a principal in a transaction be not liable under our laws, another cannot be charged merely for aiding and abetting him unless such abettor do acts which render him liable as principal.²

If principal is irresponsible, indictment should not be for aiding and abetting.

§ 213. Any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in the second degree, as to any crime committed in execution of the plan.³ Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of others with the possession of the goods, and then another of the party entice the owner away so that he who has the goods may carry them off, all are guilty as principals.⁴ So, it has been ruled, that to aid and assist a person to the jurors unknown, to obtain money by ring-dropping, makes the party principal in the second degree, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of this practice.⁵ And so confederates watching outside, the object being to effect a murder, incur the same guilt as the confederate by whom the blow is struck.⁶

Confederacy with constructive presence may constitute principal.

¹ *Supra*, § 207. See, also, *R. v. Tyler*, 8 C. & P. 616, 1838.

² *U. S. v. Libby*, 1 W. & M. 221, 1846. See *U. S. v. Crane*, 4 McLean, 317, 1850.

³ *Infra*, §§ 218, 1404; Stephen's Dig. C. L. art. 40, (5th ed.); *Sissinghurst's Case*, 1 Hale P. C. 462, 1672; *R. v. Manners*, 7 C. & P. 801, 1837; *Com. v. Knapp*, 9 Pick. 496, 1829; *McCarney v. People*, 83 N. Y. 408, 1881; *Trim v. Com.*, 18 Gratt. 983, 1868; *Breese v. State*, 12 Ohio St. 146, 1861; *Green v. State*, 13 Mo. 382, 1850; *Selvidge v. State*, 30 Tex. 60, 1867; *People v. Brown*, 59 Cal. 345, 1881. See *State v. Buchanan*, 35 La. An. 89, 1883.

⁴ *R. v. Standley*, R. & R. 305, 1818; *R. v. Passey*, 7 C. & P. 282, 1836; *R. v. Lockett*, Ibid. 300, 1836.

⁵ *R. v. Moyre*, 1 Leach, 314; *R. v. Standley*, R. & R. 305, 1817; *R. v. Passey*, 7 C. & P. 282, 1836; *R. v. Lockett*, Ibid. 300, 1836.

In *R. v. Jeffries*, 3 Cox C. C. 85, 1849, Cresswell, J., after conferring with Patteson, J., held that if A., one of two confederates, unlock the door of a room in which a larceny is to be completed, and then go away, and B., the other confederate, comes and steals the goods, the former is not a principal in the theft. This, however, is disapproved in *State v. Hamilton*, 13 Nev. 385, 1878, and, supposing that the aid rendered by A. promoted the execution of the felony, it is in conflict with the cases above stated.

⁶ *Mitchell v. Com.*, 33 Gratt. 845, 1879. *Infra*, § 218.

§ 214. But the act, in order thus to be imputed to all the confederates, must be the result and in execution of the confederacy;¹ and if the crime is committed by a confederate as collateral to an escape after the plot is exploded;² as when several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken; the others are not to be considered principals in such act.³ Persons, also, interfering in hot blood in a fight, which was started by the immediate parties deliberately, may be guilty only of manslaughter, while the immediate parties are guilty of murder.⁴ And when H. and S. broke open a warehouse and stole thereout thirteen firkins of butter, etc., which they carried along the street thirty yards, and then called the prisoner, who was apprised of the theft, and he assisted in carrying the property away; he was held

¹ See *infra*, §§ 220, 397; *R. v. Hodgson*, 1 Leach, 6, 1730; *Duffey's Case*, 26 Mich. 112, 1872.

² 1 Lew. 194, 1830; *R. v. Cruse*, 8 C. & P. 541, 1838; *R. v. Price*, 8 Cox C. C. 96; *R. v. Taylor*, L. R. 2 C. C. 147, 1875; *U. S. v. Gibert*, 2 Sumn. 19, 1837; *Com. v. Campbell*, 7 Allen, 541, 1863; *State v. Lucas*, 55 Iowa, 321, 1881; *People v. Knapp*, 26 Mich. 112, 1872; *People v. Woodward*, 45 Cal. 293, 1873; *Mercersmith v. State*, 8 Tex. App. 211, 1880. See *Breese v. State*, 12 Ohio St. 146, 1861, and cases cited *infra*, §§ 218, 220; *supra*, § 211 a.

³ *R. v. Collison*, 4 C. & P. 565, 1831; *R. v. Howell*, 9 C. & P. 437, 1839; *People v. Knapp*, 26 Mich. 112, 1872.

"There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. In other words, the principle is quite analogous to that of agency, where the liability is measured by the express or implied authority. And the authorities are quite clear and reasonable, which deny any liability for acts done in escaping, which were not within any joint purpose or combina-

tion." *Campbell, J., People v. Knapp*, 26 Mich. 112, 1872.

An interesting question, already discussed in some of its relations (see *supra*, § 187), arises where one confederate abandons the enterprise before the homicide is committed. Such abandonment, it has been held, is no defence where notice of it is not given to his associates before the blow is struck. *State v. Allen*, 47 Conn. 421, 1879.

⁴ *R. v. White*, R. & R. C. C. 99, 1805; *R. v. Collison*, 4 C. & P. 565, 1831; *R. v. Howell*, 9 C. & P. 437, 1839. In *State v. Absence*, 4 Port. 397, 1856, the maiming was part of an attack which the defendants were concerned in making; and the court erred in holding that the mayhem was not imputable to all the defendants.

not a principal, the felony being complete before he interfered.¹ And it may be, therefore, generally declared that a confederate is not responsible for a crime which is not a probable and natural result of the confederacy, unless such crime was committed with his assent.²

§ 215. In the case of murder by duelling, in strictness, all parties, as will be more fully seen, are technically principals.³ And all persons present at a prize-fight, having gone thither for the purpose of encouraging the prize-fighters, are principals in the breach of the peace.⁴

In duels
all are
principals.

§ 216. If one encourage another to commit suicide, and is present aiding him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but the latter fail in an attempt upon himself, he is principal in the murder of the first.⁵ Whether the influence of the defendant was the exclusive cause of the suicide is immaterial.⁶ All present at the time of committing the offence are principals, although only one acts, if they are confederates, and engaged in the common design of which the offence is a part.⁷ Where, however, the act is done in the absence of the party who incites it, the latter has been held in England not to be amenable to indictment as a

Persons
abetting
suicide are
principals
in murder.

¹ R. v. King, R. & R. C. C. 332, does not constitute complicity, see 1818; R. v. McMackin, R. & R. C. State v. Cox, 65 Mo. 29, 1877; Connaughty v. State, 1 Wis. 159, 1853; C. 333, 1818. *Supra*, § 160.

² See *infra*, §§ 220, 397, 478; R. v. People v. Leith, 52 Cal. 251, 1877. Murphy, 6 C. & P. 103, 1833; R. v. *Infra*, §§ 1400, 1402; *supra*, § 211 d.

Franz, 2 F. & F. 580, 1860; R. v. ³ See fully *infra*, § 614; R. v. Young, Horsey, 3 Ibid. 287, 1862; R. v. Skeet, 8 C. & P. 644, 1838.

4 Ibid. 931, 1864; R. v. Hawkins, 3 C. & ⁴ R. v. Perkins, 4 C. & P. 537, 1831; P. 392, 1828; R. v. Tyler, 8 Ibid. 616, R. v. Murphy, 6 C. & P. 103, 1833. *Cf.* 1838; R. v. Price, 8 Cox C. C. 96, R. v. Coney, cited *supra*, § 212; *infra*, 1858; U. S. v. Jones, 3 Wash. C. C. §§ 373, 636.

209, 1821; Com. v. Campbell, 7 Allen, ⁵ See more fully *infra*, §§ 448 *et* 541, 1863; Watts v. State, 5 W. Va. *seq.*; R. v. Dyson, R. & R. C. C. 523, 532, 1872; Manier v. State, 6 Baxt. 1819; R. v. Russell, 1 Mood. C. C. 595, 1875; Lamb v. People, 96 Ill. 73, 356, 1832; R. v. Allison, 8 C. & 1880; People v. Knapp, 26 Mich. 112, P. 418, 1838; Blackburn v. State, 23 1872; State v. Stalcup, 1 Ired. 30, 1840; Ohio St. 165, 1872; State v. Ludwig, Miller v. State, 15 Tex. App. 125, 1883; 70 Mo. 412, 1879.

Harris v. State, Ibid. 629, 1883. See ⁶ Com. v. Bowen, 13 Mass. 356, 1815; R. v. Collison, 4 C. & P. 565, 1831; and Whart. Prec. 107.

see other cases cited *infra*, § 397. ⁷ Green v. State, 13 Mo. 382, 1850.

That a mere sympathetic cognizance See *supra*, §§ 206-208.

principal, because he was not present; nor as an accessory before the fact at common law, because the principal cannot be convicted;¹ nor as guilty of a substantive felony under 7 Geo. III. c. 64, s. 9, because that statute is to be considered as extending to those persons only who, before the statute, were liable either with or after the principal, and not to make those liable who before could never have been tried.² But by subsequent statutes the English law in this respect is materially changed.³ That an attempt to commit suicide may be indictable at common law is elsewhere seen.⁴

A party who compels another to take poison, so as to produce death, is responsible for the murder as principal in the first degree.⁵

§ 217. Where one assailant strikes a blow which is not fatal, and a confederate follows it up with a fatal blow, both are principals in the homicide.⁶ If part of a crime also be committed in one place and part in another, each person concerned in the commission of either part is liable as principal.⁷ Hence if several combine to forge a document,

Persons
executing
parts of
crime sep-
arately are
principals.

¹ R. v. Fretwell, 9 Cox C. C. 152, 1862; L. & C. 161.

² See R. v. Leddington, 9 C. & P. 79, 1839; R. v. Russell, 1 Mood. C. C. 356, 1832.

³ See *infra*, §§ 448 *et seq.*

⁴ *Supra*, § 175.

⁵ Thus in a case tried in 1872 in Ohio (where suicide is not a crime, there being in that State no common law crimes), the evidence was that the defendant, Blackburn, gave to the deceased, Mary Jane Lowell, poison, to be taken by her; and there was evidence tending to show that the defendant, by threats of violence or otherwise, forced her to swallow the poison, or forced it down her throat. There was also evidence of a mutual agreement between the parties to commit suicide. The defendant was convicted of murder in the second degree, under the Ohio statute making killing by administering poison murder. This was sustained in the Supreme Court.

"To force poison down one's throat," said Welch, J., "or to compel him by threats of violence to swallow it, is an

administering of poison. Neither deception nor breach of confidence is a necessary ingredient in the act. It matters not whether the poison be put into the hand or into the stomach of the party whose life is to be destroyed by it." Blackburn v. State, 23 Ohio St. 146, 1872.

In a reserved case before the English judges, the evidence showed that the prisoner procured certain drugs and gave them to his wife, with intent that she should take them in order to procure abortion. She took them in his absence and died from their effects. On an indictment against him for manslaughter, it was objected that he was only an accessory before the fact, and that in law there cannot be an accessory before the fact to manslaughter. It was held that a conviction for manslaughter was proper. R. v. Gaylor, 7 Cox C. C. 253; Dears. & B. C. C. 288, 1856; People v. Weber, 5 W. Coast R. (Cal.) 290, 1885.

⁶ Tidwell v. State, 70 Ala. 33, 1881.

⁷ R. v. Kelly, 2 C. & K. 379, 1847. See R. v. Lockett, 7 C. & P. 300, 1836;

and each executes, by himself, a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.¹ And if A. counsel B. to make the paper, C. to engrave the paper, D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C., and D. may be indicted for forgery, and A. as an accessory;² for if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others.³

§ 218. It has been already seen that actual immediate presence at the injury is not necessary; (1) when the defendant acts through an irresponsible agent (*e. g.*, through a lunatic or infant);⁴ and (2) when he acts through a material agent, such as poison, which does not require the presence of a guilty director to make it effective. Nor is it necessary that the party should be actually present, an ear or eye-witness of the transaction, in order to make him principal in the second degree; he is, in construction of law, present aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it should the occasion arise.⁵ Thus, if he be outside of an inclosure, watching, to prevent surprise, or for the purpose of keeping guard, while his confederates are inside committing the felony, such constructive presence is sufficient to make him a principal in the second degree.⁶

Persons
outside
keeping
watch are
principals.

R. v. Whittaker, 1 Den. C. C. 310, 1848; *Hanna v. People*, 86 Ill. 243, 1877; *R. v. Gogerly*, R. & R. C. C. 343, 1818; *R. v. Owen*, 1 Mood. C. C. 96, 1826; *R. v. Vanderstein*, 10 Cox C. C.

¹ *R. v. Bingley*, R. & R. C. C. 446; *R. v. Kelley*, *Ibid.* 421, 1820. 177, 1865; *Com. v. Knapp*, 9 Pick. 496, 1829; *Com. v. Lucas*, 2 Allen,

² *R. v. Dale*, 1 Mood. C. C. 307, 1833. 170, 1861; *Ruloff v. People*, 45 N. Y. 213, 1870; *Stephens v. State*, (Ohio)

³ *R. v. Kirkwood*, 1 Mood. C. C. 304, 1833. See *R. v. Kelly*, 2 Cox C. C. 171, 1848. 18 Rep. 181, 1884; *State v. Hardin*, 2 Dev. & Bat. 407, 1837; *State v. Coleman*, 5 Porter, 32, 1837; *State v.*

⁴ Even when person committing crime is a guilty agent, the procurer is a principal offender. *Smith v. State*, 21 Tex. App. 107, 1886. Town, *Wright's Ohio R.* 75, 1831; *Breese v. State*, 12 Ohio St. 146, 1861; *Tate v. State*, 6 Blackf. 110, 1842; *Doan v. State*, 26 Ind. 495, 1866;

⁵ See *State v. Douglass*, 34 La. An. 523, 1882. *State v. Squaires*, 2 Nev. 226, 1865; *Selvidge v. State*, 30 Tex. 60, 1867;

⁶ *Fost.* 347, 350; 2 *Hawk. c.* 29, ss. 7, 8; 1 *Russ.* 31; 1 *Hale*, 555; *R. v. Borthwick*, 1 Doug. 207; 1 *Leach*, 66; *Truitt v. State*, 8 Tex. App. 148, 1880; *Thomas v. State*, 43 Ark. 149, 1884.

No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of a felony, and all take their part in furtherance of the common design, all are liable as principals.¹ Actual presence is not necessary if there is direct connection between the actor and the crime. Turning out a wild beast with intent to do mischief, so that thereupon death ensues, involves, as we have seen, the guilt of a principal;² and the same grade of guilt is imputable to him who, intending to kill, sets a spring-gun, or explosive machine,³ no matter how far he may be from the place where the hurt is inflicted. Hence, as will presently be more fully seen, a confederate who aids in the commission of a robbery by a signal on a distant hill, notifying the approach of the parties to be attacked, is a principal in the robbery.⁴ A person, however, is not constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to do so, if necessary.⁵

§ 219. But persons not actually assisting are not principals at common law.⁶ Thus, where Brighton uttered a forged note at Portsmouth, the plan was concerted between him and two others, to whom he was to return, when he passed the note, and divide the proceeds. The three had before been concerned in uttering another forged note; but at the time this note was being uttered in Portsmouth, the other two stayed at Gosport. The jury found all three guilty, but on a case reserved, the judges were clear that as the other two were not present, nor sufficiently near to assist, they could not be deemed principals, and therefore, they were recommended for a pardon.⁷ Going toward the place where a felony is to be committed, in order to

An abettor
must be
near
enough to
give assist-
ance.

¹ *Supra*, §§ 209-213; *R. v. Standley*, R. & R. C. C. 305, 1818.

⁵ *United States v. Burr*, 4 Cranch, 492, 1808; *infra*, § 224.

But the crime must be the result of a prearranged plan. *Roney v. State*, 76 Ga. 731, 1886; *Jordan v. State*, 81 Ala. 20, 1887; *Quinn v. State*, (Tex.) 20 S. W. Rep. 1108, 1893; *State v. Whitson*, (N. C.) 16 S. E. Rep. 332, 1892; *White v. People*, 139 Ill. 143, 1891.

² *Fost.* 349; 1 *Hale*, 514.

³ See *supra*, §§ 161, 166; *infra*, § 507.

⁴ *State v. Hamilton*, 13 Nev. 386, 1878, cited *infra*, § 220; see *Scales v. State*, 7 Tex. App. 361, 1880.

⁶ *Taylor v. State*, 9 Tex. App. 100, 1880. One within 150 yards aiding and abetting can be convicted as a principal. *State v. Chastain*, 104 N. C. 900, 1890; and see *State v. Praeter*, 26 S. C. 198, 1887.

⁷ *R. v. Soares, Atkinson & Brighton*, 2 East P. C. 974, 1802; *R. & R. C. C.* 25; and see *R. v. Stewart and others*, *Ibid.* 363, 1818; *R. v. Badcock and others*, *Ibid.* 249, 1817; *R. v. Manners*, 7 C. & P. 801, 1837. *Infra*, § 710.

assist in carrying off the property, and assisting accordingly will not make a man a principal, if he were at such a distance at the time of the felonious taking as not to be able to assist in it.¹ And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals in cases where the felony is immediately executed by responsible agents, but are accessaries before the fact.² Presence, however, during the whole of the transaction, is not necessary; for as we have already seen, if several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals.³ And presence is not to be determined by mere contiguity of space. A man who, on a mountain-top at a distance of thirty miles, assists a highway robber, by a signal, in making an attack, is a principal in the robbery.⁴

§ 220. All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime.⁵ Thus, if several persons come armed to a house with intent to commit an affray or a personal outrage (such affray or outrage having bloodshed as a probable incident), and a homicide ensues while the assailants are engaged in such illegal proceedings, then even those who may not actually participate in any overt act of outrage will be principals in the homicide.⁶ And where persons combine to stand by one

Persons confederating for wrongful purpose are chargeable with incidental felony.

¹ R. v. Kelly, R. & R. 421, 1820. & P. 437, 1837; R. v. McNaughton,

² R. v. Soares, R. & R. 25, 1802; R. 14 Cox C. C. 576, 1879; Brennan v. v. Davis, Ibid. 113, 1810; R. v. Elsee, People, 15 Ill. 511, 1853; Carrington Ibid. 142, 1813; R. v. Badcock, Ibid. v. People, 6 Parker C. R. 336, 1860; 249, 1817; R. v. Manners, 7 C. & P. State v. Johnson, 7 Oreg. 210, 1879; 801, 1837. Peden v. State, 61 Miss. 268, 1875;

³ R. v. Bingley, R. & R. 446, 1820. Allen v. State, 12 Lea, 424, 1883; W. S. See 2 East P. C. 768. See *supra*, § 217. v. Boyd, 45 Fed. Rep. 851, 1890; Carr

⁴ State v. Hamilton, 13 Nev. 386, v. State, 43 Ark. 99, 1884. *Infra*, § 1536. 1878. *Infra*, § 280. As giving a still ⁵ Dalt. J. c. 161; 1 Hale, 439; larger meaning to "abet," see State v. Hawk. b. 2, c. 29, s. 8; Simmons v. Stanley, 48 Iowa, 221, 1878. State, 61 Miss. 244, 1875; Peden v.

⁶ *Supra*, § 214; Fost. 351, 352; 2 State, 61 Miss. 268, 1875; State v. Hawk. c. 29, s. 9; R. v. Howell, 9 C. Barrett, 40 Minn. 17, 1889.

another in a breach of the peace, with a general resolution to resist to the death all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view.¹ So where a number of persons combine to seize with force and violence a vessel, and run away with her, and, if necessary, to kill any person who should oppose them in the design, and murder ensues, all concerned are principals in such murder.² Hence it is not necessary that the crime should be part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose.³ Thus where A. and B. go out for the purpose of robbing C., and A., in pursuance of the plan, and in furtherance of the robbery, kills C., B. is guilty of the murder.⁴ In such cases of confederacy all are responsible for the acts of each, if done in pursuance of, or as incidental to, the common design.⁵ Where, however, a homicide is committed collaterally by one or more of a body unlawfully associated, from causes having no connection with the common object, the responsibility for such homicide attaches exclusively to its actual perpetrators.⁶ When, also, the

¹ R. v. Howell, 9 C. & P. 437, 1837; Com. v. Hare, 4 Penn. L. J. 257; 2 Clark, 467, 1844; Ruloff v. People, 45 N. Y. 213, 1871; Williams v. People, 54 Ill. 422, 1870; Miller v. State, 25 Wis. 384, 1870; Miller v. State, 15 Tex. App. 125, 1883. See, however, qualification stated by Bigelow, C. J., Com v. Campbell, 7 Allen, 541, 1863.

² U. S. v. Ross, 1 Gallis. 624, 1814. See Brennan v. People, 15 Ill. 511, 1853.

³ See cases cited *infra*; and see R. v. Tyler, 8 C. & P. 616, 1858; R. v. Bernard, 1 F. & F. 240, 1858; R. v. Cooper, 1 Cox C. C. 266, 1845; Ferguson v. State, 32 Ga. 658, 1861; Beets v. State, Meigs, 106, 1838; *supra*, § 220; *infra*, 397. And when the crime was carried out in a way different from that suggested, the instigator is nevertheless guilty. Griffith v. State, 90 Ala. 583, 1891.

⁴ R. v. Jackson, 7 Cox C. C. 357, 1856, and cases cited *infra*, § 229.

⁵ R. v. Murphy, 6 C. & P. 103, 1833; R. v. Tyler, 8 C. & P. 616, 1838; U. S. v. Ross, 1 Gallis. 624, 1814; U. S. v. Gibert, 2 Sumn. 19, 1837; Com. v. Daly, 4 Penn. Law Journal, 156; 2 Clark, 361, 1844; Com. v. Neills, 2 Brews. 553, 1868; Brennan v. People, 15 Ill. 511, 1853; People v. Knapp, 26 Mich. 112, 1872; Moody v. State, 6 Coldw. 299, 1869; Thompson v. State, 25 Ala. 41, 1854; State v. Blackman, 35 La. An. 483, 1883; see *supra*, §§ 110, 120; Martin v. State, 90 Ala. 602, 1891.

⁶ Ibid.; *supra*, §§ 160, 214; *infra*, § 397, and cases there cited; R. v. Murphy, 6 C. & P. 103, 1833; R. v. Collison, 4 C. & P. 565, 1831; R. v. Skeet, 4 F. & F. 931; Lamb v. People, 96 Ill. 73, 1880; People v. Knapp, 26 Mich. 112, 1872. See R. v. McPhane, C. & M. 212, 1841.

offence is only manslaughter in the person striking the blow, it is only manslaughter in those engaged with him with the like temper and purpose;¹ though if there be malice proved as to any one party, he may be separately found guilty of murder.² It must also be remembered that a rioter is not responsible, on an indictment for murder, for a death accidentally caused by officers engaged in suppressing the riot;³ nor, in an affray, are the original parties responsible for a death caused by strangers wantonly and adversely breaking in.⁴ How far abandonment relieves from responsibility has been elsewhere noticed.⁵

§ 221. The distinction between principals in the first and second degree, it has been said, is a distinction without a difference; and, therefore, it need not be made in indictments.⁶ Such is only the case, however, where the punishment is the same for both degrees.⁷ But where, by particular statute, the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors.⁸ Where no such statute exists, in an indictment for murder,

Distinction between two degrees only essential when punishment varies.

¹ R. v. Murphy, 6 C. & P. 103, 1833. U. S. v. Wilson, Bald. 78, 1830; State

² R. v. Caton, 12 Cox C. C. 624, 1873. In this case there was an agreement to fight with fists. One of the party took a deadly weapon with him and used it without his associate's knowledge. It was held that the latter was not guilty of murder. This may be conceded, supposing that the object of the agreement was simply fighting with fists. But if the weapon was one likely to be carried and used in such a conflict, he ought to have been held guilty of manslaughter. U. S. v. Dyer, 59 Me. 303, 1871; State v. Center, 35 Vt. 378, 1862; State v. McGregor, 41 N. H. 407, 1870; Com. v. Chapman, 11 Cush. 422, 1853; Com. v. Fortune, 105 Mass. 592, 1870; State v. Hill, 72 N. C. 345, 1876; State v. Jenkins, 14 Rich. (S. C.) 215, 1867; State v. Anthony, 1 McCord, 285, 1821; State v. Fley, 2 Brev. 338, 1815; State v. Green, 4 Strob. 128, 1848; Hately v. State, 15 Ga. 346, 1854; Hill v. State, 28 Ga. 604, 1859; Williams v. State, 69 Ga. 11, 1881; State v. Davis, 29 Mo. 391, 1859; State v. Hessian, 58 Iowa, 68, 1882; Dennis v. State, 5 Pike, 230, 1843; People v. Ah Fat, 48 Cal. 61, 1874; Clay v. State, 40 Tex. 67, 1874; State v. Kirk, 10 Oreg. 505, 1881. See *infra*, § 522; Washington v. State, 68 Ga. 570, 1881.

³ Com. v. Campbell, 7 Allen, 541, 1863.

⁴ R. v. Murphy, 6 C. & P. 103, 1833. See more fully *supra*, § 214, and *infra*, § 397.

That the parties on both sides of a riot are responsible for the homicide of a stranger shot in the collision, see Com. v. Hare, 4 Penn. Law Journ. 257; 2 Clark, 467, 1844.

⁵ *Supra*, §§ 187, 214; *infra*, § 228.

⁶ R. v. O'Brien, 1 Den. C. C. 9, 1844; R. v. Rogers, 2 Mood. C. C. 85, 1836; R. v. Crisham, C. & M. 187, 1841;

⁷ 2 Hawk. c. 25, s. 64; Mackally's Case, 9 Co. 67 b; Fost. 345.

⁸ 1 East P. C. 348, 350; R. v. Home, 1 Leach, 473. See Rasnick's Case, 2 Va. Cas. 356, 1818; Hoffman v. Com., 6 Randolph, 685, 1828; Warden v. State, 24 Ohio St. 143, 1873.

if several be charged as principals, one as principal perpetrator, and the others as aiding and abetting, it is not material which of them be charged as principals in the first degree, as having given the mortal blow ; for the mortal injury given by any one of those present is, in contemplation of law, the injury of each and every of them.¹ An exception to the rule just stated, however, may be found in rape, in which assistants, though present, can be charged only as principals in the second degree.²

§ 222. If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of the crime, may be indicted as principals ; and though the indictment should state the mortal injury was committed by him who is absent or dead, yet if it be substantially alleged that those who were indicted were present at the perpetration of the crime, and did kill and murder the deceased by the mortal injury so done by the actual perpetrator, it shall be sufficient.³ So the party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted.⁴ And on an indictment for murder, the court may, in their discretion, try the principal in the second degree before the principal in the first degree.⁵

§ 223. At common law, in misdemeanors, there are no accessaries, all concerned, whether instigators or perpetrators, being principals, subject to be indicted as such.⁶ Thus, the master who knowingly permits his servant, while under his control, to retail liquor, in a house belonging to the

¹ *Infra*, § 522 ; Whart. Cr. Ev. § 145 ; 2 Marsh. 465 ; Archibald's C. P. 102 ; Fost. 551 ; 1 East P. C. 350 ; 6 ; Brown v. State, 28 Ga. 216, 1859 ; R. v. Gutch, M. & M. 433 ; R. v. State v. Ross, 29 Mo. 32, 1859.

Borthwick, 1 Doug. 207 ; State v. ⁵ Boyd v. State, 17 Ga. 194, 1855.

Mairs, 1 Cox R. 453, 1846 ; State v. ⁶ 3 Inst. 21, 438 ; 1 Hale, 233, 613 ; O'Neal, 1 Houst. C. C. 58, 1863 ; Dalt. J. c. 161 ; Fost. 341 ; 12 Co. 812 ; McCarty v. State, 26 Miss. 299, 1854 ; Co. Lit. 57 ; Hawk. b. 2, c. 29, s. 1 ; 4 State v. Fley, 2 Brev. 338, 1815 ; Bla. Com. 34 ; Cro. C. C. 49 ; R. v. State v. Putnam, 18 S. C. 175, 1881. Greenwood, 9 Eng. Law & Eq. 535 ;

² *Infra*, § 553 a.

³ State v. Fley, 2 Rice's Digest, (S. C. & M. 259, 1841 ; R. v. Dyson, R. & C.) 104 ; 2 Brev. 338, 1815. R. 523, 1820 ; U. S. v. Morrow, 4

⁴ R. v. Taylor, 1 Leach, 360 ; Benson v. Offley, 2 Shaw, 270 ; 3 Mod. Pet. 138, 1833 ; U. S. v. Hartwell, 3 Cliff. 121 ; R. v. Wallis, Salk. 334 ; R. v. 221, 1869 ; U. S. v. Harries 2 Bond, 311, Towle, R. & R. 314, 1818 ; 3 Price, 1869 ; U. S. v. Snyder, 3 McCr. 377,

master, is himself principal in the offence of keeping a tippling-house, and liable to the penalty.¹ If A. counsel and encourage B. to set fire to a malt-house, and B. attempt to set it on fire, both may be jointly indicted as principals in the misdemeanor of attempting to set the malt-house on fire, although A. was not present at the time of the attempt.² A man who, though at a distance, is concerned in the furnishing of lottery tickets to another, to be sold in a place where their sale is prohibited, is guilty as principal in such sale.³ In jurisdictions, also, where petit larceny is regarded either as a misdemeanor or as a minor felony subjected to a light penalty, all parties concerned in it are principals.⁴ An exception, however, to the rule, that in misdemeanors all parties concerned are principals, is taken in liquor cases, where it is held that a vendee is not indictable under the statutes;⁵ and, generally, accessories to police offences are not indictable.⁶ In negligences, also, there can be no accessories, since accessoryship is conditioned on joint intent.

§ 224. The old text-writers above cited unite in holding that in treason, also, there are no accessories.⁷ Under the Constitution of the United States, however, it has been argued that the reason of the common law doctrine that in treason all are principals, fails, and therefore that a person counselling or advising treason against the United States is an accessory before the fact,⁸ though it is hard to conceive, in an executed treason,

And so as to treason at common law.

- 1882; 14 Fed. Rep. 554; *State v. Nowell*, 60 N. H. 199, 1880; *Com. v. McComber*, 3 Mass. 254, 1807; *Com. v. Nichols*, 10 Metc. 259, 1845; *Lowenstein v. People*, 54 Barb. 299, 1868; *Uhl v. Com.*, 5 Gratt. 706, 1849; *Stratton v. State*, 45 Ind. 468, 1876; *Stevens v. People*, 67 Ill. 587, 1873; *Curlin v. State*, 4 Yerg. 143, 1833; *Com. v. Major*, 6 Dana, 293, 1838; *Com. v. Burns*, 4 J. J. Marsh. 182, 1829; *State v. Goode*, 1 Hawks, 463, 1822; *State v. Bardon*, 1 Devereux, 518, 1828; *State v. Cheek*, 13 Ired. 114, 1853; *Schmidt v. State*, 14 Mo. 137, 1851; *Williams v. State*, 12 Sm. & M. 587, 1848; *Whitney v. Turner*, 1 Scam. 253, 1836; *Sanders v. State*, 18 Ark. 198, 1857; *Kinnebrew v. State*, 80 Ga. 232, 1887; *Com. v. Dale*, 144 Mass. 363, 1887; *St. Johnsbury v. Thompson*, 59 Vt. 300, 1887.
- ¹ *Com. v. Major*, 6 Dana, 293, 1838; *infra*, §§ 247, 1503; *supra*, § 135.
- ² *R. v. Clayton*, 1 C. & K. 128, 1843.
- ³ *Com. v. Gillespie*, 7 S. & R. 469, 1822.
- ⁴ *Lasington's Case*, Cro. Eliz. 750; *Ward v. State*, 3 Hill, (N. Y.) 395, 1842; 6 Hill, (N. Y.) 144, 1843; *Shay v. People*, 22 N. Y. 317, 1860; *State v. Goode*, 1 Hawks, 463, 1822; *State v. Hart*, 7 Mo. 321, 1840. In North Carolina the rule is extended to all thefts. *State v. Gaston*, 73 N. C. 93, 1875.
- ⁵ *Infra*, § 1529.
- ⁶ See *supra*, § 23 a.
- ⁷ See 1 Hale P. C. 233, 613; 3 Inst. 138; though see 2 Hale P. C. 223.
- ⁸ *U. S. v. Burr*, 4 Cranch, 472, 501, 1808; though see *U. S. v. Hanway*, 2 Wall. Jr. 139, 1851; charge on treason, *Ibid.* 134.

of an accessaryship before the fact, that is not in itself a substantive act of treason. The principle, on the other hand, is said by an elementary writer of much learning to be in force in the several States; and he consequently argues that, in treason against the State of Virginia, accessaries do not exist.¹ But where the Constitution provides, as does the Constitution of the United States, that treason shall consist *only* in levying war against the State, or adhering to its enemies, accessaryship after the fact, which contains neither the element of levying war nor that of adhering to a public enemy, which is construed to mean exclusively a foreign power, cannot be claimed to constitute treason.²

III. ACCESSARIES BEFORE THE FACT.³

§ 225. An accessory before the fact is one who, though absent at the commission of the felony, procures, counsels, or commands another to commit said felony subsequently perpetuated in consequence of such procuring, counsel, or command.⁴ To constitute such an accessory, it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, principal. The accessory is liable for all that ensues as incident to the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C. so as to inflict grievous bodily harm, and he beat C. so that C. dies, A. is accessory to the murder, if the offence be murder in B.⁵ So if A. command B. to burn the house of C., and in doing

¹ Davis Crim. Law, 38. *Infra*, § 1812. *limite*, knowing that B. means to use it to procure her own abortion, but being unwilling that she should take

² See *infra*, § 1793.

³ For indictments under this head see Whart. Prec., Tit. Accessary. *the poison, and giving it to her because she threatened to kill herself if*

⁴ 1 Hale, 615. The meaning of the word "command" will be more fully considered in note to § 226. See *State v. Mann*, 1 Hayw. (N. C.) 4, 1814; *Ex parte Willoughby*, 14 Nev. 451, 1879. The question as to the place where the accessory is liable, is discussed *infra*, §§ 248, 278, 279. See *State v. Ayers*, 8 Baxt. 96, 1874; *Blain v. State*, 24 Tex. App. 626, 1888; *Dorsey v. Com.*, (Ky.) 17 S. W. Rep. 183, 1891. *he did not. B. does so use it, and dies. Even if B. is guilty of murdering herself, A. is not an accessory before the fact to such murder. Steph. Crim. Dig. (5th ed.) art. 40, citing R. v. Fretwell, L. & C. 161, 1862; compare R. v. Cooper, 5 C. & P. 535, 1833; R. v. Gordon, 1 Leach, 515; 1 East P. C. 352.*

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so the house of D. is also burnt, A. is accessory to the burning of D.'s house.¹ And if the offence commanded be effected, although by different means from those commanded, as, for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him, J. W. is, nevertheless, liable as accessory.²

As we have already seen, the common law has recently been changed in several States so as to treat accessories before the fact as principals.³ In many jurisdictions, however, the offences continue distinct, so that acquittal as a principal does not bar a prosecution as accessory.⁴

where there is no evidence that the principal committed the crime charged. *Armstrong v. State*, 28 Tex. App. 526, 1890.

¹ *Ibid.*; Fost. 370.

² *Ibid.* 369; *State v. Tazwell*, cited *infra*, § 226.

³ *Supra*, § 205. *Watson v. State*, 21 Tex. App. 598, 1886; *People v. Rozelle*, 78 Cal. 84, 1889; *Territory v. Guthrie*, 2 Idaho, 398, 1888; *Atterberry v. State*, (Ark.) 20 S. W. 411, 1892; *Spies v. People*, 122 Ill. 1, 1887.

⁴ See Whart. Cr. Pl. & Pr. § 458; *Com. v. Pettes*, 126 Mass. 242, 1879; *State v. Buzzell*, 58 N. H. 257, 1878.

The complication in the law of accessoryship is in some sense attributable to the circumstance that it involves one of the most difficult metaphysical problems. If the will is free, how can we punish the instigator of a crime as equally guilty with the perpetrator? The latter, it is assumed, acted with perfect freedom; we may therefore punish the instigator for giving bad counsel, as we would punish the publishers of bad books, but we cannot charge him with doing an act at whose commission he was not present, which he had no power to order, but whose performance is imputable to the free and independent will of another person. On the other hand, if the will is necessitated, we certainly cannot punish the agent whose action

is determined by another. But, illogical as it may be, we punish both. Each, we say, is responsible for the act, and by no other view could public justice be subserved. Unless the perpetrator is responsible, there is no law by which injuries can be redressed; unless the instigator is responsible, there is no law by which right can be vindicated. In other words, if the perpetrator is not made responsible, there can be no retribution for wrong acts; if the instigator is not made responsible, there can be no retribution for wrong agents. In the one case there would be no responsibility for conduct, in the other there would be no responsibility for impulse. We therefore punish the instigator as if he were free while the perpetrator was coerced, while we punish the perpetrator as if he were free and the instigator did not exist. Nor is this strange, for the same solution is accepted by us in all other lines of moral judgment. We condemn the tempted, when he yields on the ground that he yields voluntarily; we condemn the tempter on the ground that he caused the yielding. Sir W. Hamilton treats this as one of the illustrations of the practical harmony between necessity and free will. If we reject determinism, there is no law by which man can be ruled; if we reject free agency, there is no man to be ruled by the

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§ 225 *a.* As has been elsewhere noticed,¹ cases frequently occur in which two or more instigators coöperate in procuring one or more agents to act in the perpetration of a crime. Several instigators may be combined. Such cases may be classified as follows:² (1) The instigators may act concurrently with the perpetrator. In such case the ordinary law of conspiracy applies. The parties must be intentional participants in a common unlawful design. It is not enough that they are casual, incidental coöperators. To charge a party with an intentional coöperation, he must know that the others are working with him for the same criminal purpose, and he must contribute something to the common effort. If this is not done, he cannot be regarded as an instigator, or accessory before the fact. (2) Instigation may not be concurrent, but successive. In other words, A. may instigate B. to instigate C.³ In such case, supposing the causal relation be established, and C. is really induced to act by A., through B.'s agency, A. is as much responsible as if he induced C. to act by letter.

When procurement is by an intermediate agent, the accessory leaving it to such agent to find a perpetrator, it is not necessary that the accessory should be cognizant of the name of the perpetrator.⁴

§ 226. The procurement need not be tactual, it being sufficient if one or more persons become the medium through whom the work is done.⁵ It makes no matter how long a time or how great a space intervenes between the advice and the consummation,⁶ provided that there is an immediate causal connection between the instigation and the act.⁷ In cases, however,

law. And in our doctrine as to principal and accessory, we treat the principal both as free and as coerced; as free when we prosecute him individually, as coerced when we prosecute his instigator. The topic, in this connection, has been discussed by Volkman, *Grundriss der Psychologie*, 1856, pp. 374, 397; Wahlberg, *das Princip der Individualisierung in der Strafrechtspflege*; and by Drobisch, *in die moralische Statistik und die menschliche Willensfreiheit*, p. 28. See Geyer in Holzendorff's *Strafr. ii.* 340, who takes the necessitarian side of the controversy.

¹ 9 Cent. L. J. 205.

² See Holtz. *Strafr. ii.* 377.

³ *McDaniel's Case*, Fost. 121; Com. v. Glover, 111 Mass. 395, 1873.

⁴ *R. v. Cooper*, 6 C. & P. 535, 1833; *R. v. Williams*, 1 Den. C. C. 39, 1844.

⁵ Fost. 125; *R. v. Somerset*, 19 St. Tr. 804; *R. v. Cooper*, 5 C. & P. 535, 1833. *Supra*, § 225 *a.*

⁶ See *infra*, § 280.

⁷ *R. v. Sharpe*, 3 Cox C. C. 288, 1849; *R. v. Blackburn*, 6 Cox C. C. 333, 1854; Com. v. Glover, 111 Mass. 395, 1873; *Oliver v. Com.*, 77 Va. 590, 1880.

In Saunder's Case, Plowd. 475,

where the instigation consists in the furnishing aid, it is not necessary that the specific materials or machinery contributed by the

1576; 1 Hale P. C. 431, as condensed by Sir James F. Stephen (Steph. Dig. art. 42, 5th ed.): "A. advises B. to murder C. (B.'s wife) by poison. B. gives C. a poisoned apple, which C. gives to D. (B.'s child) B. permits D. to eat the apple, which it does, and dies of it. A. is not accessory to the murder of D." "This decision," adds Sir James F. Stephen, "is of higher authority than Foster's *dicta*, and marks the limit to which they extend, if it does not throw doubt upon them." The proper solution in such case is that A. is indictable for an attempt to kill C.; but that there is no causal connection between his act and the killing of D., see Whart. on Neg. §§ 90, 91; *supra*, §§ 160, 161.

Modes of Instigation.—"Procure" is the first term used in the ordinary definition of our old accessoryship before the fact. The most obvious mode of procuring is by hiring. The instigator takes the agent into his service, and engages him for a reward to commit the proposed crime. The "procuring," however, must be *before* the act. It has been much discussed whether promising a reward to a person already resolved on the act constitutes an instigation. But the better opinion is that it does in cases where the perpetrator is strengthened in his purpose by the reward.

"Counselling," to come up to the definition, must be special. Mere general counsel, for instance, that all property should be regarded as held in common, will not constitute the party offering it accessory before the fact to a larceny; "free-love" publications will not constitute their authors technical parties to sexual offences which these publications may have stimulated. Several youthful

highway robbers have said that they were led into crime by reading Jack Sheppard; but the author of Jack Sheppard was not an accessory before the fact to the robberies to which he thus added an impulse. Under the head of "counsel" may be included advice and instruction as to the modes of committing particular crimes, *e. g.*, pocket-picking. *General* instruction, it is true, could not be "counselling" in the sense before us; though it is otherwise with special instructions as to the management of a particular case. *Persuading* and *tempting* to a particular crime fall under this head. The modes in which this kind of counselling may be manifested are numerous. The counsel need not be exclusively in words. It may consist, at least in part (*e. g.*, Faust and Mephistopheles), in the exhibition of some object of desire. It is possible, also, to conceive of cases in which there is no immediate communication between the seducer and the seduced. Third persons may be used as innocent or compulsory go-betweens. *Infra*, § 231.

"Command" is a term borrowed from the Roman *mandatum*, which is frequently used in this connection. Viewing the term nakedly, it describes few cases of accessoryship. Men are rarely to be found who would commit a crime because "commanded" to by another, unless they are under special obligations to such other. Among such obligations we may primarily notice that of wife to husband, which the law recognizes in some cases as a defence to the wife when on trial. Next to this may be enumerated the obligation of child to parent, of servant to master, or subordinate to superior. These obligations do not

accessary should have been used by the principal.¹ Nor does it matter whether the instigator counselled the perpetrator directly or through an intermediate agent.

§ 227. Counselling is said in the old book to be either direct or indirect; direct consisting in express counsels, indirect in the intimation of approval or desire.² But concealment of the knowledge that a felony is about to be committed does not constitute such accessaryship,³ nor does mere momentary acquiescence in the proposed felonious plan.⁴ But any specific contribution of advice, afterward acted on, constitutes the offence. It is necessary, as has been seen, that the solicitation be

constitute a legal excuse unless the perpetrator acts under compulsion—*vis compulsiva*—or unless the command generates in him an error of fact which induces him to regard the act as innocent. Military command, also, may be an excuse to the subaltern, when he acts *bona fide* under the command, and not in satisfaction of any special private malice of his own. *Supra*, § 94. A police officer is in the same way protected, provided he acts within the range of his office, and executes what he believes to be an official duty for a public end. It is otherwise when he knowingly executes a command issued for extortionate or other unlawful purposes. A command need not be in *words*. It may be in *signs*. See Holtzen. *Strafr.* ii. 353.

“Advising” may be by a process of deception, by a misrepresentation of facts. A. contrives to induce B. to believe he has received an injury from C., which it is B.’s duty to avenge by taking C.’s life. Supposing A. to act in this way with the malicious purpose of killing C. by the agency of B., and to then specifically advise the killing of C., A. is guilty at common law as accessary before the fact, or, under our recent statutes, as principal. 9 Cent. L. J. 204.

“Suppose, for instance, A. tells B.

of facts which operate as a motive to B. for the murder of C. It would be an abuse of language to say that A. had killed C., though no doubt he has been the remote cause of C.’s death. . . . In Othello’s case, for instance, I am inclined to think that Iago could not have been convicted as accessary before the fact to Desdemona’s murder, but for the single remark: ‘Do it not with poison, strangle her in her bed.’” 3 Steph. Hist. Crim. Law, 8.

¹ State v. Tazwell, 30 La. An. Pt. II. 884, 1878.

² 1 Hale, 616.

³ Noftsinger v. State, 7 Tex. App. 301, 1880; Rucker v. State, Ibid. 549, 1880; Alford v. State, (Tex.) 20 S. W. Rep. 553, 1892.

⁴ 1 Hale, 616; 2 Hawk. c. 29, s. 23; *supra*, § 211 a.

B. and C. agree to fight a prize fight for a sum of money; A., knowing their intention, acts as stakeholder. B. and C. fight, and C. is killed. A. is not present at the fight, and has no concern with it except being stakeholder. Even if in such a case there can be an accessary before the fact, A. is not accessary before the fact to the manslaughter of C. Steph. Dig. art. 40 (5th ed.), citing R. v. Taylor, L. R. 2 C. C. 147, 1875. See other cases on prize fights, cited *infra*, § 372.

made either directly or indirectly, to the person committing the act.¹ But knowingly to invite a person to a place so that he may be there murdered constitutes, when he is murdered accordingly, the offence.² Accessaryship cannot be based on negligence.³ That sympathy does not constitute coöperation has been already seen.⁴

§ 228. If the advice of the accessary be countermanded before it operates in any way, he is relieved from responsibility;⁵ and if an instigator, when withdrawing, not merely expresses his disapproval of the crime, but takes all the measures in his power to prevent its consummation, and such measures fail because of *casus*, or some new intermediate impulse, then his criminality ceases. But it does not cease simply because, after starting the ball, he changes his mind, and tries, when too late, to stop it. To emancipate him from the consequences, not only must he have acted in time, and done everything practicable to prevent the consummation, but the consummation, if it takes place, must be imputable to some independent cause. On the other hand, it is plain that when the instigator changes his mind, after having gone as far as an attempt, and abandons a further prosecution of the design, he is indictable for the attempt. It has

Counter-manded advice does not constitute offence.

¹ R. v. Blackburn, 6 Cox C. C. 333, 1854.

² R. v. Manning, 2 C. & K. 887, 1849.

³ *Supra*, § 129.

When the question of *punishment* comes up, it is not unimportant to inquire to what extent the perpetrator was overborne by the superior will of the instigator, and how far the latter is to be considered as the exclusive contriver of the crime. As has been well said, when a bandit whose trade is assassination, offers himself for this purpose to a rich grandee, the case is very different from that of an unsophisticated and comparatively innocent agent who is led by the protracted and subtle wiles of a Mephistopheles into a path of guilt he never would otherwise have approached. Geyer, in Holtz. Straf. ii. 353. A distinction, also, is to be made between a single hasty and ill-

considered word (as was alleged by Queen Elizabeth to have been the case with her order for the execution of Queen Mary), and a chain of cool and deliberate directions. But these distinctions do not go merely to the question of degree of punishment. The amount of potency with which the instigation was applied has much to do with determining whether there was really a causal relation between the instigation and the criminal act. The former may have been merely a strong expression of enmity, or a strong opinion as to the right to do a particular thing, without any intention that the criminal act should result from the expression. If so, the criminal act is not imputable to the alleged instigator. Cent. L. J. 1879, p. 184.

⁴ *Supra*, § 211 d.

⁵ *Supra*, § 187; 1 Hale, 618.

been argued that if the frustration of the attempt is due to his interposition, consequent upon his repentance, he is relieved from all prosecution. But it is hard to see how his repentance, *subsequent* to the attempt, can cancel his responsibility for the guilt of the attempt; though it would be otherwise if he intervened prior to the attempt.¹

§ 229. While an accessory before the fact (or instigator) is responsible for all crimes incidental to the criminal misconduct he counsels,² or which are among its probable consequences, it is otherwise as to collateral crimes not among such incidental and probable consequences.³

Accessory
not liable
for collat-
eral
crimes.

¹ Cent. L. J. 1879, p. 203. For further views, see *supra*, § 187.

² See *supra*, § 120; Steph. Dig. art. 42 (5th ed.); R. v. Gaylor, 7 Cox C. C. 253, 1856.

Thus, where A. instigates B. to rob C., and B. murders C. in carrying out the robbery, A. is accessory before the fact to the murder. *State v. Davis*, 87 N. C. 514, 1882. See, to same effect, *Stephens v. State*, Sup. Ct. Ohio, 1884, citing *U. S. v. Ross*, 1 Gall. 624, 1814; *Stepp v. State*, 11 Ind. 62, 1858; *People v. Vasques*, 49 Cal. 550, 1875; *supra*, § 213.

³ *Supra*, § 214; *People v. Knapp*, 26 Mich. 112, 1872; *Lucas v. State*, 55 Iowa, 221, 1881; *Watts v. State*, 5 W. Va. 532, 1867. See Foster, 370; 1 Hale, 687; 3 Inst. 51; *Stephens v. State*, (Ohio) 18 Rep. 1881, 1884.

The question in the text is considered by me in the Central Law Journal for 1879, where the views of the later German authorities are given. From this I condense the following:

Suppose the perpetrator, undertaking to execute the purpose of the instigator, commits acts, while performing his mandate, in excess of such purpose. Is the instigator responsible for the excess?

If we relied solely on the analogies from the civil side of the law, we would say that the principal or master

is liable for all such acts when done in the discharge of the agency or service, though these acts were expressly forbidden by the principal or master. This rule holds good on the criminal side of the law, so far as concerns indictments for negligence. But it cannot be extended to indictments for malicious acts. A. counsels B. to commit a specific crime. B., in committing this crime, maliciously commits another collateral crime, not within the scope of A.'s counsel, and, it may be, forbidden by A. A. cannot, at common law, be convicted of doing intentionally and maliciously this collateral act, which he never intended, and which he had even forbidden. Of negligence in putting these powers in his agent's hands, or of negligence as incidental to the working of the illegal instrumentality he put in motion, he may be convicted, but not of designing something he did not design. Of negligence he may be certainly convicted, if the crime, though unforeseen by him, is incidental to one procured by him: as when he sends a servant out to steal property in the night, and the servant, in striking a match, sets fire to the house.

Quantitative variations in the mode of executing a crime are not to be viewed as excesses in the sense above stated. A homicide, for instance, is

§ 230. The question of the relative guilt of the accessory before the fact and the instigator has been elsewhere discussed.¹ It is argued on the one side that instigation, from the nature of things, involves more design, premeditation, coolness, and intelligence than does perpetration. The instigator bears to the perpetrator the relation of the seducer to the seduced. The instigator would have perpetrated the crime anyhow; the perpetrator would not have perpetrated it without the instigation. To this it is answered that instigation does not necessarily involve premeditation, but that premeditation is necessarily involved in perpetration.² Instigation may consist in the expression of a momentary petulant desire, as was the case with Henry II., when saying he wished he was rid of Becket, or of advice which the adviser himself never expected to have embodied in action. Perpetration, on the other hand, when in obedience to a plan previously entertained, involves not merely premeditation, but action as a realization of this premeditation. Not only is the criminal design harbored, but it is unflinchingly matured and executed. Nor is the relation of instigator and perpetrator always that of seducer and seduced. The relation may be that of confederate with confederate. Each enters into the partnership of crime; and the chief difference between the two is that the instigator is not present at the act which the perpetrator commits. The perpetrator may be as much the seducer of the instigator, as the instigator of the perpetrator.

imputable to the instigator, though executed with a cruelty in excess of that commanded. So if A. directs B. to inflict on C. an injury whose probable consequences will be death, A., as we have seen, is as chargeable, if death ensues, as is B., with the homicide. *Supra*, § 214. As to minor crimes, instigation to commit a greater crime incloses instigation to commit a lesser crime. If A., for instance, counsels B. to commit highway robbery, which results in larceny, A. is accessory before the fact to the larceny. But it is otherwise as to minor offences not included in the major. Thus counselling to commit larceny would not involve accessoryship to the offence of cheating by cards, though part of the same transaction.

As is seen above, the accessory before the fact, is not liable for any malicious excursions made, outside of the range of the employment, by the perpetrator. It should be remembered, however, that the instigator may often use ambiguous terms: "Get me this thing anyhow;" or, "Bring me this man alive or dead." If so, the instigator is chargeable with any misconstructions the ambiguity may produce. It is in this sense that James II. and Louis XIV. are chargeable with instigation in the attempted assassinations of William III.

¹ See Cent. L. J. for 1879, p. 183; *Ibid.* for 1885, p. 6.

² See *Oliver v. Com.*, 77 Va. 590, 1880; *Cook v. State*, 14 Tex. App. 96, 1883.

Henry's barons, in taunting him with Becket's insults, and offering themselves as the avengers of those insults, may have been the tempters who led Henry to utter the fatal wish, and thus have been the original planners as well as the final perpetrators of the crime to which he gave a hasty intermediate assent. Instigation, therefore, does not necessarily involve origination.¹ The accessory before the fact may be really the agent of the principal. To this it is rejoined that what we have to do with is instigation in its logical sense, as the origination of a crime to be effected through another; and that this involves a double criminality, that of the instigator himself and that of the perpetrator; that the instigator is in this respect a free agent, bringing into effect an act doubly criminal as infringing the rights of the object of the crime, and as steeping in guilt its agent. At common law, the assumption is that the guilt of the perpetrator (principal) is imputable to the instigator (accessary before the fact), and hence the conviction of the latter is to depend on the conviction of the former, as a condition precedent, and must be of the same grade of offence. Where under recent legislation, however, the instigator (accessary before the fact) is treated as principal, there principal and accessary before the fact (or instigator and perpetrator) may, as we will presently see more fully, be convicted of different grades.²

§ 231. The assistance must be rendered knowingly. It is not necessary, indeed, that the principal should know all the conditions of the help rendered to him, but it is necessary for the accessory to know the guilty purpose he contributes to help. The chief of a plot, for instance, is not bound to know a coöperator in order to implicate the latter as accessary; but the coöperator cannot be convicted unless he is shown to have been acquainted with the character of the plot.³

§ 231 a. A detective entering apparently into a criminal conspiracy already formed for the purpose of exploding it is not an accessary before the fact.⁴ For it should be remembered that while detectives, when acting as decoys, may

¹ *R v. Tuckwell*, C. & M. 215, 1842; 1877; *Price v. People*, 109 Ill. 109, 1848. See *Whart. Cr. Ev.* § 440; *State v. Brownlee*, 84 Iowa, 473, 1892;

² *Infra*, §§ 232, 236.

³ *Supra*, § 129.

⁴ *Supra*, § 149, where the cases are given. 1887; but see *People v. Bollanger*, 71 Cal. 17, 1886.

apparently provoke the crime, the essential element of *dolus*, or malicious determination to violate the law, is wanting in their case. And it is only the *formal* and not the *substantive* part of the crime that they provoke. They provoke, for instance, in larceny, the asportation of the goods, but not the ultimate loss by the owner. They may be actuated by the most unworthy of motives, but the *animus furandi* in larceny is not imputable to them; and it is in larcenous cases or cheats that they are chiefly employed. They may, however, become liable for negligence in their conduct, when it leads to injuries which prudence on their part might have avoided; as when they instigate an ambush which results in a homicide;¹ or when the checks they look forward to as likely to explode a plot, whose execution they advise, are not properly applied. Nor should it be forgotten that if one who silently watches a crime until it ripens is an accessory, then the guilt of accessoryship falls on a parent who watches anxiously but silently a child's course until the period when interposition and warning would be likely to be successful, and on a specialist in science, who, suspecting that there may be some wrongful purpose in preparation in a neighboring laboratory, forbears to give notice of the danger until he sees that it assuredly exists.

Eminently is this the case with persons who, from a sense of duty, or under the direction of the public authorities, watch even as apparent members the progress of conspiracies which could in no other way be exposed.²

§ 232. It has been doubted whether there can be an accessory before the fact to manslaughter, since accessoryship presupposes premeditation, and premeditation is incompatible with manslaughter.³ But, as will be seen, an instigator may, in hot blood, stimulate a person incensed with another to execute a deed of vengeance on such other, when the offence of the perpetrator would be only manslaughter; and we may also hold that an instigator may be guilty of murder in instigating another to commit manslaughter by the rash use of danger-

May be accessory before the fact to manslaughter.

¹ See *supra*, § 149.

² See *Campbell v. Com.*, 84 Pa. 187, s. 24. See *infra*, § 236. *Bowman v.* 1877, cited *supra*, § 149; *Cent. L. J. State, (Tex.)* 20 S. W. Rep. 558, 1892, for 1885, p. 5.

³ See *R. v. Taylor*, L. R. 2 C. C. 617, 1885. 147, 1875; *Boyd v. State*, 17 Ga. 202,

1855. Compare 2 Hawk. P. C. p. 444, s. 24. See *infra*, § 236. *Bowman v. State, (Tex.)* 20 S. W. Rep. 558, 1892, but see *People v. Weber, (Cal.)* 19 Rep.

ous instrumentalities.¹ *A fortiori* there may be an accessory before the fact to murder in the second degree.²

§ 233. It is not material that an accessory should have originated the design of committing the offence. If the principal had previously formed the design, and the alleged accessory encouraged him to carry it out by stating falsehoods, or otherwise, he is guilty as accessory before the fact.³

Quantity of aid im-
material. § 234. The *quantity* of aid rendered is of no consequence. A counterfeiting raid, for instance, may have a hundred persons concerned as accessories, some contributing very little aid. All, however, are technically guilty.⁴ What distinguishes the act of the accessory from that of the principal is that the accessory, while concerned in facilitating the execution of the guilty purpose, takes no part in this execution, leaving it to the principal.⁵

Conditions of time imma-
terial. § 235. There is no particular period of time to which accessoryship is limited. It may take place when the guilty act is concocted, when it is prepared, or when it is executed, provided that in the latter case there is not actual presence.⁶ And it may be coupled with accessoryship after the fact.⁷

Grade of guilt not necessarily the same. § 236. A question of considerable interest has arisen as to the extent to which the principal's personal relations are to be imputed to the accessory. A public officer, for instance, committing a specific act, is liable to a severer punishment than would be a private citizen. Is a private citizen, who is an accessory to an officer in such an offence, chargeable with the same grade of guilt? Or is an accessory to a trustee, who is guilty of embezzlement, to be charged with the same grade of guilt as would the trustee? On this question we have the following possible theories:⁸

¹ *Infra*, § 236. See, to same effect, *R. v. Smith*, 2 Cox C. C. 233, 1848; *Keithler v. State*, 10 Sm. & M. 192, 1848. See *R. v. Tuckwell*, C. & M. Steph. Dig. C. L. art. 250 (5th ed.), 215, 1841. citing *R. v. Gaylor*, D. & B. 288, 1855; *R. v. Taylor*, L. R. 2 C. C. 147, 1875.

⁴ See *supra*, § 217.

⁵ See *supra*, § 206.

² *Infra*, § 546. *Hagan v. State*, 10 Ohio St. 459, 1860. That there may be accessories *after* the fact to man-

⁶ See *Watson v. State*, 9 Tex. App. 237, 1880.

slaughter, see *R. v. Greenacre*, 8 C. & P. 35, 1837; *R. v. Richards*, 13 Cox C. C. 611, 1878.

⁷ *R. v. Blackson*, 8 C. & P. 43, 1837.

⁸ *Berner*, § 111.

(1) The accessory is absorbed in the principal, so that the principal's personal relations, in respect to the crime, are imputable to the accessory.

(2) Each offender is chargeable only for what he really is. Thus, the non-public officer cannot be punished as a public officer, and the non-trustee cannot be punished as a trustee. Hence, according to this view, where a principal in a homicide, from the fact of his bearing a particular relation to the deceased, would be guilty of murder in the first degree, an accessory not bearing this relation would be guilty only of murder in the second degree.

(3) We may distinguish, as do several codes, between those qualities, which establish or cancel, and those which increase or diminish, punishability. As to the first, the personal relations of the principal are the standard. As to the second, each offender is to be judged according to his own peculiar relations. Hence, to take up the last case, an accessory to a murder, whose grade is determined by the personal qualities of the perpetrator, is to be judged from his own and not his principal's relations. A non-officer, also, who aids an officer in an offence, whose grade is increased by the official relation, is liable only for the lower grade of the offence. On the other hand, a non-officer who aids in a purely official crime (*e. g.*, acceptance of a bribe by a judge) is, by the force of the distinction before us, liable as accessory to the crime.

Another question arises in homicide when the accessory and the principal are acting under different degrees of passion. Under the old law, the defendant was first convicted, and then the accessory was charged with being accessory to the offence which the conviction covered. But now that instigation is a substantive offence, it must be remembered that the offence of the instigator is not necessarily of the same grade as that of the perpetrator. The instigator may act in hot blood, in which case he will be only guilty of manslaughter, while the perpetrator may act coolly, and thus be guilty of murder. The converse, also, may be true: the instigation may be cool and deliberate, the execution in hot blood by a person whom the instigator finds in a condition of unreasoning frenzy. A person desiring coolly to get rid of an enemy, for instance, may employ as a tool some one whom that enemy has aggrieved and who is infuriated by his grievance. Hence an accessory before the fact (or, to adopt the terms of recent codes, an instigator) may be guilty of murder, while the principal (or perpetrator) may be guilty of manslaughter; or the accessory before the fact (instigator), acting in hot

blood, may be guilty of manslaughter, while the perpetrator (principal), acting with deliberate malice, may be guilty of murder.¹

§ 237. At common law, the conviction of some one who has committed the crime must precede or accompany that of one charged as accessory.² A prisoner does not waive his right to call for the record of such conviction, by pleading.³ Conviction of the principal is not admissible evidence until judgment has been rendered on the verdict;⁴ and, when the trials are concurrent, there can be no judgment against the accessory until there is a sentence of the principal.⁵ The record must be proved in the usual mode.⁶ But even at common law, where there are two principals, and only one convicted, the other being dead, the accessory must answer notwithstanding the non-conviction of the deceased.⁷ By statutes, however, now almost universally adopted, the offence of an accessory is made substantive and independent, and consequently the accessory may be tried independently of the principal, though in such case the guilt of the principal must be alleged and proved.⁸ And the principal may be averred to be unknown.⁹

¹ That joint participants may be not liable to be tried while the principal is amenable to the laws of the State and is still unconvicted. *State v. Groff*, 1 Murphy's R. 270, 1809. See *State v. Goode*, 1 Hawks, 463, 1822; *Harty v. State*, 3 Blackf. 386, 1837.

² See *U. S. v. Crane*, 4 McLean, 317, 1850; *Com. v. Andrews*, 3 Mass. 126, 1808; *Com. v. Briggs*, 5 Pick. 429, 1827; *Com. v. Phillips*, 16 Mass. 423, 1820; *Baron v. People*, 1 Parker C. R. 246, 1854; *Brown v. State*, 18 Ohio St. 496, 1868; *Com. v. Williamson*, 2 Va. Cas. 211, 1817; *Smith v. State*, 46 Ga. 298, 1872; *State v. Pybass*, 4 Humph. 442, 1843. As to N. Y. statutes, see *supra*, § 205. *Bowen v. State*, 25 Fla. 645, 1889.

³ See *U. S. v. Crane*, 4 McLean, 317, 1850; *Com. v. Andrews*, 3 Mass. 126, 1808; *Com. v. Briggs*, 5 Pick. 429, 1827; *Com. v. Phillips*, 16 Mass. 423, 1820; *Baron v. People*, 1 Parker C. R. 246, 1854; *Brown v. State*, 18 Ohio St. 496, 1868; *Com. v. Williamson*, 2 Va. Cas. 211, 1817; *Smith v. State*, 46 Ga. 298, 1872; *State v. Pybass*, 4 Humph. 442, 1843. As to N. Y. statutes, see *supra*, § 205. *Bowen v. State*, 25 Fla. 645, 1889.

⁴ *State v. Duncan*, 6 Iredell, 236, 1846.

⁵ 2 Curw. Hawk. § 41.

⁶ *People v. Gray*, 25 Wend. 465, 1841.

⁷ *Com. v. Knapp*, 10 Pick. 477, 1830.

⁸ See *State v. Ricker*, 29 Me. 84, 1848; *Pettes v. Com.*, 126 Mass. 242, 1879; *People v. Gray*, 25 Wend. 465, 1841; *Holmes v. Com.*, 25 Pa. 221, 1855; *Com. v. Hughes*, 11 Phila. 430, 1876; *Brown v. State*, 18 Ohio St. 496, 1868; *Noland v. State*, 19 Ohio, 131, 1850; *Hatchett v. Com.*, 75 Va. 925, 1880; *Ulmer v. State*, 14 Ind. 52, 1860; *Yoe v. People*, 49 Ill. 410, 1869; *State v. Comstock*, 46 Iowa, 265, 1877;

⁹ *Com. v. Adams*, 127 Mass. 15, 1879.

¹ *Fost.* 360; 1 *Hale*, 623; *U. S. v. Burr*, 4 Cranch, 502, 1808.

In North Carolina, the principle has been somewhat expanded, it having been there held that the accessory is

When principal and accessory are tried separately, conviction of the principal is *primâ facie* evidence of his guilt, on the trial of the accessory, but may be collaterally disputed when the issue is the guilt of the accessory.¹

Ogden v. State, 12 Wis. 532, 1861; Jordan v. State, 56 Ga. 92, 1876; Loughridge v. State, 6 Mo. 594, 1841; People v. Campbell, 40 Cal. 129, 1876; People v. Outeveras, 48 Cal. 19, 1874; State v. Cassidy, 12 Kans. 550, 1873. As to English statute, see R. v. Hughes, Bell C. C. 242, 1858; R. v. Gregory, L. R. 1 C. C. 77; 10 Cox C. C. 459, 1867. As to New York statute see *supra*, § 205.

At common law an accessory is discharged by the acquittal of his principal on those charges whereon the indictment against himself is founded. U. S. v. Crane, 4 McLean, 317, 1850.

Even in a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny, the judges, it is said, were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should be acquitted also. R. v. Dannelly, R. & R. 310, 1818; 2 Marsh. 571.

¹ R. v. Turner, 1 Mood. 347, 1833; State v. Ricker, 29 Me. 84, 1848; State v. Rand, 33 N. H. 216, 1856; Com. v. Knapp, 10 Pick. 477, 1829; Com. v. Stow, 1 Mass. 54, 1806; People v. Buckland, 13 Wend. 592, 1835; State v. Duncan, 6 Ired. 236, 1846; Keithler v. State, 10 Sm. & M. 192, 1848. *Infra*, C. C. 253; Dears. & B. C. C. 288, 1855.

It should be observed that the statute of 7 Geo. IV. c. 64, s. 9, which

several American statutes copy, only applies where the accessory might at common law have been indicted with or without the conviction of the principal; and, therefore, where a defendant was indicted as accessory before the fact to the murder of S. N., she having, by his procurement, killed herself, it was ruled that the statute did not apply. R. v. Russell, 1 Mood. C. C. 356, 1832; R. v. Gaylor, 7 Cox § 244.

At common law where the principal and accessory are tried together, if the principal plead otherwise than the general issue, the accessory is not bound to answer until the principal's plea be first determined. 9 H. 7, 19; 1 Hale, 624; 2 Inst. 184. Where the general issue is pleaded, however, the jury must be charged to inquire first of the principal, and if they find him not guilty, then to acquit the accessory; but if they find the principal guilty, they are then to inquire of the accessory, 1 Hale, 624; 2 Inst. 184. See Holmes v. Com., 25 Pa. 221, 1855.

In Massachusetts an accessory before the fact may be tried in the county of the consummated act, though the act of accessoryship was committed elsewhere. Com. v. Pettes, 114 Mass. 307, 1873. See *infra*, §§ 279, 287.

In Virginia an accessory cannot be prosecuted for a substantive offence, but only as accessory to the principal felon. The guilt of the principal felon must be proved, but not his conviction. Hatchett v. Com., 75 Va. 925, 1880.

In Tennessee, where a principal to a murder was sentenced to imprisonment for life, in accordance with the

Under the recent statutes, which treat principals and accessaries before the fact as confederates, the declarations and acts of the one, in furtherance of the common plan, are admissible against the other.¹ It is otherwise when the conspiracy is terminated,² the accessory being tried for a substantive offence, and the principal's confessions, after the joint action is closed, not being receivable against him.³

§ 238. At common law it is not necessary, in an indictment against an accessory before the fact in a felony, to set out the conviction or execution of the principal. It is enough to aver the latter's guilt.⁴

The indictment must show the commission of the offence as particularly as is necessary in an indictment against the principal.⁵ In States where it is provided by statute that an accessory before the fact shall be deemed and considered as principal and punished accordingly, an accessory may be indicted and convicted as a principal.⁶ It is otherwise at common law,⁷ and in States where this law prevails, an accessory before

statute of 1838, c. 29, an accessory before the fact, subsequently tried and convicted (the jury bringing in a general verdict of guilty, without finding mitigating circumstances), was held to be properly sentenced to imprisonment for life. *Nuthill v. State*, 11 Humph. 247, 1850.

As to Louisiana, see *State v. Washington*, 33 La. An. 1473, 1881.

An accessory cannot take advantage of an error in the record against the principal. *State v. Duncan*, 6 Ired. 236, 1846; *Com. v. Knapp*, 10 Pick. 477, 1829.

¹ See *infra*, § 1405.

² *R. v. Turner*, 1 Mood. C. C. 347, 1833; *State v. Newport*, 4 Harring. 567, 1847.

³ *Ibid.*; *Ogden v. State*, 12 Wis. 532, 1860. See, as taking a less restricted view of admissibility, *U. S. v. Hartwell*, *supra*; *R. v. Blick*, 4 C. & P. 377, 1830.

⁴ *State v. Sims*, 2 Bail. (S. C.) 29, 1830; *State v. Crank*, *Ibid.* 66, 1831; *Holmes v. Com.*, 25 Pa. 221, 1855.

⁵ *Com. v. Dudley*, 6 Leigh, 614, 1834; *Jordan v. State*, 56 Ga. 92, 1876. See *People v. Schwartz*, 32 Cal. 160, 1867; *People v. Crenshaw*, 46 Cal. 65, 1873; *People v. Thrall*, 50 Cal. 415, 1875. See *State v. Mosley*, 31 Kans. 355, 1883.

⁶ *Campbell v. Com.*, 84 Pa. 187, 1877; *Com. v. Hughes*, 11 Phila. 430, 1876; *Raiford v. State*, 59 Mich. 106, 1883; *Jordan v. State*, 56 Ga. 92, 1876; *State v. Zeibart*, 40 Iowa, 169, 1875; *Dempsey v. People*, 47 Ill. 323, 1868; *Yoe v. People*, 49 Ill. 410, 1869; *State v. Cassidy*, 12 Kans. 550, 1873. See *infra*, § 245; and see *Whart. Pl. & Pr.* § 458; *Ward v. Com.*, 14 Bush, 232, 1877.

⁷ *R. v. Fallon*, 9 Cox C. C. 242, 1869; *R. v. Plant*, 7 C. & P. 575, 1836; *State v. Larkin*, 49 N. H. 39, 1869; *State v. Wyckoff*, 2 Vroom, 65, 1868; *Hughes v. State*, 12 Ala. 458, 1847; *Josephine v. State*, 39 Miss. 613, 1866; *Walrath v. State*, 8 Nebr. 80, 1889. For other cases see *infra*, § 245.

the fact, though by statute punishable as principal, must nevertheless be indicted, not as principal, but as accessory before the fact.¹

§ 239. At common law, the verdict must specify the grade, and under a verdict of "guilty as accessory," the defendant cannot be sentenced as accessory before the fact.² Verdict must specify grade. As has just been seen, accessory and principal (or instigator and perpetrator) may, under recent codes, be convicted of different grades.

§ 240. If the felony is not committed, he who counsels or commands its commission is not liable as accessory before the fact but he may be convicted for the attempt as a substantive misdemeanor, if steps were taken to consummate the offence.³ Attempt.

VI. ACCESSARIES AFTER THE FACT.

§ 241. Although in other jurisprudences he who directs or counsels a specific offence is involved in the same penalty as the actual perpetrator, the English common law stands alone in assigning the same grade of guilt to those who conceal or protect the perpetrator after the commission of the offence.⁴ That such persons should be punished is eminently just; but it is eminently unjust that they should be punished in the same way as the criminal whom they shelter.

¹ *Pettes v. Com.*, 126 Mass. 242, Breach. See Berner, Lehrbuch, 1877, 1879; *People v. Campbell*, 40 Cal. 129, 1871. See *People v. Shepardson*, 48 Cal. 189, 1874. *Infra*, § 245; *Williams v. State*, 41 Ark. 173, 1882. "Incite, move and procure, aid, counsel, hire, and command the said person as aforesaid unknown, the said felony and abortion in manner and form aforesaid to do and commit," has been sustained in Massachusetts as sufficiently describing the offence of an accessory before the fact. *Com. v. Adams*, 127 Mass. 15, 1880.

² *State v. Rose*, 20 La. An. 143, 1868.

³ 2 East. R. 5, 1802; Ch. C. L. 264. *Supra*, § 173.

⁴ What we call accessoryship after the fact is punished in Germany and France as an independent offence, in the nature of our Escape, or Prison

In England, the old common law has been modified by stat. 24 & 25 Vict., which limits the punishment to imprisonment for four years. See *R. v. Fallon*, L. & C. 217, 1869; 9 Cox, 242.

Receiving stolen goods does not, at common law, constitute accessoryship after the fact to the larceny. It was otherwise by the statute 3 Will. & Mary. In most jurisdictions, however, the reception of stolen goods is now an independent crime. See *infra*, §§ 982 *et seq.*

Receiving money, knowing that it was obtained by robbery, does not constitute accessoryship after the fact at common law. *Williams v. State*, 55 Ga. 391, 1874.

By the English common law, however, a person, according to the text-books, who, when knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon,¹ whether he be a principal or an accessory before the fact, is an accessory after the fact, involved in the same penalty as the principal.² When we examine the cases given, however, we find that the assistance to a felon, which constitutes this form of accessoryship, is such assistance as to some extent shelters the principal from prosecution, as, for instance, where the alleged accessory concealed the principal in his house,³ or shut the door against his pursuers, until he should have an opportunity of escaping,⁴ or took money from him to allow him to escape,⁵ or supplied him with money, a horse, or other necessities, in order to enable him to escape,⁶ or where the principal was in prison, and the accessory, before conviction, bribed the jailor to let him escape, or supplied him with materials for the same purpose,⁷ or in any way aided in compassing his escape.⁸ Merely suffering the principal to escape, however, it is held, will not impute the guilt of accessoryship to the party so doing.⁹ And it is conceded that if a person supply a felon in prison with victuals or other necessities, for his sustenance;¹⁰ or succor and sustain him if he be bailed out of prison;¹¹ or profession-

¹ 1 Hale, 618; 4 Bl. Com. 37; Roscoe's Cr. Ev. 184; see *R. v. Lee*, 6 C. 404, 1862; 2 Hawk. c. 29, s. 1; P. & P. 536, 1854.

A man who employs another person to harbor the principal may be convicted as an accessory after the fact, although he himself did no act to relieve or assist the principal. *R. v. Jarvis*, 2 Moo. & R. 40, 1841. So it appears to be settled that whoever rescues a felon imprisoned for the felony, or voluntarily suffers him to escape, is guilty as accessory. Hawk. P. C. b. 2, c. 29, s. 27. See Roscoe's Cr. Ev. 184; and see generally as to how far "concealing" constitutes accessoryship after the fact, *White v. People*, 81 Ill. 333, 1876.

² *Wren v. Com.*, 26 Gratt. 952, 1875; *Taylor v. Com.*, 11 Bush, 154, 1876; *Loyd v. State*, 42 Ga. 221, 1871; *Harrol v. State*, 39 Miss. 702,

1866; *People v. Gassaway*, 28 Cal. 404, 1862; 2 Hawk. c. 29, s. 1; P. Wms. 475.

³ Dalt. 530, 531. *Infra*, § 652, and cases there cited.

⁴ 1 Hale, 619.

⁵ 9 H. 4, 1.

⁶ Hall's Sum. 218; 2 Hawk. c. 29, s. 26. See *Com. v. Filburn*, 119 Mass. 297, 1876.

⁷ 1 Hale, 621; Hawk. b. 2, c. 29, s. 26; Archbold, by Jervis, 9.

⁸ See *infra*, §§ 1672, 1677, as to prison breach.

⁹ Hale, 619; *Wren v. Com.*, *ut supra*; *Taylor v. Com.*, 11 Bush, 154, 1876. See *R. v. Brannon*, London Law Times, Feb. 28, 1880, p. 319.

¹⁰ 1 Hale, 620. See *R. v. Chapple*, 9 C. & P. 355, 1840.

¹¹ 1 Hale, 620.

ally attend a felon sick or wounded, although he know him to be a felon;¹ or speak or write in order to obtain a felon's pardon or deliverance,² or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly;³ or even if he himself agree, for money, not to give evidence against the felon;⁴ or know of the felony and do not disclose it;⁵ these acts will not be sufficient to make the party an accessory after the fact. There must be some independent criminality to make them an offence.⁶ Statutes, also, now exist, making accessoryship after the fact substantively indictable. Even interference with public justice by promoting the escape of a criminal is now tried as an independent offence.⁷

§ 242. Three things are laid down in the books as necessary to constitute a man accessory after the fact to the felony of another.

1. The felony must have been committed.⁸
2. The defendant *must know that the felon is guilty*,⁹ and this, therefore, is always averred in the indictment.¹⁰ And though it has been intimated that constructive notice of the felony will, in

Knowl-
edge of
principal's
guilt
essential.

¹ 1 Hale, 332.

² Ibid.

³ 3 Inst. 139; 1 Hale, 620. But inducing a witness to testify falsely will constitute one an accessory after the fact. *Blakely v. State*, 24 Tex. App. 616, 1888.

⁴ Moore, 8. See *Wren v. Com.*, 25 Gratt. 789, 1875.

⁵ 1 Hale, 371, 618; *State v. Hann*, 40 N. J. L. 228, 1878; *State v. Giles*, 52 Ind. 356, 1875; *State v. Fries*, 53 Ind. 489, 1876; *White v. People*, 81 Ill. 833, 1876.

⁶ *Reynolds v. People*, 83 Ill. 479, 1877; *Welch v. State*, 3 Tex. App. 413, 1879.

⁷ *Infra*, §§ 652, 1672, 1677; *Com. v. Miller*, 2 Ashm. 61, 1835. That presence at the crime is not necessary, see *Pinkard v. State*, 30 Ga. 757, 1860.

⁸ 1 Ch. C. L. 264; 1 Hale, 622; 2 Hawk. c. 29, s. 35; *Harrol v. State*, 39 Miss. 702, 1866; *Poston v. State*, 12 Tex. App. 408, 1881.

⁹ 1 Hale, 622; *Com. Dig. Justices*, T. 2. See *R. v. Butterfield*, 1 Cox C. 93, 1845; *R. v. Greenacre*, 8 C. & P. 35, 1837; *Wren v. State*, 26 Gratt. 952, 1876. That such knowledge is to be inferred from facts, see *White v. People*, 81 Ill. 333, 1875; *Tully v. Com.*, 13 Bush, 142, 1877.

¹⁰ Hawk. b. 2, c. 29, s. 33.

It is sometimes said that the inception of the offence of accessories after the fact must be subsequent to that of the principal offence. This, however, is not necessarily the case. A receiver, for instance, may make his arrangements to receive the goods obtained by a projected larceny. If he does not act in concert with the principal offender—in other words, if the principal does not know that he is thus acting—he is an accessory after the fact. But it is otherwise if his reception is in consequence of a previous engagement. If he should say, "Go ahead; I will stand by you, and

some cases, suffice : as where a man receives a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety ;¹ yet the better opinion is that there should be laid such a basis of inculpatory facts as properly to raise the presumption of knowledge.²

3. The felon must be to some extent sheltered from pursuit by the defendant.³

§ 243. The only relation, so it is said, which excuses the harboring a felon is that of a wife to her husband, because she is considered as subject to his control, as well as bound to him by affection.⁴

But by the English common law no other ties, however near, will excuse ; for if the husband protect his wife, a father his son, or a brother his brother, they contract the guilt, and are liable to the punishment, of accessaries to the original felony.⁵

§ 244. At common law, as we have seen,⁶ the conviction of the principal is a necessary prerequisite to the conviction of the accessory. Where the principal and accessory are joined in an indictment, and tried separately, the record of the principal's conviction is irrebuttable proof of such conviction, and is *primâ facie* evidence of his guilt, upon the trial of the accessory ; and as the burden of proof is on the accessory, he must then show that the principal ought not to have been convicted.⁷ But the accessory, in such case, is not restricted to proof of facts that were shown on the former trial, but may prove others which are incompatible with the guilt of the principal.⁸ If the conviction of the principal be reversed, this brings with it the reversal of the judgment against the accessory.⁹

take care of the things after you get them," he is accessory before the fact, or instigator, and hence, by recent legislation, principal. He encourages the thief, and becomes therefore a party to theft."

¹ Dyer, 355 ; Staunf. 41 b.

² 1 Hale, 323, 622 ; R. v. Burrigge, 3 P. Wms. 475 ; Tully v. Com., 13 Bush, 142, 1877.

³ R. v. Chapple, 9 C. & P. 355, 1840 ; Loyd v. State, 42 Ga. 221, 1871.

⁴ 1 Hale, 621 ; Hawk. b. 2. c. 29, s. 34 ; 4 Bla. Com. 39 ; Com. Dig. Jus. T. 2.

⁵ Ibid. As to N. Y. statute, see *supra*, § 205.

⁶ *Supra*, § 237 ; Edwards v. State, 80 Ga. 127, 1887.

⁷ Com. v. Knapp, 10 Pick. 484, 1830 ; State v. Chittem, 2 Dev. 49, 1830 ; State v. Duncan, 6 Ired. 236, 1846. See *supra*, § 237.

⁸ Com. v. Knapp, 10 Pick. 484, 1830. See State v. Sims, 2 Bail. (S. C.) 29, 1830 ; State v. Crank, Ibid. 66, 1831.

⁹ Ray v. State, 13 Nebr. 55, 1882.

§ 245. An accessory after the fact cannot be convicted on an indictment charging him as principal.¹

Indictment must be specific.

The question of jurisdiction is hereafter considered.²

V. LIABILITY OF PRINCIPAL FOR CRIMINAL ACT OF AGENT.

The cases under this head may be classed as follows :

(a) *Where the Agent acts directly under the Principal's Commands.*

§ 246. When the agent performs the illegal act under an absent principal's direction, either express or implied, this imposes responsibility on the principal.³ In misdemeanors the act may be charged to have been done by the principal himself, without reference to an agent.⁴ Such, also, is the case in felonies, where the agent is innocent, insane, or a slave, in which case the party commanding the felony to be done, though absent at the time of its commission, is principal in the first degree.⁵ In felonies, where the agent is responsible, the absent principal is at common law accessory before the fact.⁶ As we have seen, an agent, when physically free, is not relieved from responsibility by the fact that he is acting under his principal's directions.⁷

Commanding principal liable for agent's act.

(b) *Where the Agent is acting at the Time in the Line of the Principal's Business, but without Specific Instructions.*

§ 247. A principal is *prima facie* liable for the illegal acts of an agent done in a general course of illegal business authorized by

¹ *Supra*, § 238; *R. v. Fallon*, 9 Cox 181, 1845; *Seaman v. Com.*, 1 Weekly C. C. 242, 1862; *R. v. Soares*, R. & R. Notes, 14, and note appended thereto; 25, 1802; *State v. Wyckoff*, 2 Vroom, Sloan v. State, 8 Ind. 312, 1856. For master's liability for servant's negligent act, see *supra*, § 135; *infra*, §§ 341, 479, 1877; *Wade v. State*, 71 Ind. 535, 1880; *State v. Dewer*, 65 N. C. 572, 1422, 1503.

1871; *Anderson v. State*, 63 Ibid. 675, 1880; *Hughes v. State*, 12 Ala. 458, 1847; *Josephine v. State*, 39 Miss. 613, 1866; *People v. Campbell*, 40 Cal. 129, 1871. Under statutes, see *supra*, § 238.

² *Infra*, §§ 287, 288.

³ See *Felton v. U. S.*, 96 U. S. 699, 1877; *Lathrop v. State*, 51 Ind. 192; *infra*, § 1503; *supra*, §§ 205 et seq.

⁴ *U. S. v. Morrow*, 4 Wash. C. C. 733, 1829; *Com. v. Stevens*, 10 Mass.

⁵ *Supra*, §§ 207, 223; *infra*, § 341; *R. v. Michael*, 2 M. C. C. 120; 9 C. & P. 356, 1840; *R. v. Spiller*, 5 C. & P. 333, 1832. "If a man does, by an innocent agent, a felony, the employer and not the agent is accountable criminally." *R. v. Bleasdale*, 2 C. & K. 765, 1848.

⁶ *Infra*, § 247.

⁷ *Supra*, §§ 94 et seq.; *Play v. People*,

the principal,¹ and this is eminently the case in indictments for nuisances, which could not be abated if the master was not liable for the servant's acts, if in general furtherance of the master's plan.² And the rule applies to all cases where a master inflicts indictable injury through a servant.

And so where agent acts in line of principal's business.

Thus, where a barkeeper in a hotel sells liquor, or a salesman in a bookstore in the usual course of business sells a libellous book, or where a clerk publishes a libel in a newspaper, the principal is responsible, and, if there be no other evidence, may be convicted.³ Even the fact that the principal, who was the publisher of a newspaper, was living at the time one hundred miles distant from the place of publication, was sick and entirely ignorant of the libel being published, is at common law no defence.⁴ A master, also, may be liable for the negligence of a servant whom he negligently appoints or negligently controls.⁵ But it is otherwise if the agent be without authority, express or implied, and the act be out of the range of the agent's business, and against the principal's express and *bonâ fide* commands.⁶ It should also be remembered that as it

¹ *R. v. Dixon*, 3 M. & S. 11, 1814; clerk without the owner's consent. *Roberts v. Preston*, 9 C. B. (N. S.) 208, 1860; *State v. Wentworth*, 65 Me. 234, 1875; *Com. v. Nichols*, 10 Metc. 259, 1845; *Anderson v. State*, 22 Ohio St. 305, 1871; *Mollihan v. State*, 30 Ind. 266, 1869; *infra*, § 1503.

² *R. v. Stephens*, L. R. 1 Q. B. 702-10, 1866.

³ *R. v. Almon*, 5 Burr. 2686, 1770; *R. v. Dodd*, 2 Sessions Cases, 33; *R. v. Gutch*, Moody & M. 433, 1829; *U. S. v. Nunnemacher*, 7 Biss. 111, 1875; *Com. v. Park*, 1 Gray, 553, 1854; *Com. v. Nichols*, 10 Metc. 259, 1845; *Com. v. Morgan*, 107 Mass. 199, 1871; *Com. v. Boston R. R.*, 126 Mass. 61, 1879; *State v. Smith*, 10 R. I. 258, 1872; *Com. v. Gillespie*, 7 S. & R. 469, 1821; *State v. Mathis*, 1 Hill, (S. C.) 37, 1833; *Britain v. State*, 3 Humph. 203, 1842; *Com. v. Major*, 6 Dana, 293, 1838; *Hipes v. State*, 73 Ind. 39, 1880; 1 Ben. & H. Lead. Cas. 241; *infra*, §§ 341, 1422, 1467, 1503. This rule holds even as to the sale of liquor on Sunday by a

⁴ *R. v. Gutch*, Moody & M. 433, 1829.

⁵ *Supra*, § 135.

⁶ See *supra*, § 135; *infra*, § 1503; *R. v. Bennett*, Bell C. C. 1, 1858; 8 Cox C. C. 74, cited *supra*, § 154; *U. S. v. Halberstadt*, Gilp. 262; *Com. v. Nichols*, 10 Metc. 259, 1846; *Barnes v. State*, 19 Conn. 398, 1848; *State v. Privett*, 4 Jones, 100, 1856; *State v. Dawson*, 2 Bay, 360, 1796; *Hipp v. State*, 5 Blackf. 149, 1841; *O'Leary v. State*, 44 Ind. 91, 1876; *Anderson v. State*, 39 Ind. 553, 1871; *State v. McGrath*, 73 Mo. 181, 1879; *State v.*

is only by agents that corporations can act, it is not necessary to prove, on charging a corporation with a criminal act committed by an agent, within his range of duty, that this act was specifically authorized by the corporation.¹

(c) *When the Principal resides out of the Jurisdiction.*

§ 248. When the principal resided out of the jurisdiction in which the offence was consummated he is chargeable in such place of consummation, notwithstanding his non-residence.²

Non-resident principal intra-territorially liable.

VI. MISPRISION.

§ 249. At common law a party is guilty of misprision of felony who stands by the commission of the felony without endeavoring to prevent it, and who, knowing of its commission, neglects to prosecute the offender.³ Misprision, as a substantive offence, however, is practically obsolete.

Misprision of felony is concealment of felony.

The same end, so far as is consistent with the general policy of society, is reached by the rule noticed in another work, which makes it incumbent on all persons present when an unlawful act is attempted to take part with the officers of the law in the prevention of such act.⁴

James, 63 Mo. 570, 1876. As to liability for co-conspirators, see *infra*, § 1405. That a principal, who leaves the performance of his official duties to a subaltern, is indictable for the subaltern's failure to perform an official duty, see *U. S. v. Buchanan*, 4 Hughes, 487; 9 Fed. Rep. 689, 1881; *U. S. v. Beaty*, Hemp. 487, 1848.

has committed high treason, and does not within a reasonable time give information thereof to a justice of assize or a justice of the peace, is guilty of misprision of treason, and must, upon conviction thereof, be sentenced to imprisonment for life, and to forfeit to the queen all his goods and the profits of his lands during his life."

¹ *Supra*, § 91; *R. v. Medley*, 6 C. & P. 292, 1834; *infra*, §§ 1422, 1423, 1425.

Art. 175 (5th ed.): "Every one who knows that any other person has committed felony and conceals or procures the concealment thereof, is guilty of misprision of felony." As to the punishment for misprision of felony in England, see Stephen's Dig. Crim. Law (5th ed.), art. 18.

² See *infra*, §§ 279, 280, 287; *R. v. Garrett*, 22 Law & Eq. 607; 6 Cox C. C. 260, 1854; *U. S. v. Davis*, 2 Sumn. 482, 1837; *Com. v. Pettes*, 114 Mass. 307, 1873; *People v. Adams*, 3 Denio, 190, 1847; *Adams v. People*, 1 Comst. 173, 1848; *Com. v. Gillespie*, 7 S. & R. 469, 1821.

⁴ See Whart. Cr. Pl. & Pr. §§ 10 *et seq.* As to misprision of treason, see *U. S. v. Burr*, 4 Cranch, 470, 1808; *infra*, §§ 1782 *et seq.* By Rev. Stat.

³ Hawk. P. C. b. 1, c. 59, s. 2; 1 Hale P. C. 431-448.

According to Sir J. F. Stephen, Dig. Crim. Law, art. 174 (5th ed.), "Every one who knows that any other person made specifically indictable.

the principal,¹ and this is eminently the case in indictments for nuisances, which could not be abated if the master was not liable for the servant's acts, if in general furtherance of the master's plan.² And the rule applies to all cases where a master inflicts indictable injury through a servant.

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¹ R. v. Dixon, 3 M. & S. 11, 1814; clerk without the owner's consent. Roberts v. Preston, 9 C. B. (N. S.) 208, 1860; State v. Wentworth, 65 Me. 234, 1875; Com. v. Nichols, 10 Metc. 259, 1845; Anderson v. State, 22 Ohio St. 305, 1871; Mollihan v. State, 30 Ind. 266, 1869; *infra*, § 1503.

² R. v. Stephens, L. R. 1 Q. B. 702-10, 1866.

³ R. v. Almon, 5 Burr. 2686, 1770; R. v. Dodd, 2 Sessions Cases, 33; R. v. Gutch, Moody & M. 433, 1829; U. S. v. Nunnemacher, 7 Biss. 111, 1875; Com. v. Park, 1 Gray, 553, 1854; Com. v. Nichols, 10 Metc. 259, 1845; Com. v. Morgan, 107 Mass. 199, 1871; Com. v. Boston R. R., 126 Mass. 61, 1879; State v. Smith, 10 R. I. 258, 1872; Com. v. Gillespie, 7 S. & R. 469, 1821; State v. Mathis, 1 Hill, (S. C.) 37, 1833; Britain v. State, 3 Humph. 203, 1842; Com. v. Major, 6 Dana, 293, 1838; Hipes v. State, 73 Ind. 39, 1880; 1 Ben. & H. Lead. Cas. 241; *infra*, §§ 341, 1422, 1467, 1503. This rule holds even as to the sale of liquor on Sunday by a

⁴ R. v. Gutch, Moody & M. 433, 1829.

⁵ *Supra*, § 135.

⁶ See *supra*, § 135; *infra*, § 1503; R. v. Bennett, Bell C. C. 1, 1858; 8 Cox C. C. 74, cited *supra*, § 154; U. S. v. Halberstadt, Gilp. 262; Com. v. Nichols, 10 Metc. 259, 1846; Barnes v. State, 19 Conn. 398, 1848; State v. Privett, 4 Jones, 100, 1856; State v. Dawson, 2 Bay, 360, 1796; Hipp v. State, 5 Blackf. 149, 1841; O'Leary v. State, 44 Ind. 91, 1876; Anderson v. State, 39 Ind. 553, 1871; State v. McGrath, 73 Mo. 181, 1879; State v.

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I. JUDICIAL POWERS SETTLED BY FEDERAL CONSTITUTION.

§ 252. THE powers given to Congress under this head are :

- To provide for the punishment of counterfeiting the securities and current coin of the United States.¹
- To define and punish piracies, felonies committed on the high seas, and offences against the law of nations.²
- To make rules for the government and regulating of the land and naval forces.³

Summary of federal judicial powers given by Constitution.

To provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States.⁴

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;⁵

¹ Art. 1, § 8, cl. 6.

² Ibid. cl. 10.

³ Ibid. cl. 14.

⁴ Ibid. cl. 16.

⁵ Ibid. cl. 17. See *infra*, § 260, n. 8.

CHAPTER X.

IN WHAT COURTS INDICTMENTS ARE COGNIZABLE.

I. JUDICIAL POWERS SETTLED BY
FEDERAL CONSTITUTION.

Summary of federal judicial powers given by Constitution, § 252.

Prevalent view is that federal judiciary has no common law criminal jurisdiction, § 253.

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Rulings do not shut out common law as a standard of interpretation, § 255.

No formal jurisdiction is given of exclusively common law offences, § 256.

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Also offences against individuals on federal soil or on ship, § 260.

Also offences against property of federal government, § 261.

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II. IN WHAT COURTS OFFENCES
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6. *Offences committed part in one Jurisdiction and part in another.*

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In continuous offences each place of overt act has cognizance, § 288.

Adjustment of punishment in such cases, § 289.

Offences in carriages and boats, § 290.

In larceny, thief liable wherever goods are brought, § 291.

In homicide, place of wound has cognizance, and by statute place of death, § 292.

Law of place of performance determines indictability, § 292 *a*.

Sovereigns may have concurrent or successive jurisdiction, § 293.

7. *Courts Martial and Military Courts.*

Martial law is law for the army, military law is law imposed on a subjugated country, § 294.

Judgments of, may be a bar, § 295.

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To make rules for the government and regulating of the land and naval forces.³

To provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States.⁴

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;⁵

¹ Art. 1, § 8, cl. 6.

² Ibid. cl. 10.

³ Ibid. cl. 14.

⁴ Ibid. cl. 16.

⁵ Ibid. cl. 17. See *infra*, § 260, n. 8.

and to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States.¹

To enforce the rights established by the fourteenth and fifteenth amendments.²

§ 253. It is said in a case which will presently be more fully noticed, and which is assumed to have settled the law on this important question, that although it may be that the Supreme Court possesses jurisdiction derived immediately from the Constitution, of which the legislative power cannot deprive it, all other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be invested with none but what the power ceded to the general government authorizes Congress to confer. Certain implied powers, it is admitted, must necessarily result to courts of justice from the nature of their institution: as to fine for contempt, to imprison for contumacy, and to enforce obedience to orders; but jurisdiction of crimes against the federal government, it is held, is not among these powers. Before an offence can become cognizable by the United States courts, so it is concluded, Congress must first recognize it as such, affix a punishment to it; and declare the court that shall have jurisdiction.³

§ 254. The first case which involved the question of the common law criminal jurisdiction of the federal courts was that of *Henfield*, tried for illegally enlisting in a French privateer; a case tried in 1793, but for the first time fully reported in 1850.⁴ In this case Chief Justice Jay, Judge Wilson, and Judge Iredell, of the Supreme Court, and Judge Peters of the District Court, concurred in holding that all viola-

¹ Ibid. cl. 18. In this section the word *necessary* has been construed to mean *needful, requisite, essential*, and *conducive to*, and gives Congress the choice of the means best calculated to exercise the powers they possess; and under this construction it has been held that Congress has power to inflict punishment in cases not specified by the Constitution, such power being implied as necessary and proper to the sanction of the laws and the exercise of the delegated powers. *M'Culloch v. State of Maryland*, 4 Wheat. 413, 1819; *U. S. v. Bevens*, 3 Wheat. 336, 1818; *Martin's Lessee v. Hunter*, 1 Wheat. 304, 1816; *Ex parte Bollman*, 4 Cranch, 75, 1807; *U. S. v. Fisher*, 2 Cranch, 358, 396, 1804.

² Whart. Com. Am. Law, §§ 591 *et seq.*

³ *U. S. v. Hudson and Goodwin*, 7 Cranch, 32, 1810; *U. S. v. Coolidge*, 1 Wheat. 416, 1816. See Duponceau on Jurisdiction of United States Courts.

⁴ Whart. State Trials, 49.

tions of treaties, of the law of nations, and of the common law, so far as federal sovereignty is concerned, are indictable in the federal courts without statute. Almost at the same time before Judge Iredell, Judge Wilson, and Judge Peters, an American citizen was convicted, at common law, for sending a threatening letter to the British Minister.¹ Then came Isaac Williams's case, where the same law was held by Chief Justice Ellsworth.²

Such was the state of the law when Judge Chase, in Worrall's case³ (Chief Justice Jay, Judge Wilson, and Judge Iredell being no longer on the bench, and Chief Justice Ellsworth being abroad), without waiting to learn what had been decided by his predecessors, startled both his colleague and the bar by announcing that he would entertain no indictment at common law. No reports being then, or for some time afterward, published, of the prior rulings to the contrary, it is not to be wondered that the judges who came on the bench after Judge Chase supposed that he stated the practice correctly. In this view Judge Washington seems to have held that there could be no indictment for perjury at common law in the courts of the United States;⁴ and Chief Justice Marshall,⁵ in more than one case, treats the same point as if settled by consent.⁶ But in a case which occurred in the Circuit Court of Massachusetts⁷ in 1813, on an indictment for an offence committed on the high seas, the question arose whether the Circuit Court had jurisdiction to try offences against the United States which had not been defined, and to which no punishment had been affixed. Judge Story, admitting that the courts of the United States were of limited jurisdiction, and could exercise no authority not expressly granted to them, contended that when an authority was once lawfully given, the nature and extent of that authority, and the mode in which it should be exercised, must be regulated by the rules of the common law. The inference, he urged, was plain, that the Circuit Courts have cognizance of all offences against the United States; that what these offences were depended upon the common law, applied to the powers confided to the United States; that the Circuit Courts,

¹ U. S. v. Ravara, Whart. State Tr. 91; 2 Dallas, 297, 1793.

² Whart. State Trials, 651.

³ Whart. State Trials, 189.

⁴ See 1 W. C. C. R. 84, 1804, the report of which case appears to be defective in the conclusion of Judge Washington's opinion.

⁵ U. S. v. Burr, 4 Cranch, 500, 1808.

⁶ U. S. v. Bevens, 3 Wheat. 336, 1818; U. S. v. Wiltberger, 5 Wheat. 76, 1820.

⁷ U. S. v. Coolidge, 1 Gall. 488,

having such cognizance, might punish by fine and imprisonment where no punishment was specially provided by statute; that the admiralty was a court of extensive criminal as well as civil jurisdiction; and that offences of admiralty were exclusively cognizable by the United States, and punishable by fine and imprisonment, where no other punishment was specially prescribed. The district judge dissenting, the case came before the Supreme Court of the United States; and it is evident from the report,¹ that a strong desire existed in the minds of the judges to hear the whole question of the extent of jurisdiction reargued. The attorney-general, however, declined to do so, being unwilling to attempt to shake the opinion in *United States v. Hudson and Goodwin*;² by the authority of that case the court felt themselves bound, and so certified to the Circuit Court.³

§ 255. But even assuming, as was said on another occasion,⁴ that it is now finally established that the common law, *as a source of jurisdiction*, is not recognized in the federal courts, this does not exclude the operation of the common law, *as a rule for the exercise of a jurisdiction previously given*. That the common law is necessarily thus appealed to will hereafter appear in the chapters discussing offences against the United States; and it will be seen that there is not one of these offences whose character is not, according to the construction given by the federal courts, determined by a resort to the common law.⁵

Rulings do not shut out common law as a standard of interpretation.

¹ 1 Wheat. 415, 1816.

² 7 Cranch, 32, 1813.

³ Chancellor Kent does not seem to think that the case of *U. S. v. Coolidge* should be governed by the same principle as those of *U. S. v. Hudson*, and *U. S. v. Worrall*—the one a libel and the other an attempt to bribe a commissioner of the revenue—the two latter being decided on the ground that the Constitution had given to the courts no jurisdiction in such cases; whereas the case of *Coolidge* was one of admiralty, over which the federal courts seem to have a general and exclusive jurisdiction. Kent's Com. vol. i. p. 338. As following *U. S. v. Coolidge*, and denying jurisdiction, see *U. S. v. Maurice*, 2 Brock, 96,

1823; *U. S. v. Scott*, 4 Biss. 29, 1865; *U. S. v. Babcock*, 4 McL., 113, 1846; *U. S. v. Taylor*, 1 Hughes, 514, 1873. Hence the United States courts have no jurisdiction to try attempts to bribe revenue officers to burn distilleries. *U. S. v. Gibson*, 47 Fed. Rep. 833, 1891. To same effect, see argument of Clifford, J., in *U. S. v. Cruikshank*, 92 U. S. 564, 1875; *infra*, § 256. But otherwise as to offences on high seas and places within exclusive jurisdiction. *U. S. v. Shepherd*, 1 Hughes, 520, 1873.

⁴ Wharton State Tr. 87.

⁵ See particularly as to piracy, *infra*, § 1860, and see vindication of position in the text in Whart. Com. Am. Law, §§ 12, 200, 452. Compare, also, Mar-

§ 256. While, therefore, it is settled that the federal courts have no jurisdiction of offences not declared to be such by federal statute, yet, as these statutes mostly designate offences by title, leaving their definition to the common law, it is the common law that is the final arbiter as to what such offences are. And even this formal restriction of federal jurisdiction to statutory offences is in some measure done away with by a statute, hereafter to be noticed more fully, by which conspiracies against the United States are made indictable.¹ Other common law offences against the United States are still cognizable in State courts, when committed within State limits, and where State cognizance of them is not prohibited by federal statute.² But when common law offences against the United States are committed on the high seas, or on exclusively federal territory, they are either punishable in the federal courts, or they are not punishable at all.

No formal jurisdiction of exclusively common law offences.

§ 257. It remains to consider such offences as are brought within the jurisdiction of the federal courts by act of Congress. The offences thus particularly enumerated by Congress may be collected under five general heads; first, those against the law of nations; secondly, those against federal sovereignty; thirdly, offences against the persons of individuals; fourthly, offences against property; and fifthly, offences against public justice.

Statutory jurisdiction of federal courts.

§ 258. (a) Under the first head, namely, offences against the law of nations, may be classed, the accepting and exercising, by a citizen, a commission to serve a foreign State against a State at peace with the United States;³ fitting out and arming, within the limits of the United States, any vessel

Includes offences against law of nations.

bury *v.* Madison, 1 Cranch, 137, 1803; course is found in *U. S. v. Meyer*, *U. S. v. Outerbridge*, 5 Saw. 620, 1868; cited Whart. Prec. 955, note. As illustrations of the rejection of common law jurisdiction, see *U. S. v. Babcock*, 4 McLean, 113, 1846; *Anon.* 1 Wash. C. C. 84, 1804; *U. S. v. Maurice*, 2 Brock. 96, 1823; *U. S. v. New Bedford Bridge*, 1 Woodb. & Minot, 401, 1846; *U. S. v. Lancaster*, 2 McLean, 431, 1841; *U. S. v. Barney*, 5 Blatch. C. C. 294, 1866; *U. S. v. Scott*, 4 Biss. 29, 1865; and cases cited in § 254.

¹ *Infra*, §§ 1356 a, 1785.

² *Infra*, § 266; 10 Wash. Writ. by Sparks, 535; Whart. State Tr. pp. 87, 88. An instance of common law jurisdiction being accepted as a matter of

³ Rev. Stat. 1878, 5281; *infra*, § 1901.

for a foreign State to cruise against a State at peace with the United States;¹ increasing or assisting, within the United States, any force of armed vessels of a foreign State at war with a State with which the United States are at peace; setting on foot within the United States, any military expedition against a State at peace with the United States;² suing forth or executing any writ or process against any foreign minister, or his servants, the writs being also declared void;³ and violating any passport; or in any other way infracting the law of nations, by violence to an ambassador, or foreign minister, or their domestics.⁴

§ 259. (b) Under the second head, namely, offences against federal sovereignty, may be classed, treason against the United States and misprision of treason;⁵ holding any treasonable correspondence with a foreign government;⁶ recruiting soldiers to serve against the United States;⁷ enlisting by a citizen within, or going out of the United States with intent to enlist in the service of any foreign State;⁸ fitting out and arming a vessel by a citizen of the United States, out of the United States, with intent to cruise against citizens of the United States;⁹ illegally holding office;¹⁰ false personation in naturalization;¹¹ offences against the elective franchise;¹² false personation of owners of stock or other claim against the United States;¹³ obstructing officers executing warrants under civil rights laws;¹⁴ conspiring to prevent a person holding or accepting federal office;¹⁵ injuring a person so holding office;¹⁶ offences against Indians;¹⁷ offences on Guano Islands;¹⁸ political offences against the federal government committed by subjects abroad;¹⁹ perjury and forgery abroad;²⁰ and the various offences defined in the statutes relating to the post-

¹ Rev. Stat. 1878, 5281; *infra*, § 1901.

² Rev. Stat. 5285; *infra*, § 1905.

³ Rev. Stat. 5286.

⁴ Ibid. 4063; *infra*, § 1899.

⁵ Rev. Stat. 4062.

⁶ Ibid. 5331-8. As to subsequent statutes, see *infra*, §§ 1782 *et seq.*

⁷ Rev. Stat. 5335; *infra*, § 1789.

⁸ Rev. Stat. 5337; *infra*, § 1786.

⁹ Rev. Stat. 5282.

¹⁰ Ibid. 5284.

¹¹ Ibid. 1787.

¹² Ibid. 5424; *infra*, §§ 1833 *et seq.*

¹³ Rev. Stat. 5425-9, 5506, 5511-19, 5520, 5529, 5532; *infra*, §§ 1833 *et seq.* See, also, *U. S. v. Morrissey*, 32 Fed. Rep. 147, 1887.

¹⁴ Rev. Stat. U. S. 5435-8.

¹⁵ Ibid. 5516.

¹⁶ Ibid. 5518.

¹⁷ Ibid. 5518.

¹⁸ Ibid. 2128, 2146, 2150.

¹⁹ Ibid. 5576. See *Jones v. U. S.*, 11 Sup. Ct. Rep. 80, 1891; *Smith v. U. S.*, 137 U. S. 224, 1891.

²⁰ *Infra*, § 274.

²¹ *Infra*, § 276.

office;¹ to counterfeiting,² to piracy, revolt, and the slave-trade.³ Under this head may be noticed conspiracies against the United States, as hereafter specified.⁴

§ 260. (c) Under the third head, namely, offences against the persons of individuals, may be classed, subjecting any person to deprivation of rights under color of law;⁵ depriving any person of equal protection of law;⁶ murder or manslaughter, in any fort, dock-yard, or other place or district of country under the sole and exclusive jurisdiction of the United States;⁷ causing death on ship by explosive substances;⁸ murder, manslaughter, or rape, upon the high seas, or in any river, haven, basin, or other like place out of the jurisdiction of the United States, etc.;⁹ offences covered by statutes protecting persons on the high seas, or arms of the sea, or rivers, or bays within the admiralty jurisdiction of the United States, and out of the jurisdiction of particular States;¹⁰ and kidnapping persons with intent to enslave.¹¹

Also offences against individuals on federal soil, or on ships, or depriving individuals of civil rights.

¹ Rev. Stat. U. S. 5463 *et seq.* 24 States, by buying lands for other than Stat. at L. 364, 25 Stat. at L. 1825, and the purpose of governing the same, does not exclude State jurisdiction. U. S. 25 Stat. at L. 496.

² Ibid. 5457, 742, 26 Stat. at L.

³ See Rev. Stat. U. S. 5413–80.

⁴ *Infra*, § 1556 *a.*

⁵ Rev. Stat. U. S. 5510.

⁶ Ibid. 5519.

⁷ Ibid. 5339, 26 Stat. at L. 81, 123. This jurisdiction is exclusive, unless there is a reservation to the State in the act of cession. U. S. *v.* Bevans, 3 Wheat. 336, 1818; U. S. *v.* Cornell, 2 Mason, 60, 1819; U. S. *v.* Davis, 5 Mason, 356, 1829. See U. S. *v.* Barney, 5 Blatch. 294, 1866; Reynolds *v.* People, 1 Colo. Ter. 179, 1869; Territory *v.* Burgess, 8 Mont. 57, 1888; Sharon *v.* Hill, 24 Fed. Rep. 726, 1885; Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 525, 1885. The mere reservation of the right “to serve State processes” in the ceded place does not exclude federal jurisdiction. Lahser *v.* State, 30 Tex. App. 387, 1891; U. S. *v.* Davis, *ut supra*. But the United States, by buying lands for other than the purpose of governing the same, does not exclude State jurisdiction. U. S. *v.* Penn, 48 Fed. Rep. 669, 1892. See Wills *v.* State, 3 Heisk. 141, 1871. Where the United States acquires land within a State in any other way than by purchase with its consent, forts, arsenals, or other public buildings erected thereon for the use of the general government, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. But when not so used the powers of the State over such places will be as full and complete as over any other places within its limits. Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 525, 1885.

⁸ Rev. Stat. U. S. 5354.

⁹ *Infra*, § 269. See R. S. of U. S. §§ 5339–40.

¹⁰ Rev. Stat. U. S. 5346 *et seq.*; R. S. U. S. §§ 5339–40. The open waters

¹¹ Rev. Stat. U. S. 5525.

§ 261. (d) Under the fourth head, namely, offences against property, may be classed, embezzling or purloining any arms or other ordnance belonging to the United States, by any person having the charge or custody thereof, for purposes of gain, and to impede the service of the United States;¹ custom-house frauds;² frauds in stealing implements used in printing obligations, or papers of importance;³ burning, or aiding to burn, any dwelling-house, store, or other building, within any fort, dock-yard, or other place under the jurisdiction of the United States;⁴ setting fire to, or burning, or aiding to set fire to, or burn, any arsenal, armory, etc., of the United States, or any vessel built or building, or any materials, victuals, or other public stores;⁵ taking and carrying away, with intent to steal, the personal goods of another, from within any of the places under the sole and exclusive cognizance of the United States, or being accessory thereto;⁶ and the various forms of robbery and larceny on the high seas.

§ 262. (e) Under the fifth head, namely, offences against public justice, may be classed, bribing any United States judge or legislator with intent to obtain any opinion, judgment, or vote, in any suit depending before him;⁷ receiving such

of the Great Lakes are "High Seas" within the meaning of this act, and the United States courts have jurisdiction of crimes committed on board ships belonging to United States citizens navigating their waters. *U. S. v. Rodgers*, 150 U. S. 249, 1894, affirming 46 Fed. Rep. 1, 1891. See, also, *U. S. v. Beyer*, 31 Fed. Rep. 35, 1887. An offence at sea within cannon-shot of the shore is cognizable in the federal courts. *U. S. v. Grush*, 5 Mason, 290, 1829; *U. S. v. Holmes*, 5 Wheat. 412, 1820. But a ship lying at anchor between Boston and Chelsea, off Constitution Wharf, at the distance of one-fourth or one-third of a mile from said wharf, in water of the depth of four or five fathoms at low tide, and between one-third and half a mile's distance from the navy-yard in Charlestown, is within the body of the county of Suffolk; and an offence so committed on board a merchant ship so situate, owned by a citizen or

citizens of the United States, is exclusively cognizable by the courts of the State. *Com. v. Peters*, 12 Metc. 387, 1847; *People v. Welch*, 141 N. Y. 266, 1894. See *infra*, §§ 270, 270 a.

¹ Rev. Stat. U. S. 5439, 5456.

² *Ibid.* 5444.

³ *Ibid.* 5453-4.

⁴ *Ibid.* 5385.

⁵ *Ibid.* 5386.

⁶ And see *Com. v. Gaines*, 2 Va. Cas. 172. The burden is on the government to show that the crime was committed on land which was under the exclusive jurisdiction of the United States. *U. S. v. Meagher*, 37 Fed. Rep. 875, 1888.

Larceny of whiskey from bonded warehouses is triable in State courts. The federal courts only have jurisdiction to punish for removal by owner without payment of taxes. *State v. Harmon*, 104 N. C. 792, 1889.

⁷ Rev. Stat. U. S. 5451.

bribe ;¹ extortion of any kind ;² embezzlement by public officers ;³ other forms of official misconduct ;⁴ obstructing any officer of the United States in the service of any legal writ or process whatsoever ; demanding and receiving, by reason of his office, any greater fees than those allowed by law, by a public officer, or his deputy ;⁵ endeavoring to impede, intimidate, or influence any juror, witness, or officer in any court of the United States in the discharge of his duties, or by threats or force obstructing or impeding, or endeavoring to impede the due administration of justice therein ;⁶ committing perjury, or causing another to do so, in any suit or controversy depending in any of the courts of the United States, or in any deposition taken in pursuance of the laws of the United States ;⁷ taking other forms of false oaths forbidden by acts of Congress ;⁸ endeavoring to defeat the course of justice ;⁹ circulating obscene literature through the mail or custom-house.¹⁰

§ 263. By clauses in several of the acts referred to, it is expressly declared that nothing therein shall be construed to deprive the courts of the individual States of jurisdiction under the laws of the several States, over offences made cognizable by these acts. Such is the case, as has been noticed, with the crimes of forging, coining, and counterfeiting.¹¹ By the act establishing and regulating the Post-office Department, authority is given to the federal officers to prosecute in the State courts offences against the department.¹²

II. IN WHAT COURTS OFFENCES COGNIZABLE BY THE UNITED STATES ARE TO BE TRIED.

When the State and the Federal Courts have Concurrent Jurisdiction.

§ 264. Under the Federal Constitution exclusive jurisdiction is vested in the federal courts of all offences cognizable under the

¹ Ibid. 5500-2.

² Ibid. 5481-7.

³ Ibid. 5488-90.

⁴ Ibid. 5482 *et seq.*

⁵ Ibid. 5481.

⁶ Ibid. 5404-6. See *U. S. v. Logan*, 45 Fed. Rep. 872, 1891.

⁷ Rev. Stat. 1878, 5392 Where a State court was temporarily and legally sitting in the United States govern-

ment building, and perjury was committed before it, the State courts have jurisdiction to punish the offence. *Exum v. State*, 90 Tenn. 501, 1892.

⁸ *Infra*, § 276.

⁹ Rev. Stat 1878, 5407.

¹⁰ Ibid. 1785. *Infra*, § 1831.

¹¹ See *infra*, § 748.

¹² Rev. Stat. U. S. 1878, 3833.

authority of the United States, unless where the laws of the United States shall otherwise direct.¹ In the language of Judge Washington, in delivering the opinion of the Supreme Court in a leading case, "Congress cannot *confer* jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the State courts may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal courts."² How far the grant of exclusive jurisdiction extends is discussed in another work.³

§ 265. Statutes having been enacted by Congress giving, as to several lines of offences, concurrent jurisdiction to the State courts, it has been held in several of the States, not without the sanction of repeated intimations of the Supreme Court of the United States, that although the State Courts may exercise jurisdiction in cases authorized by the laws of the States, and not prohibited by the exclusive jurisdiction of the federal courts, yet it cannot be considered obligatory on the State tribunals to exercise such jurisdiction.⁴ On the other hand, as will be seen, we have cases in which State courts of high authority have accepted this jurisdiction.

§ 266. Of the vexed questions here involved we may venture to accept the following solutions :

1. Congress cannot constitutionally confer on a State court jurisdiction over offences exclusively against the federal government. Statutes conferring such jurisdiction do not and cannot bind the State courts as such.
2. Offences which are directed against the sovereignty of a State, or which directly affect the State or its population, are punishable in such State, notwithstanding the fact that such offences are also directed against the sovereignty of the federal government, unless the Constitution gives the federal government exclusive jurisdiction over the offence;⁵ and even where the federal courts have exclusive

¹ *Houston v. Moore*, 5 Wheat. 1, 1820.

⁴ *Prigg v. Com.*, 16 Peters, 539, 630, 1842.

² *Ibid.* See *U. S. v. Ames*, Boston Law Rep. vol. 9, p. 295. As to concurrent jurisdiction, see Whart. Cr. Pl. & Pr. § 242.

⁵ "A State court of original jurisdiction having the parties before it may, consistently with federal legislation, determine cases at law or in equity arising under the Constitution

³ Whart. Com. Am. Law, § 524.

jurisdiction of one aspect of an offence, this does not prevent a State court from prosecuting another aspect of the same offence.¹ Whether one sovereign, by prosecuting an offence thus indictable both by itself and by another sovereign, bars a prosecution by such other sovereign, is elsewhere discussed.²

3. Offences exclusively against the United States are exclusively cognizable in the federal courts; and offences exclusively against the States are exclusively cognizable in the State Courts.³ The

or laws of the United States, or involving rights dependent on such Constitution or laws." Harlan, J., in *Robb v. Connolly*, 111 U. S. 624, 1883, cited *infra*, § 267. *U. S. v. Wells*, 15 Int. Rev. Rec. 56.

¹ *E. g.*, where the uttering a forged treasury note is prosecuted as an uttering in the federal courts, and as a cheat in the State courts. Whart. Com. Am. Law, § 524. *Infra*, § 293.

² *Infra*, §§ 273, 298. And see particularly Whart. Cr. Pl. & Pr. § 441. As to perjury, see *infra*, § 1275. As to treason, see *infra*, §§ 812-18. As to coining, in addition to points above given, see *infra*, § 749. As to larceny and mail robbery, see *State v. Townsend*, 1 Houst. C. C. 10, 1868.

³ The propositions in the text are dependent upon principles of constitutional construction, which it is out of the range of the present treatise to discuss. If, however, as is here assumed, each State is sovereign as to all powers not ceded to the federal government, the State has jurisdiction of all crimes committed within its borders unless the exclusive jurisdiction of such crimes is ceded to the federal government. And if each State is sovereign as to its own functionaries, these functionaries cannot accept any jurisdiction conferred on them by the federal government, unless the right to impose this jurisdiction is ceded by the States to the federal government. Otherwise the federal legislature could appropriate

to itself the time, the duty, and the allegiance of State officials, and thereby put them under its immediate control. As to perjury, see *infra*, § 1275.

Among the rulings bearing on this topic may be cited the following:

In Massachusetts, it is said that the enactment of a federal statute directing the punishment of a crime, as against the United States, excludes all State jurisdiction, unless the concurrent jurisdiction of the States be saved in the statute. "By the terms of the Judiciary Act," said Ames, J., in the Supreme Court of Massachusetts, in reference to this point, "the courts of the United States are vested with the exclusive cognizance of all crimes that are made punishable by act of Congress, *except where the act of Congress makes other provision*; and it would therefore seem that the crime of embezzlement by a cashier of a national bank located within our territory is taken out of the jurisdiction of our courts. This is at least strongly implied in *Com. v. Tenney*, 97 Mass. 50, 1867, and in fact is conceded by the learned attorney-general in the argument of this case." *Com. v. Felton*, 101 Mass. 204, 1869; *Com. v. Ketner*, 92 Pa. 372, 1880. See *Com. v. Fuller*, 8 Metc. 313, 1844; *State v. Tuller*, 34 Conn. 280, 1867. *Infra*, § 1041.

Hence even an accessory to an embezzlement of the funds of a national bank by one of its officers cannot be tried in Massachusetts, even though

federal courts, therefore, have no jurisdiction of offences exclusively against the States.¹

the offence of an accessory is not provided for by the federal statutes. *Com. v. Felton*, 101 Mass. 204, 1869. See *Com. v. Ketner*, 92 Pa. 372, 1880.

On the other hand, it has been held in the same State in *Com. v. Barry*, 116 Mass. 1, 1874; that a larceny committed by an officer of a national bank of the property of the bank may be punished in a State court, notwithstanding that he may also be subject to punishment for embezzlement under the United States statute. "The fact," so it is argued in the opinion of the court, "that Hine was teller of the bank subjects him to the punishment imposed for his breach of trust in that capacity, under the statute of the United States; it does not relieve him from his liability to punishment for the larceny at common law, or under statutes of the State. There is no identity in the character of the two offences, although the same evidence may be relied upon to sustain the proof of each. An acquittal or conviction of either would be no bar to a prosecution for the other." See *Com. v. Carpenter*, 100 Mass. 204, 1868; *Morey v. Com.*, 108 Mass. 433, 1871. To the same effect is *State v. Tuller*, 34 Conn. 280, 1867, where it was held that while the State courts cannot exercise jurisdiction of the offence of embezzlement by an officer of a national bank of the property of a bank, they have jurisdiction of the larceny or purloining by such officer of the property of others left with the bank for safe-keeping. At the same time, it is admitted in Connecticut that

offences against the federal government are exclusively cognizable in federal courts. *State v. Tuller*, *ut supra*; *Ely v. Peck*, 7 Conn. 240, 1829; *infra*, § 1041.

In *Com. v. Tenney*, 97 Mass. 50, 1867, it was held that a State court has jurisdiction of an indictment against an officer of a national bank for fraudulently converting to his own use the property of an individual deposited in the bank, under a State statute making such fraudulent conversion "larceny."

It is no objection to the jurisdiction of State courts that the same acts, constituting forgery under State laws, are also violations of the national banking laws, and that the offender may be subjected to punishment for both. *Cross v. State*, 10 Sup. Ct. Rep. 47, 1889.

Perjury in naturalization proceedings, no matter what may be the court in which the false oath is taken, is held to be an offence against the general government, and not punishable in State courts. *People v. Sweetman*, 3 Parker C. R. 358, 1855; *State v. Adams*, 4 Blackf. 146, 1840; *People v. Kelly*, 38 Cal. 145, 1870; *State v. Kirkpatrick*, 32 Ark. 117, 1878. See *infra*, §§ 1041, 1275, 1870. By other courts, however, for the reason that perjury in such cases strikes at state as well as federal integrity, this view is denied. *Infra*, § 1275; *State v. Whittemore*, 50 N. H. 245, 1870; *Rump v. Com.*, 30 Pa. 475, 1858. See *U. S. v. Bailey*, 9 Pet. 238, 1835. Yet we may agree that the State courts have no

¹ *Bush v. Kentucky*, 107 U. S. 110, 1882; *U. S. v. Pennsylvania*, 4 Hughes, 491, 1880. So perjury committed before a State court legally sitting in a United States government building is triable in State courts. *Exum v. State*, 90 Tenn. 501, 1892.

III. CONFLICT AS TO HABEAS CORPUS.

§ 267. For many years after the adoption of the Federal Constitution the State courts claimed to have the right to issue writs of

jurisdiction of perjury before federal land officers (*People v. Kelly*, 38 Cal. 145, 1870; see, also, *State v. Pike*, 15 N. H. 83, 1844; *State v. Adams*, 4 Blackf. 146, 1840); and of perjury in federal judicial investigations. *Ex parte Bridges*, 2 Woods, 428, 1875; s. c. under name of *Brown v. U. S.*, 14 Am. L. Reg. N. S. 566; *Shelly v. State*, 11 Lea, 594, 1882; though it may be otherwise as to special aspects of perjury under federal statutes; *infra*, § 1275. See, on this topic, Whart. Com. Am. Law, § 524. See *Exum v. State*, 90 Tenn. 501, 1892.

In Ohio, on an information for selling distilled liquors without a license, contrary to the act of Congress, it was held by all the judges that the United States could not prosecute in the State courts. In a previous case, on a similar question, the court had been equally divided. *U. S. v. Campbell*, 6 Hall's L. J. 113. Larceny of whiskey from bonded warehouses is triable in State courts; federal courts only punish removal without paying tax. *State v. Harmon*, 104 N. C. 792, 1890.

In Virginia, it has been decided that the courts of that State have no jurisdiction of stealing packages from the mail, that being an offence created by act of Congress; *Com. v. Feely*, 1 Va. Cas. 321, 1815; and the same view was taken in an action brought to recover a penalty for a breach of the revenue laws, notwithstanding such penalty being expressly made recoverable in the state courts. *Serg. Cons. Law*, 288.

In Kentucky (*Haney v. Sharp*, 1 Dana, 442, 1833), in an action to recover a penalty under an act of Congress, for a refusal to make return to the marshal of a list of the defendant's

family, it was held that, as no tribunal of the State had an inherent or concurrent jurisdiction in such cases, the jurisdiction of the courts of the federal government must necessarily be exclusive, and that the State courts could take no cognizance.

In Missouri, it has been even said that the power to punish counterfeiting current coin is, notwithstanding the statute, vested exclusively in Congress; that the States have no concurrent legislation on the subject; and that a statute of a State providing for the cognizance and punishment of such crimes is void. *Mattison v. State*, 3 Mo. 421, 1838. See *State v. Shoemaker*, 7 Ibid. 177, 1841. As to coining, see generally *infra*, § 748.

Of coining and counterfeiting, however, the State courts, it is generally agreed, have independent jurisdiction, so far as such offences constitute cheats, either consummated or attempted, the offence being one which, at least in some of its aspects, is directed against the sovereignty of the particular States, and the jurisdiction originally existing in the State courts, and not being formally ceded to the general government. *Prigg v. Com.*, 16 Pet. 630, 1842; *Fox v. Ohio*, 5 How. (U. S.) 410, 1847; *State v. Randall*, 2 Aikens, 89, 1826; *Com. v. Fuller*, 8 Metc. 313, 1844; *Manley v. People*, 7 N. Y. 295, 1852; *U. S. v. Smith*, 1 Southard, 33, 1818; *Rump v. Com.*, 30 Pa. 475, 1858; *Sutton v. State*, 9 Ohio, 132, 1841; *Hendrick v. Com.*, 5 Leigh, 707, 1835; *Jett v. Com.*, 18 Gratt. 933, 1866; *State v. Pitman*, 1 Brev. 32, 1805; *State v. Antonio*, 3 Brev. 562, 1816; *Waldo v. Wallace*, 12 Ind. 569, 1859; *Chess v. State*, 1 Blackf. 198, 1822; *Snoddy v. Howard*, 51 Ind. 411,

habeas corpus to examine the validity of commitments under federal process.¹ We have had, it is true, rulings by federal

1875; *Harlan v. People*, 1 Dougl. (Mich.) 207; *State v. McPherson*, 9 Iowa, 53, 1859; *Sizemore v. State*, 3 Head, 26, 1859; *People v. White*, 34 Cal. 183, 1868; though see *Rouse v. State*, 4 Ga. 136, 1848. See, for a fuller discussion, Whart. Com. Am. Law, § 524.

In South Carolina, the courts at one time went the extreme length of saying that every offence against the laws of the United States is an offence against the laws of South Carolina and that she has a right to punish all violations of her law, unless the exclusive power to punish has been delegated by the Constitution of the United States to the judiciary established by it. *State v. Wills*, 2 Hill, (S. C.) 687, 1835. Such, however, seems now no longer the law in that State. *State v. McBride*, Rice, 400, 1839.

In Pennsylvania it is settled that while the federal courts have exclusive jurisdiction of offences of which Pennsylvania has no common law or statutory cognizance, *e. g.*, embezzlement by officer of national bank; *Com. v. Ketner*, 92 Pa. 372, 1880; it is otherwise with offences of which Pennsylvania has common law or statutory jurisdiction, *e. g.*, forgery at common law. *Com. v. Luberg*, 94 Pa. 85, 1880.

In *Bletz v. Columbia Bank*, 87 Pa. 87, 1878, we have the following from Agnew, C. J.: "We may now refer to some of our own decisions and laws. Thus it was held that our courts had jurisdiction of a forgery of power of attorney to obtain a pension under an act of Congress. *Com. v. Shaffer*, 4 Dallas, App. 26, 1797. In *White v. Com.*, 4 Binn. 418, 1812, this court decided that passing a counterfeit note of the Bank of the United States was indictable under the Act of 22d April, 1794, specially including the notes of that bank."

After noticing *Buckwalter v. U. S.*, 11 S. & R. 193, 1824, and *Huber v. Reily*, 53 Pa. 112, 1866, the opinion thus proceeds: "The legislation of our State has run in the same direction. In 1829, Judge King, Thomas I. Wharton, and Judge Shaler, reported the penal act of that year. The Act of 23d April, 1829, provided for forging and uttering any gold or silver coin then or thereafter passing or in circulation in this State, and for forging, counterfeiting, or uttering a counterfeit note of the Bank of the United States. In 1860 the same great criminal lawyer, Judge King, with Judge Knox, and another, was upon a commission to codify the criminal law, and reported the new sections of the Act of 31st March, 1860, from 156 to 163 inclusive, punishing offences relating to the coin; and in the report referred to the laws of the United States, and the case of *Fox v. Ohio*, 5 How. 410; deciding upon an elaborate argument that the clauses of the Constitution of the United States, relating to the power to coin money and regulate its value, do not prevent the State from enacting a law to punish the offence of passing counterfeit coin of the United States. These laws have remained unquestioned, yet I do not assert that none of the provisions applied to the coin of the United States can be questioned." But any doubt that might arise on this point would not touch the indictability of passing counterfeit coin as cheats.

As will be hereafter seen, an indictment lies in the U. S. Circuit Court, under the federal statute, against a guardian for embezzling pension money paid to him for his ward. *U. S. v. Hall*, 98 U. S. 343, cited *infra*, § 1049.

¹ See Sergeant's Const. Law, 236, 287; *Martin v. Hunter*, 1 Wheat. 304,

judges, that they have *exclusive* jurisdiction on *habeas corpus*, whenever the applicant is restrained, illegally or otherwise, under authority of the United States, whether by virtue of a formal commitment or otherwise.¹ But such claim was not recognized by the State courts, and cases are not infrequent in which by the latter tribunals persons held by the military authorities of the United States, under color of illegal enlistments, have been discharged.² On the other hand, it was at one time held in New York that a State court will not, on *habeas corpus*, review the legality of the arrest of an alleged deserter by a provost marshal of the United States;³ though this point was subsequently reconsidered, and it was held that the court would issue the writ to direct a provost marshal to produce an infant, under eighteen years, whom he claimed to hold as a soldier and deserter.⁴

Right of
State
courts to
discharge
from fed-
eral ar-
rests.

In 1867 a case of collision arose in New York between the federal and State courts on this issue, under the following circum-

1816; *State v. Dimmick*, 12 N. H. 194, 1841; *Com. v. Chandler*, 11 Mass. 83, 1814; *Com. v. Harrison*, 11 Mass. 63, 1814; *Com. v. Downes*, 24 Pick. 227, 1839; *Sanborn v. Carlton*, 15 Gray, 399, 1860; *McConologue's Case*, 107 Mass. 154, 1871; New York R. S. vol. ii. 563, § 22; 3 Hall's L. J. 206; 5 Hall's L. J. 497; *Lanahan v. Birge*, 30 Conn. 438, 1861; *Husted's Case*, 1 Johns. Cas. 136, 1801; *In re Stacy*, 10 Johns. 328, 1813; *U. S. v. Wyngall*, 5 Hill, 16, 1843; *Barlow's Case*, 8 West. Law J. 567; *Com. v. Camac*, 1 S. & R. 87, 1814; *Com. v. Fox*, 7 Pa. 336, 1847; *Com. v. Wright*, 3 Grant, 437, 1863; *Ex parte Mason*, 1 Murphy, 336, 1809; *Disinger's Case*, 12 Ohio St. 256, 1861; *Higgins's Case*, 16 Wis. 351, 1864; though see *Spangler's Case*, 11 Mich. 298, 1862; *In re Willis*, 38 Ala. 429, 1865. In Whart. Cr. Pl. & Pr. §§ 783 a, 980 *et seq.* will be found rulings of the U. S. Supreme Court on the topics in the text.

¹ *In re Farrand*, 1 Abb. (U. S.) 140, 1867; *Ex parte McDonald*, 9 Am. Law Reg. 662; 1 Low. 100, 1865; *Farrand v.*

Fowler, 2 Am. L. J. Rep. 4. That the exclusive jurisdiction to try the scope and validity of United States process is vested in United States courts, see *In re Johnson*, 46 Fed. Rep. 477, 1891; *Covell v. Heyman*, 111 U. S. 176, 1883. *Ex parte Royall*, 117 U. S. 241, 1885. Therefore, where a prisoner confined under sentence of federal courts is released by virtue of a writ issued out of a State court, he may be rearrested on order of the federal court. *In re Johnson*, 46 Fed. Rep. 477, 1891.

² *Ex parte Reynolds*, 6 Parker C. R. 276, 1860. See, also, *Ex parte Hamilton*, 1 Ben. 455, 1867; but see *Norris v. Newton*, 5 McL. 92, 1850; *U. S. v. Rector*, *Ibid.* 174, 1850; *Veremaitre's Case*, 13 Am. Law Rep. 608.

³ *In re Hopson*, 40 Barb. 34, 1863; *Ex parte Anderson*, 16 Iowa, 595, 1864.

⁴ *Ex parte Barrett*, 42 Barb. 479, 1863. See *People v. Gaul*, 44 Barb. 98, 1865; *In re Martin*, 45 Barb. 142, 1865.

stances: A commander in the army of the United States made return to a writ of *habeas corpus* issued by the State court, that he held the petitioner as a recruit in the United States army, and pursuant to laws of the United States regulating enlistments. The State court examined the validity of the enlistment, determined it to be invalid, and directed the recruit to be discharged. The officer refused to discharge him, and the State court committed the officer for contempt. The commander sued out a *habeas corpus* in the District Court of the United States, who discharged him, holding that the State court exceeded its jurisdiction in examining the validity of the enlistment; and that it had no power to proceed beyond ascertaining that the officer held the recruit by color of authority from the United States.¹ It is, no doubt, clear that a *habeas corpus* issued by a State judge has no authority within the limits of the sovereignty assigned by the Constitution to the United States;² but at the same time each court, on application made to it for this writ, is compelled to determine where the limits of such sovereignty are to be placed.³ It is conceded on all sides that the State courts cannot, on *habeas corpus*, examine whether a particular offence, charged in an indictment found in a federal court, is or is not an offence against the United States, or go beyond such indictment.⁴ And in 1871 the question was settled, so far as concerns enlistments, by an express ruling of the Supreme Court of the United States to the effect that State courts have no jurisdiction to discharge in such cases by *habeas corpus*, the exclusive jurisdiction being in the federal courts.⁵

It is otherwise, however, in respect to matters of which the federal government has not exclusive jurisdiction. In such case the courts of the States "have the right to inquire into the grounds

¹ *In re Farrand*, 1 Abb. (U. S.) 140, 1867. may be inquired into by a federal court, see *Ex parte Schmeid*, 1 Dill.

² *Ableman v. Booth*, 21 Howard, 587, 1871; *McCall's Case*, 5 Phila. 259, 506, 1858; *Ex parte Sifford*, 5 Am. Law 1863; *McCall v. McDowell*, 1 Abb. Reg. 659; *Ex parte Kelly*, 37 Ala. 474, (U. S.) 212, 1867. In case of the enlistment of minors, the right is not

³ Though see *In re Farrand*, 1 Abb. taken away by the federal statutes of (U. S.) 140, 1867. 1864, though it is not now within the

⁴ *Ex parte Hill*, 5 Nev. 154, 1869. jurisdiction of State courts. *In re*

⁵ *Tarble's Case*, 13 Wall. 399, 1871. Neill, 8 Blatch. 156, 1871; *In re Mc-* This question is fully considered in Donald, 1 Low. 100, 1865; 9 Am. Law Whart. Cr. Pl. & Pr. §§ 978 *et seq.* Reg. 662. See *In re Hanchett*, 18 Fed.

That the validity of an enlistment Rep. 26, 1883.

upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the Constitution or the laws of the United States,"¹

§ 268. In the Revised Statutes of the United States (edition 1878), compiling the previous statutes on this subject the following provisions are made as to writs of *habeas corpus*:

Federal courts have statutory powers of *habeas corpus* in federal cases.

(751) "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*.²

(752) "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.³

¹ Harlan, J., *Robb v. Connolly*, 111 U. S. 624-639, 1883.

² Under this provision are cited the acts of Sept. 24, 1789; April 10, 1869; March 2, 1833; Feb. 5, 1867; Aug. 29, 1842, and the following cases: *U. S. v. Hamilton*, 3 Dall. 17, 1797; *Ex parte Burford*, 3 Cr. 448, 1805; *Ex parte Bollman*, 4 Cr. 75, 1808; *Ex parte Wilson*, 6 Cr. 52, 1810; *Ex parte Kearney*, 7 Wh. 38, 1823; *Ex parte Watkins*, 3 Pet. 193, 1830; *Ibid.* 7 Pet. 568, 1833; *Ex parte Milburn*, 9 Pet. 704, 1834; *Holmes v. Jennison*, 14 Pet. 540, 1840; *Ex parte Barry*, 2 How. 65, 1844; *Ex parte Dorr*, 3 How. 103, 1845; *Barry v. Mercein*, 5 How. 103, 1847; *In re Metzger*, 5 How. 176, 1847; *In re Kaine*, 14 How. 103, 1852; *Ex parte Wells*, 18 How. 307, 1855; *Ex parte Milligan*, 4 Wall. 2, 1866; *Ex parte McCardle*, 6 Wall. 318, 1867; *Ibid.* 7 Wall. 506, 1868; *Ex parte Yerger*, 8 Wall. 85, 1868; *Ex parte Lange*, 18 Wall. 163, 1873; *In re Heinrich*, 5 Blatch. 414, 1867; *Ex parte Keeler*, Hemp. 306, 1845; *U. S. v. Williamson*, 3 Am. Law Rep. 729; *Bennet v. Bennet*, 1 Deady, 299, 1867; *Ex parte Evarts*, 7 Am. Law Rep. 79; *Norris v. Newton*, 5 McL. 92, 1850; *U. S. v. Rector*, 5 McL. 174, 1850; *Veremaitre's Case*, 13 Am. Law Rep. 608; *Ex parte Sifford*, 5 Am. Law Rep. 659; *Ex parte McCan*, 14 Am. Law Rep. 158; *U. S. v. French*, 1 Gallis. 1, 1814; *U. S. v. Anderson*, Cooke, 143; *Ex parte Cheeney*, 5 Law Rep. 19; *Ex parte Des Rochers*, 1 McAll. 68, 1855; *Ex parte Pleasants*, 4 Cr. C. C. 314, 1834; *Ex parte Turner*, 6 Int. Rev. Rec. 147; *Ex parte Jenkins*, 2 Wall. Jr. 521, 1853; *Ex parte Robinson*, 6 McL. 355, 1855; *Ex parte Smith*, 3 McL. 121, 1842; *Meade's Case*, 1 Brock. 324, 1819; *Fisk v. Un. Pac. R.*, 10 Blatch. 518, 1873; *In re Stupp*, 11 Blatch. 124, 1873; *In re McDonnell*, 11 Blatch. 79, 170, 1873; *In re Thomas*, 12 Blatch. 370, 1874; *In re Giacamo*, 12 Blatch. 391; *In re Stupp*, 12 Blatch. 501, 1875; *In re Bird*, 2 Saw. 33, 1871; *In re Bogart*, 2 Saw. 396, 1873.

³ Under this provision are cited the acts of Sept. 24, 1789; April 10, 1869; March 2, 1833; Feb. 5, 1867; Aug. 29, 1842.

(753) "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations, or unless it is necessary to bring the prisoner into court to testify."¹

The courts of the United States have, it is ruled, not merely jurisdiction to inquire, on *habeas corpus*, into the legality of all commitments under federal process, civil or military,² but may issue the

¹ Under this provision are cited the acts of Sept. 24, 1789; March 2, 1833; Feb. 5, 1867; Aug. 29, 1842, and the following cases: *Ex parte* Dorr, 3 How. 103, 1845; *Ex parte* Barnes, 1 Sprague, 133, 1855; *Ex parte* Bridges, 2 Woods, 428, 1875. See Rev. Stat. U. S. 1878, 763. See Whart. Cr. Pl. & Pr. §§ 978 *et seq.* 506, 1868. And hence the Supreme Court of the United States has appellate jurisdiction, on *habeas corpus*, to relieve from unlawful imprisonment one committed for trial by a military tribunal, and remanded, after a hearing, by a district court. *Ex parte* Yerger, 8 Wall. 85, 1869.

The jurisdiction of the Supreme Court on appeal, taken away by the Act of March 27, 1868, was finally restored by the Act of March 3, 1885, 23 Stat. at Large, 437. But under this act the appeal lies only from the final decision of the circuit court, and not from the decision of a circuit judge sitting as a judge and not as a court. *Carper v. Fitzgerald*, 121 U. S. 87, 1886.

By the Act of March 27, 1868, the appeal to the Supreme Court of the United States was restricted.

Under the Act of 1867, a person held under arrest, by order of a State tribunal, in violation of any law of the United States, may be released by a federal court. *Ex parte* Seymour, 1 Ben. 348, 1866. See, also, *Ex parte* Robinson, 6 McL. 355, 1855; *Ex parte* Jenkins, 2 Wall. Jr. 521, 1853; *Ex parte* Des Rochers, 1 McAll. 68, 1855.

The Act of March 27, 1868, taking away an appeal to the Supreme Court of the United States, has been held only to apply to proceedings under the Act of February 5, 1867. See Rev. Stat. U. S. 1878, 763. The prior appellate jurisdiction in *habeas corpus* remains. *Ex parte* McCardle, 7 Wall. 1843.

The Supreme Court does not have appellate jurisdiction, in *habeas corpus* cases, over a naval court-martial, nor over offences which it has power to try. *Wales v. Whitney*, 114 U. S. 564, 1884.

² *Ex parte* Milligan, 4 Wall. 2, 1866; *Meade's Case*, 1 Brock. 324, 1819; *Ex parte* Keeler, Hemp. 306, 1843.

writ to discharge a federal officer arrested on State process, for his conduct in executing a federal writ.¹ The delicate questions arising in the exercise of this branch of jurisdiction are more fully considered in another volume.²

The writ, however, will be refused when the object is to review commitments under State penal process conflicting with no federal law.³ And the federal courts, on *habeas corpus*, will not inquire into the validity of convictions and sentences of State courts acting *de facto*, though not *de jure*.⁴

IV. CONFLICT AND CONCURRENCE OF JURISDICTIONS.

1. *Offences at Sea.*

§ 269. As a rule, a ship is viewed as part of the country whose flag she bears;⁵ and in conformity with this principle, all offences

¹ *Ex parte Jenkins*, 2 Wall. Jr. 521, 1853; *Ex parte Robinson*, 6 McL. 355, 1855; *Ex parte Sifford*, 5 Am. Law Reg. 659; *In re Farrand*, 1 Abb. (U. S.) 140, 1867. See Whart. Cr. Pl. & Pr. § 981.

² Whart. Cr. Pl. & Pr. §§ 981, 996 *b*.

³ *Ex parte Dorr*, 3 How. (U. S.) 103, 1845; *Norris v. Newton*, 5 McL. 92, 1850; *U. S. v. Rector*, Ibid. 174, 1850.

The federal courts will not interfere by *habeas corpus* because persons of the negro race were excluded from the grand jury indicting. *Wood v. Brush*, 11 Sup. Ct. Rep. 738, 1891.

In *habeas corpus* to release persons convicted of crime in State courts, the federal courts have no power to inquire whether the evidence was sufficient to support verdict and judgment. *In re Jordan*, 49 Fed. Rep. 238, 1892. Nor will State decisions upon constitutionality of enactment of penal code be inquired into. *Duncan v. McCall*, 11 Sup. Ct. Rep. 573, 1891. But the writ will issue when the petition alleges that a person has been deprived of his liberty without due process of law. *In re Monroe*, 46 Fed. Rep. 52, 1891.

⁴ Chase, C. J., giving unanimous judgment of Supreme Court of the United States, Richmond, April, 1869; *In re Griffin*, 25 Tex. (Sup.) 623, 1869. Nor because the prosecuting attorney was only a *de facto* officer. *In re Humason*, 46 Fed. Rep. 388, 1891. See Whart. Cr. Pl. & Pr. §§ 981, 993, 996, on this topic, showing (1) that the federal courts will discharge on all imprisonments under a State law conflicting with the federal constitution; (2) that on a *habeas corpus* the convictions even of a *de facto* court will not be reviewed; and (3) that State as well as federal courts can review arrests on extradition process. See, also, *U. S. v. McClay*, Deady, J., Cent. L. J., 1878, 255; citing *U. S. ex rel. Roberts v. Jailer of Fayette County*, 2 Abb. (U. S.) 265, 1869; *Ex parte Robinson*, U. S. Marshal, 1 Bond, 89, 1856; *Ex parte Jenkins*, 2 Wall. Jr. 521, 1853; *In re Neill*, 8 Blatch. 156, 1871; *Ex parte Joseph Smith*, 3 McL. 121, 1842; *U. S. v. Rector*, 5 Ibid. 174, 1850. See, as to extradition generally, Whart. Cr. Pl. & Pr. §§ 34 *et seq.*

⁵ Whart. Conf. of L. § 978.

committed on shipboard are regarded as cognizable by the sovereign to whom the ship belongs, no matter to what nationality belongs the offender.¹ In England, it is true, all rivers in the country, until they flow past the furthest point of land next the sea, are held within the jurisdiction of the courts of common law, and not of the Court of Admiralty;² and where the sea flows in between two points of land in the country, a straight imaginary line being drawn from one point to the other, the common law is held to have jurisdiction of all offences committed within that line;³ the Court of Admiralty of all offences without it.⁴ But of crimes not merely on the high seas, but on creeks, harbors, ports, etc., in foreign countries, the Court of Admiralty is held to have undoubted jurisdiction, and such offences may consequently be piracies. Thus, where on an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; the judges held that the admiralty had jurisdiction, it being a place where great ships go.⁵ As to offences committed on the coast, the admiralty is ruled to have exclusive jurisdiction of offences committed beyond low-water mark; and between that and the high-water mark, the admiralty jurisdiction is asserted over all offences done upon the water when the tide is in; it being

Offences
on ship-
board cog-
nizable in
country
of flag.

¹ *R. v. Lopez*, *R. v. Sattler*, Dears. & B. C. C. 525, 1855; 7 Cox C. C. 431. Foreigners enlisting in the United States navy are subject to United

In *R. v. Serva*, 1 Den. C. C. 104, it was held, according to the summary of Sir J. F. Stephen, "that the criminal law of England does not apply to foreigners on board a ship unlawfully in the custody of an English ship of war." On the other hand, States consular jurisdiction for offences committed on board United States ships. *Ross v. McIntyre*, 11 Sup. Ct. Rep. 897, 1891.

² See 1 Co. 175; 3 Inst. 113; 3 T. R. 113; 1 Hawk. c. 37, s. 11.

³ See, as to the United States, 1 Kent. Com. 30; *Com. v. Gaines*, 2 Va. Cas. 172, 1819.

A State, of which a port is a part, has the power to punish crimes committed by one foreigner upon another foreigner on board of a foreign vessel in the harbor. *Mali v. The Keeper*, 7 Sup. Ct. Rep. 385, 1887.

⁴ But see *R. v. Bruce*, R. & R. 242, 1817.

⁵ *R. v. Allen*, 1 Mood. C. C. 494, 1835.

Law, 3.

admitted that courts of common law have jurisdiction over offences committed upon the strand when the tide is out. All the other parts of the high sea are indisputably within the jurisdiction of the admiralty.¹

Since the passage of the Merchants' Shipping Act, in 1854, British jurisdiction is pushed so far as to embrace offences committed by British seamen abroad, in port as well as on ship. Since this act, also, it has been held that the central criminal court has jurisdiction of offences, primarily cognizable in admiralty, committed on British ships in foreign rivers, or at sea, though the offenders be foreigners.²

¹ Whart. Prec., notes to form 1067.

² R. v. Anderson, L. R. 1 C. C. 161, 1869; 11 Cox C. C. 198. See Lewis on For. Jur. p. 25. In R. v. Carr, 47 L. T. (N. S.) 450, 1881, jurisdiction was held to exist in the same court over receivers (British subjects) of goods stolen on board of a British ship in the port of Rotterdam.

In connection with the text may be noticed the much discussed case of *The Franconia*, 36 L. T. (N. S.) 640, 1877; a case also reported in 2 L. R. Adm. Div. 163; 46 L. J. Adm. Div. 33; 25 W. R. 796. In this case the admiralty branch of Pr. & Adm. Division had refused a motion to set aside so much of a writ of summons *in rem* as claimed compensation for the loss sustained by the plaintiff in consequence of the death of a person of whom she was administratrix, and who, whilst serving on board a British ship, had lost his life through a collision between his vessel and a foreign ship on the high seas, caused by the negligence of those on board the foreign ship. On appeal, it was held by James and Bagallay, L. JJ., (approving the decision of the court below), that the judge of the Admiralty Division has jurisdiction to entertain a suit *in rem* under Lord Campbell's Act. It was, however, ruled by Bramwell and Brett, L. JJ., (disapproving

the decision of the court below), that the jurisdiction given by the Admiralty Court Act, 1861, s. 7, does not include claims under Lord Campbell's Act. The appeal was dismissed.

In R. v. Keyn, L. R. 2 Ex. D. 23; 13 Cox, 403, 1876, a case growing out of the *Franconia* disaster, it was ruled in England that the Court of Criminal Appeal has no jurisdiction to try a foreigner, who, in a foreign ship, is chargeable with a negligent collision, producing death in the colliding English ship, though the collision was within three miles of the English coast. The vote of the court, however, on this point was seven to six: aff. Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush, J., Pollock, B., Field, J., and Sir R. Phillimore; diss. Lord Coleridge, C. J., Brett, J., Amphlett, J. A., Grove, Denman, and Lindley, JJ.

This case, with the subsequent legislation, is discussed by me in 1 Crim. Law Mag. 701 *et seq.*

The points taken by Cockburn, C. J., in which a majority of the judges agreed, were as follows:

"The extent of the realm of England is a question, not of international but of English law.

"There is no evidence that the sovereigns of this country ever either claimed or exercised any special juris-

The same general principles are admitted in German and French jurisprudence.¹

§ 270. In the United States, by statute,² the federal courts have jurisdiction not only of all piracies, revolts, homicides; robberies, and malicious injuries to vessels, and of other crimes, on the high seas, by all persons without regard to nationality, but of offences committed in American ships in foreign ports; “and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be first brought.”³ And this act

Federal
courts
have juris-
diction of
crimes on
high seas
and out of
State juris-
diction.

diction over a belt of sea adjacent to the coast, though there is evidence that the admiral has always claimed jurisdiction over persons on board of British ships, wherever they might be, and that he formerly claimed jurisdiction over all persons and all ships in the four narrow seas. This claim, however, has long since been given up, and no other claim has ever been substituted for it.

“Hence there is no evidence that any British court has jurisdiction over a crime committed by a foreigner on board a foreign ship on the high sea, but within three miles of the coast.” 2 Steph. Hist. Crim. Law, 31.

In Keyn’s Case, according to Sir J. F. Stephen (2 Hist. Crim. Law, 10), four of the judges “seem to have been of opinion that a crime committed by an act which extends over more jurisdictions than one in space is committed in the jurisdiction in which it takes effect, whether or not it is also committed in the jurisdiction in which it begins to be done. In accordance with this view, Baron Pollock and I lately held that a man who obtained goods from a merchant in Prussia by false pretences contained in a letter sent from Amsterdam, where he lived when he wrote the letter, obtained them in Prussia, and we refused a *habeas corpus* to prevent his extradition

accordingly.” This is in accordance with the ruling in *U. S. v. Davis*, 2 Sumn. 482, 1837.

¹ Whart. Conf. of L. § 861.

² Brightly, pp. 207–209; Rev. Stat. U. S. 1878, 5372.

³ Whart. Con. of L. § 862, citing *Ex parte Bollman*, 4 Cranch, 375, 1807; *U. S. v. Magill*, 1 Wash. C. C. 463, 1806; *U. S. v. Thompson*, 1 Sumn. 168, 1836. In this country a vessel lying in an open roadstead of a foreign country is held to be on the high seas. *U. S. v. Pirates*, 5 Wheat. 184, 1820; *U. S. v. Gordon*, 5 Blatch. C. C. 18, 1861; and so, also, of a vessel lying in a harbor, fastened to the shore by a cable, and communicating with the shore by boats, and not within any inclosed dock, or at any pier or wharf. *U. S. v. Seagrist*, 4 Blatch. 420, 1860. With us it is not necessary, to give the federal courts jurisdiction, that the vessel should have belonged to citizens of the United States; it is enough if she had no national character, but was held by pirates, or persons not lawfully sailing any foreign flag. And the offence is equally cognizable by the United States courts, if committed on board of a foreign vessel by a citizen of the United States, or by a foreigner on board of a United States vessel; or by a citizen or foreigner on board of a piratical vessel. *U. S. v.*

gives concurrent jurisdiction to the place of arrest, and that in which the defendant is first brought.¹

§ 270 *a*. What is the jurisdiction of a State over the ocean? To this question, which is of importance in view of the distinction noticed in the last section, we may reply that a sovereign has jurisdiction of the sea bounding his coast to the distance of a cannon-shot from low-water mark.²

Sovereign has jurisdiction of sea within cannon-shot from shore.

2. Offences by Subjects abroad.

§ 271. It is generally conceded that subjects should be held responsible to the courts of their country for offences committed in barbarous or unsettled lands.³ In England, the right to exercise extra-territorial jurisdiction over subjects is assumed to be an essential attribute of sovereignty.⁴ Mr. Wheaton states the principle very largely. "This" (the territorial) "principle is peculiar to the jurisprudence of Great Britain and the United States, and even in those two countries it has been frequently disregarded by the positive legisla-

Subjects may be responsible to their own sovereign for offences abroad.

Furlong, 5 Wheat, 183, 1820; *Ex parte Bollman*, 4 Cranch, 375, 1807; U. S. v. Kessler, 1 Bald. 20, 1828. But it is otherwise with acts of piracy committed by citizens of a foreign country in foreign vessels. Ibid.; U. S. v. Palmer, 3 Wheat. 610 at p. 632, 1818. The State of which a port is a part has the power to punish crimes committed by one foreigner upon another foreigner on board of a foreign vessel in the harbor. *Mali v. Keeper*, 7 Sup. Ct. Rep. 385, 1887.

¹ U. S. v. Baker, 5 Blatch. 6, 1861.

² Lawrence's Wheat. 321, 715, *note*, See *Com. v. Peters*, 12 Metc. 387, 1847, cited *supra*, § 260; *Manley v. People*, 7 N. Y. 295, 1852; *Mali v. Keeper*, 7 Sup. Ct. Rep. 385, 1887.

³ See Whart. Conf. of L. § 71.

But the authorities go beyond this limit. "Where an act," said Judge Vredenburg (*State v. Carter*, 3 Dutch. 501, 1859), in the Supreme Court of New Jersey, "*malum in se*, is done in solitudes, upon land where there has

not yet been formally extended any supreme human power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water."

⁴ Lewis on Foreign Jurisdic. etc., p. 14, citing acts of 6 & 7 Vict. c. 94. As to bigamy, see *infra*, §§ 1685-1696.

In 1878 the British government went so far as to sustain the execution, on board the ship *Beagle*, at sea, of a South Sea Islander, charged with the murder on shore of an Englishman. See *Sat. Rev.* Aug. 10, 1878, 169. And see this case discussed by me in 4 *South. Law Review*, 676, and also *infra*, § 284, *note*. The jurisdiction is doubted in *Rosc. Crim. Ev.* pp. 246, 247.

tion of each, in the enactment of statutes by which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the courts of that country to which the party owes allegiance, and whose laws he is bound to obey.”¹ Mr. Wheaton does not here notice the provision of the Federal Constitution which guarantees to each accused party a trial in the State and district where the crime was committed. But it is easy to reconcile his statement as above given with this provision, by adopting the view of the Federal Supreme Court, that the Constitution has application only to offences committed on the soil of the United States.²

§ 272. With regard to the particular States of the American Union, complicated constitutional questions may here arise. Is a domiciled citizen of Massachusetts, for instance, when travelling abroad, responsible, on the general hypothesis of extra-territorial penal power of sovereigns over subjects abroad, to the United States, or to Massachusetts, or to both? The better opinion is that he is responsible to them penally, when he is abroad, under the same conditions and limitations as he was when he was at home.³ For an infringement of the laws of Massachusetts, he is responsible to Massachusetts; for an infringement of the laws of the United States, to the United States.

§ 273. By the Revised Statutes⁴ the ministers and consuls of the United States, in pursuance of treaties with China, Japan, Siam, Egypt, and Madagascar, are “fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offences against law, committed in such countries.”⁵ By a subsequent section the same jurisdiction is extended to “consuls and commercial agents of the United States *at islands or in*

¹ Dana’s Wheaton, § 113. That a foreigner enlisted in United States navy is subject to United States criminal laws, see *Ross v. McIntyre*, 11 Sup. Ct. Rep. 897, 1891.

² *U. S. v. Dawson*, 15 How. (U. S.) 467, 1853.

³ *Com. v. Macloon*, 101 Mass. 1, 1869; *Com. v. Gaines*, 2 Va. Cas. 172, 1819; *State v. Carter*, 3 Dutcher, 501, 1859; *State v. Main*, 16 Wis. 398, 1864; though see, as denying state

extra-territorial jurisdiction, *Tyler v. People*, 8 Mich. 320, 1860; *State v. Knights*, 2 Hayw. 109, 1815; and as inclining to the same view, see *People v. Merrill*, 2 Parker C. R. 590, 1854;

Cummins v. State, 12 Tex. App. 121, 1882. For bigamy, see *infra*, §§

1685–1698.

⁴ Ed. of 1878, 4084. But as to Japan, see treaty of 1895.

⁵ See *In re Stubbs*, 11 Blatch. 124, 1873.

countries not inhabited by any civilized people, or recognized by any treaty with the United States."¹ This, it will be seen, is a positive claim of the United States government to exercise extra-territorial jurisdiction over its own citizens in uncivilized countries, independent of any treaty authorization. The jurisdiction, however, is limited to persons owing allegiance to the United States.²

A similar jurisdiction is asserted by both German and French jurists over their subjects in barbarous or semi-civilized lands,³ and it is now, partly by treaty, partly as a matter of international law, partly because in semi-civilized lands the domestic authorities generally refuse to take cognizance of suits in which foreigners are concerned, a settled practice for civilized consular jurisdiction, in matters both criminal and civil, to be exercised not only in Asia and Africa but in Turkey.⁴

§ 274. The act of January 30, 1790, provides that if any "citizen of the United States, whether he be actually resident or abiding within the United States, *or in any foreign country*, shall without the permission or authority of the government of the United States, *directly or indirectly commence or carry on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States*, he shall be guilty of a high misdemeanor, and subjected to a fine not exceeding five thousand dollars, and imprisonment for not less than six months or over three years. This act still remains among the statutes of the United States;⁵ and its continued existence is the strongest of illustrations that the power of Congress to "define and punish offences against the law of nations" is maintained by the government of the United States to authorize it to punish at home political offences committed by its citizens abroad.

Also over
political
offences
abroad.

The Act of February 25, 1863,⁶ making correspondence with

¹ Rev. Stat. 4088.

nally at Shanghai in "Her Majesty's Court for China and Japan."

² See 11 Op. Atty.-Gen. 474. As to bigamy, see *infra*, §§ 1685-1696.

³ Whart. Conf. of Laws, § 866; Fœlix, ii. p. 294. See Bar, § 138.

⁴ See Whart. Com. Am. Law, §§ 147, 171. In *Hart v. Gumpach*, L. R. 4 P. C. 439, the suit was brought origi-

⁵ Brightly, p. 201; Rev. Stat. 1878, 5335. See President's Message of Dec. 3, 1798; Mr. Jefferson to Mr. Madison, Jan. 3, 1799; Randall's Life of Jefferson, iii. p. 467.

⁶ Brightly, Fed. Stat. ii. 154.

rebels a misdemeanor, declares that "where the offence is committed in a foreign country, the District Court of the United States for the district where the offender shall be first arrested shall have jurisdiction thereof."

§ 275. By the English law, all offences by subjects against the government are cognizable by English courts, no matter where the defendant may have been resident at the time of the offence,¹ and by the jurists of continental Europe this view is accepted as universally authoritative.² Nor does it exclude the jurisdiction of the offended State, that a foreign country, within whose bounds the offence was organized, had concurrent jurisdiction of the offence. It is a fundamental principle of international law that each State is primarily authorized to punish offences against itself. Of course, it cannot invade the territory or the ships of another country in order to arrest the offender.³ But the arrest may be made whenever the offender is found in the territory of the offended sovereign.

§ 276. The Act of Congress of August 18, 1856,⁴ authorizes secretaries of legation and consular officers to administer oaths and perform notarial duties, and makes perjury or subornation of perjury abroad before such officers punishable "in any district of the United States, in the same manner, in all respects, as if such offence had been committed in the United States." This act is not confined to persons owing allegiance to the United States, but includes aliens committing the designated offences. The same act makes penal the forgery abroad of consular papers. And at common law it is argued that a State may punish perjury committed before one of its own commissioners to take testimony in a foreign State.⁵

The same view is taken by German and French jurists.⁶ In England, in indictments for administering or taking unlawful

¹ Wendell's Blackstone, iv. p. 305; Case, and Trent Case, in Woolsey, § R. v. Azzopardi, 1 C. & K. 203, 1843; 81; Whart. Com. Am. Law, §§ 139, R. v. Anderson, 11 Cox C. C. 198, 146, 239.

1869; L. R. 1 C. C. 161. *Infra*, §§ 276, 284. See Sir Geo. Cornwall S. 1878, 4083-4130.

Lewis's work on Foreign Jurisdiction, etc. p. 20. As to bigamy, see *infra*, §§ 1685, 1696. ⁴ Brightly, 180. See Rev. Stat. U. S. 1878, 4083-4130. ⁵ See *Phillipi v. Bowen*, 2 Pa. 20, 1845; *Com. v. Kunzemann*, 41 Pa. 429, 1861. *Infra*, § 1264.

² Bar, p. 530, § 138; Ortolan, No. 880. ⁶ *Infra*, § 284. See Whart. Conf. of

³ See this discussed in the Kozta Laws, § 874.

oaths, the venue may be laid in any county in the realm, though the offence was committed abroad.¹ In indictments for forgery, the venue may be laid, and the offence charged to have been committed in any county where the offender was apprehended or in custody.²

§ 277. In England, in indictments for murder or manslaughter, or for being accessory before or after the fact to murder or manslaughter, the offence being committed by a British subject on land out of the United Kingdom, the venue may by statute be laid in any county appointed by the Lord Chancellor in the commission issued for the trial of the offender.³ This provision applies to homicides committed by British subjects within the dominions of a foreign sovereign;⁴ but, until afterward amended, not to offences by foreigners, though committed on Englishmen, and on board English ships.⁵

Homicide
by subjects
abroad
punish-
able in
England.

3. *Liability of Extra-territorial Principal.*

§ 278. Cases can easily be conceived in which a person, whose residence is outside a territory, may make himself, by conspiring extra-territorially to defeat its laws, intra-territorially responsible. If a forger, for instance, should establish on the Mexican side of the boundary between the United States and Mexico a manufactory for the forgery of United States securities, for us to hold that when the mischief is done he would not be liable to arrest on extradition process, and that he could afterward take up with impunity his residence in the United States, would not merely expose us to spoliation, but bring our government into contempt.

Extra-ter-
ritorial
principal
may be in-
tra-terri-
torially in-
dicted.

To reply that in such case the Mexican government can be relied upon to punish, is no answer: because, first, in countries of such imperfect civilization penal justice is uncertain; secondly, because Mexico may hold that we have jurisdiction, and that, therefore, she will not exert it; thirdly, because in cases where, in such countries, the local community gains greatly by the fraud, and suffers by it no loss, the chances of conviction and punishment would be slight; and, fourthly, because all that the offender would have to do to escape

¹ 37 Geo. III. c. 123, § 6; 52 Geo. 198, 1869. See *R. v. Mattos*, 7 C. & III. c. 104, § 7. P. 458, 1836.

² 1 Will. IV. c. 66, § 44.

³ 9 Geo. IV. c. 31, § 7.

⁴ *R. v. Sawyer*, R. & R. C. C. 294, *supra*. See article in London Law 1818; *R. v. Azzopardi*, 1 C. & K. 203, Magazine for 1868, p. 124. For sub-1843; *R. v. Anderson*, 11 Cox C. C. sequent statute, see *supra*, § 269.

⁵ *R. v. Depardo*, 1 Taunt. 26, 1808; R. & R. C. C. 134; *R. v. Mattos*, *ut*

justice in such a case would be to walk over the boundary line into the United States, where on this hypothesis he would go free. In political offences there is this consideration to be added, that it is now an accepted doctrine of international law that no government will punish a refugee for treason against a sovereign;¹ and hence a government, on the hypothesis here disputed, would have no redress for offences directed abroad by refugees against its sovereignty, even though the offenders were its own subjects, and should, after the commission of the offence, return to its soil.

§ 279. A party who in one jurisdiction puts in operation a force which does harm in another jurisdiction, is responsible in both jurisdictions for the harm.² That he is responsible in the place where he starts the wrong will be hereafter seen.³ His responsibility in the place where the wrong takes effect is also generally recognized. Thus, it has been held that the originator of a nuisance to a stream in one country, which affects such stream in another country, is liable to prosecution in the latter country;⁴ that the author of a libel uttered by him in one country and published by others in another country, from which he is absent at the time, is triable in the latter country;⁵ that such is also the case when a man in one country incites an agent in another country to commit perjury;⁶ that he who on one side of a boundary shoots a person on the other side, is amenable in the country where the blow is received;⁷ that he who in one State employs an innocent

Principal
responsi-
ble for ex-
tra-terri-
torial acts.

¹ Whart. Conf. of Laws, §§ 876, 910.
² *Supra*, §§ 248, 284, *note*; *infra*, §§ 287, 1207. See Whart. Conf. of Laws, §§ 877-921; Whart. Cr. Ev. § 112; Wooton v. Miller, 7 Sm. & M. 380, 1846; State v. Chapin, 17 Ark. 561, 1856; Hanks v. State, 13 Tex. App. 289, 1882; Hatfield v. Com., (Ky.) 12 S. W. Rep. 309, 1890; accepting views of text. See *infra*, §§ 287, 288, as to responsibility in the place of starting the offence.

In Indiana a statute making a foreign principal punishable for his agent's criminal acts within the State, has been held to apply only to persons who are principals in the commission of the offence. Johns v. State, 19 Ind. 421, 1862.

³ *Infra*, §§ 287 *et seq.*

⁴ Stillman v. White Rock Co., 3 Wood. & M. 538, 1849; State v. Smith, 82 Iowa, 423, 1891. See R. v. Burdett, 4 B. & Ald. 95 at p. 175, 176, 1821; Bulwer's Case, 7 Co. 2 b, 3 b; Com. Dig. Action, N. 3, 11. That the place of originating nuisance has jurisdiction, see *infra*, § 288.

⁵ R. v. Johnson, 7 East, 65, 1806; Com. v. Blanding, 3 Pick. 304, 1823. That place of mailing also has jurisdiction, see *infra*, §§ 287, 288.

⁶ Com. v. Smith, 11 Allen, 243, 1866.

⁷ 1 Hale P. C. 475; U. S. v. Davies, 2 Sumn. 482, 1838; cited and approved in State v. Wyckoff, 2 Vroom, (N. J.) 68, 1864, and the same point taken in Com. v. Macloon, 101 Mass. 1, 1869. And the person who fires

agent to obtain goods by false pretences in another State, is amenable in the latter State;¹ that the forger in one State of a title to land in another State, may be punished in the latter State;² that a thief who sends goods by another person, not an accomplice in the theft, to a foreign State for sale, is indictable in the latter State;³ that he who sells through agents, guilty or innocent, lottery tickets in another State, is amenable in the State of the sale, though he was absent from such State personally;⁴ that he who gives poison in one jurisdiction which operates in another is responsible in the latter jurisdiction,⁵ and so is a person who in one county advises another,

the shot cannot be tried in the State from which the shot was fired, though both he and the person shot are citizens of that State. *State v. Hall*, (N. C.) 19 S. E. Rep. 602, 1892. See as to U. S. *v. Davis*, *infra*, § 288.

¹ *People v. Adams*, 3 Denio, 190, 1846; aff. 1 Comst. 173, 1848, and authorities cited *infra*, § 280. S. P. held in *R. v. Garrett*, 6 Cox C. C. 260, 1854, *infra*, where Lord Campbell affirmed the principle, but ruled an acquittal on other grounds. "The rule," said Chief Justice Beasley, of New Jersey, in 1864, (*State v. Wyckoff*, 2 Vroom, 69), "appears to be firmly established, and upon very satisfactory grounds, that where the crime is committed by a person absent from the country in which the act is done, through the means of a merely material agency, or by a sentient agent who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case; otherwise the anomaly would exist of a crime but no responsible criminal." This view, as will be seen in a succeeding section, is sustained in several other States, though dissented from in Connecticut. *Com. v. Grady*, 34 Conn. 119, 1866; *infra*, § 280. Stripping the question of the artificial complications arising from the common law distinction between felony and mis-

demeanor, the better opinion is that the country of the starting and the country of the consummation of a crime have each jurisdiction in cases where there is a substantive offence in each. Thus where the instruments for the commission of a homicide are prepared in England to be applied in France, England as well as France has jurisdiction of the conspiracy; and so the country of the sending of libels and of noxious compounds has jurisdiction as well as the country of receiving. *Infra*, §§ 287, 288, 292.

² *Lindsay v. State*, 38 Ohio St. 507, 1882; *Hanks v. State*, 13 Tex. App. 289, 1882. See *Ex parte Carr*, 28 Kans. 1, 1882.

³ *Com. v. White*, 123 Mass. 430, 1877.

⁴ *Com. v. Gillespie*, 7 S. & R. 469, 1821. Under the statutes of the United States punishing the sending and delivering of lottery matter through the mails (act of Sept. 19, 1890,) the offence of "delivering" is consummated where matter received, and therefore a citizen of New York sending such matter through the mails to a citizen of Illinois may be tried in Illinois. *U. S. v. Horner*, 44 Fed. Rep. 677, 1891.

⁵ The overt act of homicide by administering poison within the meaning of the law, consists not simply in prescribing or furnishing the poison, but also in directing and causing it to

by signals, when to commit a highway robbery in another county;¹ and that though an accessory before the fact is amenable in the place of accessoryship,² he may become, if directing the execution of the act, amenable in the place of consummation.² In a case of obtaining money by false pretences in England, the offender being at the time in Russia, this absence was in itself held to be no ground for acquittal; and Lord Campbell, sustained by Baron Parke, declared "that a person may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our courts;" Baron Parke saying that "a person, though personally abroad, might commit a crime in England, and be afterward punished here; as, for instance, if he, by a third party, send poisoned food to one in England, meaning to kill him, he would be guilty of murder, if death ensued, although he could not be amenable to justice till he was personally within the jurisdiction."⁴ "It was a monstrous thing," Sir R. Phillimore is reported as saying at a meeting of the Law Amendment Society, in 1868, "that any technical rule of venue should prevent justice from being done in this country on a criminal for an offence which was perpetrated here, but the execution of which was concocted in another country." Hence we may hold that presence at the crime is not an essential condition of indictability.⁵

be taken; so that if the poison be prescribed and furnished in one county to a person who carried it into another county, and there, under the directions given, takes and becomes poisoned, and dies of the poison, the administering is consummated, and the crime committed, if committed at all, in the county where the person is poisoned. *Robbins v. State*, 8 Ohio St. 131, 1858.

It makes no difference that the party implicated never was in the State where the offence was committed. *Lindsay v. State*, 38 Ohio St. 507, 1882.

¹ *State v. Hamilton*, 13 Nev. 386, 1878.

In this case it was proved that there was a conspiracy between the defendants and others to rob the treasure of Wells, Fargo & Co., on the road between Eureka and some point

in Nye County, Nevada; that H. was to ascertain when the treasure left Eureka, and signal his confederates by a fire on the top of a mountain in Eureka County, which could be seen by them in Nye County, thirty or forty miles distant; that the signals were given by him, and his confederates attacked the stage and attempted to rob the treasure. It was held that H. was a principal.

² *Infra*, § 287.

³ *Supra*, § 225; *State v. Ayers*, 8 Baxt. 96, 1874.

⁴ *R. v. Garrett*, 6 Cox C. C. 260, 1854; s. c. Dears. 232; and see *R. v. Jones*, 4 Cox C. C. 198; 1 Den. C. C. 551, 1849.

⁵ *Com. v. White*, 123 Mass. 430, 1877; S. P., *R. v. Manley*, 1 Cox C. C. 104, 1845; *R. v. Ball*, 1 Cox C. C. 281, 1845.

§ 280. Some doubt, however, has been expressed as to whether, when the agent who thus intra-territorially consummates the guilty act is personally responsible, the principal who extra-territorially plans it is intra-territorially liable in cases of felony, he being absent from the jurisdiction at the time of the commission of the offence. That a foreign instigator is so liable is expressly denied by the Supreme Court of New Jersey,¹ in a case in which it was ruled that unless the agent was innocent, so as to be a mere tool, the party employing him could not be regarded as a principal; and that if such employing party were simply an accessory before the fact, absent from the State at the principal offence, he could not, by the common law, be tried in New Jersey. The same view has been maintained as to felonies, in New Hampshire,² North Carolina,³ and Arkansas,⁴ though it is conceded that by statute the accessory may be made triable in the place of the overt act.⁵ It is to be noticed, however, that this view, growing from the distinction between an innocent and a guilty agent in case of felony, is purely technical, based on an arbitrary fiction of the old common law relating to felonies alone, and not touching the question of general jurisdiction. Thus, in treason and misdemeanors, in which all concerned are principals, and in which, therefore, the rule that an accessory can only be tried in the place where he is accessory, if there be such a rule, does not obtain, all parties concerned are liable to punishment in any country where an overt act is performed. This is expressly ruled as to treason;⁶ and in misdemeanors the result is demonstrable, as it is in those States in which all accessories before the fact are by statute principals. If, in such cases, the extra-territorial offender acts through an innocent agent, he is on all sides regarded as intra-territorially liable. If he acts through a guilty agent, he is indictable for conspiracy, when jurisdiction vests in any country in which an overt act is performed;⁷ or, on the same reasoning, he may be so indicted as principal in misdemeanor, or as inciter, when the offence in any of its aspects is a

Doubts in cases where agent is independently liable.

¹ *State v. Wyckoff*, 2 Vroom, 65, 1864. The same distinction is taken in *Lindsay v. State*, 38 Ohio St. 507, 1882.

² *State v. Moore*, 6 Fost. 448, 1854.

³ *State v. Knight*, 1 Taylor, (N. C.) 65, 1799. See *Ex parte Smith*, 6 Law Rep. 57, 1846.

⁴ *State v. Chapin*, 17 Ark. 561, 1856. § 247.

⁵ *Infra*, § 287.

⁶ *Ibid.*

⁷ *Infra*, §§ 287, 1397. See this distinction well stated in *State v. Chapin*, 17 Ark. 561, 1856. See, also, *R. v. Johnson*, 6 East R. 583, 1805; *Johns v. State*, 19 Ind. 421, 1862; *State v. Hamilton*, 13 Nev. 386, 1878; *infra*,

misdemeanor.¹ Even as to felonies, the rule that the absent accessory before the fact may be indicted in the country of the commission, where the principal is responsible, has been explicitly affirmed in Connecticut,² and is good in all those States in which accessories are by statute principals.³ But the assertion of such jurisdiction in the place of consummation in no way impairs the jurisdiction of the place of accessoryship over the accessory.⁴

It is conceded that to secure the trial of a subject in a foreign land the offended sovereign must obtain possession of the person of such offender by process of extradition. This is elsewhere fully discussed.⁵ To arrest such offender in a foreign sovereign's territory, either by force or stealth, is a violation of the law of nations. Yet though so, it is a violation of which the offended sovereign alone has a right to complain. The person so arrested cannot plead the unlawfulness of the arrest in bar.⁶

4. *Offences by Aliens in Country of Arrest.*

§ 281. By the modern Roman law, all residents are bound by the territorial law. "Whoever," says Berner, in his authoritative work on the territorial bounds of penal jurisdiction,⁷ "enters our territory, juridically binds himself to submit to the laws of this territory. This duty is the more imperative as the laws which exact obedience are the more stringent. It is absurd to suppose that this obedience diminishes or ceases in respect to those laws on which the very existence of the community is staked."⁸ And it is even held

Aliens indictable in the country of the crime. Roman law.

¹ Com. v. Smith, 11 Allen, 243, person, and is, therefore, ancillary to jurisdiction of place of concoction. 1866. See R. v. Murdock, 2 Den. C. C. 298, 1850. *Infra*, § 287.

² State v. Grady, 34 Conn. 118, 1866. See R. v. Brisac, 4 East, 164, 1804; Bennett & Heard's Lead. Cas. 2d ed. ii. p. 151; Bishop's C. L. i. § 80. As to Warren & Costello's Case, see U. S. Diplomatic Correspondence, 1868, pt. i. pp. 51, 129. For a report of these cases, and also for correspondence concerning the same, see same volume, pp. 341-348.

⁴ *Infra*, § 287.

⁵ Whart. Crim. Pl. & Pr. §§ 39 et seq.; State v. Smith, 1 Bailey, 283, 1830.

⁶ *Ex parte* Krans, 1 B. & C. 258, 1823; *Ex parte* Scott, 9 B. & C. 446, 1829; 4 M. & R. 361; Brewster v. State, 7 Vt. 118, 1835; Dow's Case, 18 Pa. 37, 1851. See, fully, Whart. Crim. Pl. & Pr. § 27.

⁷ Berlin, 1855, p. 83.

⁸ See Com. v. Pettes, 114 Mass. 307, 1873. Jurisdiction in place of consummation supposes, it should be added, possession of the defendant's enemies, see Brightly, i. p. 33; Rev. Stat. U. S. 1878, §§ 4067 et seq.

in Prussia that a foreigner who lingers in a country with which the sovereign of his allegiance is at war, may be tried for treason to the country of his residence, if he aids in warlike designs against it.¹

§ 282. "Local allegiance," says Blackstone, "is such as is due from an alien or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases the instant the stranger transfers himself from the kingdom to another."² Indictments for political offences of all grades have been based on this form of allegiance.³ In *So in English and American law.* Guinet's case, which was a prosecution in the United States Circuit Court in Philadelphia in 1795, for fitting out in Philadelphia a French armed vessel, to cruise against England, the United States and England being then at peace, the point that the defendant, a Frenchman by birth, had entered into the service of the French republic, was made by the defence, but was treated by the court as without weight, and the defendant was convicted.⁴ In the trial of the Fenian conspirators in England and Ireland in 1868, several of the defendants set up alienage and citizenship in the United States as a defence, but in vain. Mr. Adams, speaking of this in a letter to Mr. Seward, of May 2, 1868,⁵ says: "The only question he," one of the defendants, "raises, is that of citizenship; but even that relates rather to the form of trial, as on the merits, even his being admitted to be an alien would not shield him from the consequence of acts dangerous to the peace of the realm." The same view was taken by Mr. Buchanan, when Secretary of State.⁶ Such, also, is the tenor of a speech by Lord Lyndhurst in the House of Lords, in March, 1853.⁷

¹ Preussiches, St. G. B. § 70.

² Comm. ii. 377.

³ See 27 Howell's St. Tr. 627; Pel-
tier's Case, 28 Ibid. 530, 1803; R. v. Carlisle v. U. S., 16 Wall. 147, 1872; Bernard, 1 F. & F. 240, 1858, cited see U. S. v. Villato, 2 Dall. 370, 1797; *infra*, § 287, and cases cited *infra*, Sprague, J., 23 Law Rep. 705.

⁴ Whart. St. Tr. 98; U. S. v. Wilt-
berger, 5 Wheaton, 76, 1820; Whart. p. 192; R. v. McCafferty, 10 Cox C. C. 603, 1867.

St. Tr. 185. The Act of July 31, 1861, punishing seditious conspiracy, applies to "persons within any
⁵ Diplomatic Cor. U. S., 1868, pt. i.
⁶ See Cockburn on Nationality, London, 1869, p. 82, for other authorities to this effect.

State or Territory of the United
States," embracing all residents. ' 124 Hansard's Parl. Deb. 1046, cited Whart. Conf. of Laws, § 904, and discussion in Crim. Law Mag. for March, 1885.

gave aid and comfort to the enemy

Nor can such an alien divest himself of the penal incidents of his acts against the government which he attacks, as those incidents are defined by the *lex delicti commissi*. Of this we have, in 1870, an English illustration. An alien was indicted for high treason, in compassing to depose the Queen, and in levying war against the Queen. The material overt acts of compassing to depose the Queen were: (1) Conspiring at Dublin, to raise rebellion and levy war within the realm; and (2) levying war within the realm at various places. There was evidence that he was a member of the directing body of a treasonable conspiracy, having for its object the overthrow of the Queen's government and the establishment of a republic in Ireland. There was also evidence that he had planned an attack upon the castle of Chester, in England, for the purpose of seizing arms there, and conveying them to Ireland, with the view of raising an insurrection there. Evidence was also given that the directing body had, in February, 1867, given orders for a rising in Ireland. On the 23d of February, 1867, he was arrested while attempting to land in Dublin. On the 5th of March, 1867, he being in custody, an insurrectionary movement, the result of the commands of the directing body of the conspiracy, broke out in several places in Ireland, and various acts of war were committed. It was held that these several acts of war were admissible against him on the trial.¹

Foreign ambassadors and their retinues, it should be added, are not indictable for crimes committed in the country to which they are officially deputed. The only remedy is to send them home.²

§ 282 a. An Indian, who is not, under the Federal Constitution, the member of an independent tribe, relieved as such from State jurisdiction, is indictable in a State court for an offence committed in such State, in violation of the laws of the State, in the same way as would any other foreigner residing in the State.³ The State courts, also, have jurisdiction of

So as to
Indians.

¹ R. v. McCafferty, 1 Ir. R. C. L. Doxtater, 47 Wis. 278, 1879; State v. 363; 10 Cox C. C. 603, 1867. Tachanatah, 64 N. C. 614, 1870; State

² 1 Kent. Com. 39; U. S. v. Lafontaine, 4 Cranch C. C. 173, 1834; Resp. v. Foreman, 3 Yerg. 256, 1835; State v. Tassels, Dud. (Ga.) 229, 1830; Caldwell v. State, 1 St. & P. (Ala.) 327,

³ Worcester v. Georgia, 6 Pet. 518, 1832; Clay v. State, 4 Kans. 49, 1866; 1837; U. S. v. Holliday, 3 Wall. 407, Reed v. State, 16 Ark. 499, 1855; 1865; U. S. v. Cisna, 1 McL. 254, People v. Antonio, 27 Cal. 404, 1865; 1835; U. S. v. Sa-coo-da-cut, 1 Abb. People v. Ketchum, 73 Cal. 635, 1887; U. S. C. C. 377, 1867; U. S. v. Stahl, Kie v. U. S., 27 Fed. Rep. 351, 1886. 1 Woolworth C. C. 192, 1864; State v.

homicides within their limits, even of tribal Indians by white men.¹ Power, it has been held, exists in Congress to prescribe punishment for the homicide of white men by Indians within Indian reservations;² and to regulate the sale of liquor or other commodities among Indian tribes, whether within or without State limits.³ The complicated questions arising from conflicts of jurisdiction in this relation are elsewhere more fully discussed.⁴ But it may now be regarded as settled, that Congress, even over Indian reservations, is supreme, subject only to the Constitution; and that this supreme authority may be exercised by treaty without specific legislation.⁵ At the same time, by § 2146 of the Revised Statutes, Congress has expressly excepted from the jurisdiction of the courts over offences in Indian country, "crimes committed by one Indian against the person or property of another Indian," and offences committed by an Indian who has been punished by the local law of his tribe.⁶

¹ *Pickett v. U. S.*, 1 Idaho, (N. S.) 523, 1876. Gallons of Whiskey, 93 U. S. 188, 1876; see *Holden v. Joy*, 17 Wall. 211,

² *U. S. v. Martin*, 8 Sawy. 473, 1882; 14 Fed. Rep. 814; see *U. S. v. Bridleman*, 7 Sawy. 243, 1881; *People v. Ketchum*, 73 Cal. 635, 1887. Rape committed by a white man upon a white woman on an Indian reservation is triable in United States courts. *U. S. v. Partello*, 48 Fed. Rep. 670, 1891.

³ *Cherokee Tobacco Case*, 11 Wall. 616, 1870; *U. S. v. Shawmox*, 2 Sawy. 118, 1871; *U. S. v. Earll*, 15 Chic. Leg. News (July, 1883), 359. See, on this question, Whart. Com. Am. Law, §§ 26, 265, 434.

⁴ See Whart. Conf. of Laws, § 7; Whart. Com. on Am. Law, §§ 26, 265, 434; Walker on Indian Quest., Pamp. 1874; N. Am. Rev. Ap. 1873.

⁵ *In re Crow Dog*, 109 U. S. 556, 1883.

"That this (federal) legislation could constitutionally be extended to embrace Indians in the Indian country, wherever it operates of itself, without the aid of any legislative provision, was decided by this court in the case of *U. S. v. Forty-three*

Gallons of Whiskey, 93 U. S. 188, 1876; see *Holden v. Joy*, 17 Wall. 211, 1872; *The Cherokee Tobacco Case*, 11 Wall. 616, 1870." *Matthews, J.*, *In re Crow Dog*, 109 U. S. 567, 1883. In this case it was held that under federal legislation and treaties the federal courts in Dakota had no jurisdiction of offences, in Indian reservations, of Indian on Indian. *Smith v. U. S.*, 151 U. S. 50, 1894, decides the same. But see *Ex parte Sloan*, 4 Sawy. 330, 1877.

⁶ *Ibid.*; *Smith v. U. S.*, 151 U. S. 50, 1894. Alaska is not an "Indian country" within the meaning of this section of the Revised Statutes, and the District Court of Alaska has jurisdiction of the murder of one Indian by another Indian therein. *Kie v. U. S.*, 27 Fed. Rep. 351, 1867. But where the statute applies, State courts as well as federal are excluded. *Ex parte Cross*, 20 Nebr. 417, 1887. That the federal courts have exclusive jurisdiction of the homicide of white men by Indians on Indian reservations, see *U. S. v. Monte*, 2 West Coast Rep. 265. And of larceny by white man from

§ 283. Where a person bearing arms commits illegal acts within our territorial limits, by command of his own sovereign or pretended sovereign, then our quarrel is with the sovereign and not with the subject, provided we recognize such sovereign as a belligerent. In time of war this is clear; it being conceded that we then can treat such offender, if captured in the illegal act, only as a prisoner of war. In time of peace, the better opinion is that the same rule prevails. If our laws be in this way infringed, we must seek redress from the invading sovereign, and not from the subject who acts as the latter's subaltern.¹ But this only applies to cases where the subject is an officer or functionary of the foreign sovereign, or where the foreign sovereign adopts his act.² On the same reasoning, when, as in the case of our late

Indian on reservation, see *U. S. v. loco*; 6 Webster's Works, 244; Lawrence, *Com. sur Wheat.* iii. 430; *Com. v. Blodgett*, 12 Metc. 56, 1847; 37 Am. Dec. 363. For review of debate in Senate on this case, see 18 Alb. L. J. 506 *et seq.* Compare opinion of U. S. Attorney-General in the Modoc Case, June, 1873. And see *Phillips v. Eyre*, L. R. 6 Q. B. 1, 24, 1870; 1 Op. Atty.-Gen 45, 81; *Maisonnaire v. Keating*, 2 Gall. 325, 1815.

But when an Indian commits a crime outside of the Indian country (although on another Indian), he is, like any other person, amenable to the criminal laws of the place where the crime was committed. *In re Wolf*, 27 Fed. Rep. 606, 1886; *People v. Ketchum*, 73 Cal. 635, 1887; *U. S. v. Thomas*, 47 Fed. Rep. 488, 1891.

¹ *The Emulous*, 1 Gall. 563, 1814; *supra*, § 94; *infra*, § 300.

² *Infra*, § 310; Whart. Conf. of Laws, § 911; *The Emulous*, 1 Gall. 563, 1814; *Com. v. Blodgett*, 12 Metc. 56, 1847; *People v. McLeod*, 1 Hill, (N. Y.) 377, 1841; 25 Wend. 483, where the principle was denied by the New York Supreme Court, and asserted by the federal government. See review in 4 Law Rep. 169, 1844; *McLeod's Trial*, by Gould, pamp.; Neilson's Choate, 215; *Globe Newspaper*, 1841, App. 422; 1 Am. Law Mag. 348, and compare John Quincy Adams' Diary, in

Mr. Webster's position, that in such case the quarrel is exclusively with the foreign sovereign, is contested by Dr. Lieber. See Lieber's Life, 149.

Lord Campbell, in his autobiography (*Life*, 2d ed. 1881, p. 19), says: "The affair of the *Caroline* was much more difficult. Even Lord Grey told me he thought we were quite wrong in what we had done. But assuming the facts that the *Caroline* had been engaged, and when seized by us was still engaged in carrying supplies and military stores from the American side of the river to the rebels in Navy Island, part of the British territory, that this was permitted, and could not be prevented, by the American authorities, I was clearly of opinion that although she lay on the American side of the river when she was seized, we had a

civil war, insurgents are recognized as belligerents, then such insurgents, if in arms, are not punishable in the civil courts for acts done when on military duty, but are responsible solely to military law, according to the rules of war.¹

5. *Offences by Aliens abroad.*

§ 284. As we have already seen,² a principal organizing abroad a crime which is executed within our territory is indictable in our courts for the crime. We will presently see that by statute aliens forging our government securities abroad, or committing perjury before our consuls, are made indictable in our courts. We may therefore hold that offences against our rights may be indictable though extra-territorially designed.³

Extra-territorial offences against our rights may be intra-territorially indictable.

clear right to seize and destroy her, just as we might have taken a battery erected by the rebels on the American shore, the guns of which were fired against the Queen's troops in Navy Island. I wrote a long justification of our government, and thus supplied the arguments used by our foreign secretary, till the Ashburton treaty hushed up the dispute."

¹ *Supra*, § 94; Whart. Conf. of Laws § 909; 1 Hale, 433; 3 Inst. 50; Coleman v. State, 97 U. S. 509, 1876; Com. v. Holland, 1 Duvall, 182, 1873; Clark v. State, 37 Ga. 195, 1867; Hammond v. State, 3 Cold. (Tenn.) 129, 1866; though see U. S. v. Greathouse, 2 Abb. (U. S.) 364, 1868; *infra*, §§ 310, 1801. As to martial law, see Whart. Crim. Pl. & Pr. § 979; Whart. Com. Am. Law, § 217; *infra*, § 294.

² *Supra*, § 278.

³ The several theories of criminal jurisdiction may be classified as follows:

I. SUBJECTIVE, or those based on the conditions of the offender.

1. *Universality of jurisdiction*, which assumes that every State has jurisdiction of all crimes against either itself or other States by all persons at all

places. This theory has few advocates in England or the United States. It has, however, the high authority of Taney, C. J., who said in *Holmes v. Jennison*, 14 Pet. 540, 568, 569, 1840, that the States of the Union "may, if they think proper, in order to deter offenders from other countries from coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction."

2. *Personal jurisdiction*, which assumes that a State has jurisdiction over all crimes committed by its subjects, no matter what may be their residence at the time of the offence, or the sovereignty whose rights they invade. This theory has little support in our jurisprudence. It is otherwise in England. In the case of *Tivnan (Tirnan)*, 5 B. & S. 645, 679, Chief Justice Cockburn says: "An offence may be cognizable, triable, and justiciable in two places—*e. g.*, a murder by a British subject in a foreign country. A British subject who commits a murder in the United States of America may be tried and punished here by our municipal law, which is made to extend to its citizens in every

§ 285. Jurisdiction over aliens abroad is expressly claimed by the United States in cases of perjury and forgery before its consular

part of the world." Cited by Blatchford, J., *Stubbs's Case*, 12 Blatch. 124, 1874.

3. *Territorial jurisdiction*, which assumes that each State has cognizance of all offences when the offender at the time of the offence was on its territory; but that it has jurisdiction of no other offences. This has been the prevalent English and American theory.

II. OBJECTIVE, which assumes that each State has jurisdiction of all offences which assail its rights, or the rights of its subjects, no matter where the offender was at the time of the commission of the offence. This view, which appears to be the one best calculated to reconcile our adjudications on the vexed question before us, I have discussed at some length in the *Southern Law Review* for December, 1878, (vol. iv. p. 676). From this article I condense the following:

The *real* theory of jurisdiction, as it is called by its advocates, rests, as has been seen, on the *objective*, rather than on the *subjective*, side of crime. Jurisdiction is acquired, not because the criminal was at the time of the crime within the territory of the offended sovereign, nor because he was at the time a subject of such sovereign, but because his offence was against the rights of that sovereign or of his subjects. The real theory is, therefore, valuable as an adjunct to the territorial theory. We punish all who offend on our own soil because our duty is to attach to crime committed within our borders its retribution. But, in addition to this, we must punish, when we obtain control over the person of the offender, offences committed abroad, by either subject or foreigner, against our own rights.

But the term "our own rights," in this sense, is susceptible of a double meaning. It may be the sum of all the possible objects of crime found within our territory; or it may mean the sum of all the possible objects of crime *belonging to the State or any of its subjects*. The first, therefore, confines the real theory to attacks upon objects existing within our territorial bounds. The second expands this theory so as to include attacks upon our citizens and their property abroad. Or, to illustrate this distinction: by the first of these theories—the "territorial-real," as it might be called—the execution of a murderer of a subject on a savage island would not be justified; by the second—the "personal-real"—it would. A foreigner, to take another illustration, who forges abroad American coin, by the first theory, is liable only in case the false coin circulates in this country; while by the second theory he is liable for the circulation of such coin abroad.

Two objections, however, may be made to the real theory of jurisdiction just stated:

The first is that it renders foreigners liable for disobedience to a law with which they are unfamiliar. But if this objection is valid, it would relieve foreigners intra-territorially as well as extra-territorially. If a foreigner can set up the defence of ignorance of our laws abroad, he can set up the defence of ignorance of our laws on our own shores. The foreigner who, when arriving in one of our cities, passes counterfeit United States coin, is not likely to be any more familiar with our statutes than he who executes the forgery abroad. But in point of fact no such ignorance can be set up. The foreigner who

officers; nor, as has been seen, can there be serious doubt ^{Jurisdiction} that an alien who, when abroad, plans violations of the ^{tion} claimed in

forges our securities abroad knows forgery to be a crime as well as does the most expert counterfeiter who has never left our shores. Neither the domestic nor the foreign counterfeiter is familiar with the letter of our statutes; and if ignorance of the letter excuses, it would excuse the most veteran home malefactor. In other words, the presumption of knowledge of the unlawfulness of crimes *mala in se* is not limited by State boundaries. The unlawfulness of such crimes is assumed wherever civilization exists.

Another and more serious objection is that the real theory assails the prerogatives of foreign sovereignties.

To this may be replied that the objection proves too much. If a foreign sovereign has exclusive jurisdiction over his own subjects, then we cannot, under any circumstances, punish the subjects of a foreign sovereign. But this no one, even among the sturdiest advocates of the personal theory, pretends. It is conceded on all sides that the moment a foreigner sets foot on our shores, we hold him liable to our penal system in all its details. Nor is this all. There is no civilized State that has not passed statutes making it a criminal offence, punishable in its courts, for foreigners, even in their own country, to forge its securities, or to make false and fraudulent oaths before its consuls. We do not, it is true, attempt to arrest them in their own land, unless as a preliminary to a demand for extradition; we are restrained from making unconditional arrests by the countervailing principle of the inviolability of the soil of foreign States. But when such offenders come voluntarily or involuntarily, within our borders, we try them as justly subject to our

laws, on the ground that they have criminally assailed our rights. Nor is this all. Among the numerous cases of piracy which have been adjudicated in our courts, where is the case in which the defence of foreign allegiance was ever set up? What counsel would have the audacity to claim that because a pirate was the subject of a foreign prince, therefore he could not be tried for his piracy in the courts of the United States?

What, however, are our own distinctive rulings as to the important question which has been just discussed? At the outset, in answering this question, we are arrested by the sixth amendment to the Constitution of the United States: "*In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the assistance of counsel for his defence.*"

Does this clause control State prosecutions? Does it preclude any prosecution of an offender except in the State and district *where he was* when the offence was committed? What does "where the offence was committed" mean?

Waiving the first question, as to whether crimes cognizable by the States are subject to the limitation just stated, we are obliged to give a decided negative to the second question, and to maintain that the place where the crime takes effect, and not the place where the offender at the time stood, is the place of the com-

cases of
forgery
and per-

laws of a foreign State, is amenable to the laws of such State, should he be arrested on its soil after the commis-

mission of the crime. The history of the federal government, in its several departments, abounds with cases in which persons were put on their trial in districts in which they were not present at the time of the commission of the offence. We must, in fact, take the amendment before us in connection with the second section of the third article of the Constitution, which provides that criminal trials "shall be held in the State where the said crimes shall have been committed; *but when not committed in any State, the trial may be at such place or places as the Congress may by law have directed.*" That the place of the commission of the crime is not necessarily the place where the offender stood at the time when the crime was committed, in the opinion of those concerned in the early construction of the Constitution, is further illustrated by the fact that Congress, in execution of the power given by the Constitution to "define and punish piracies and felonies committed on the high seas, and offences against the laws of nations," proceeded in one of its earliest sessions, to provide for the punishment on land of offences committed at sea. Few questions, in fact, claimed earlier and more conspicuous attention from the executive than those which concerned the arrest and punishment at home of offences against our sovereignty, or against the law of nations, abroad. And for the purpose of providing a specific place of trial in such cases, it was prescribed by statute that "the trial of crimes committed *on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district in which the offender is apprehended, or into which he may be first brought.*" That this limitation,

however, refers exclusively to the federal government and to federal sovereignty, as indicated, not merely by the considerations we have already noticed, but by the exclusive use of the word "district," and the avoidance of the word "State," in the statute.

But it is not only of cases in which the offender was, at the time of the offence, on the high seas that we have thus claimed jurisdiction. By an act of Congress passed June 22, 1860, as is noticed in the text, we have invested with criminal jurisdiction our consuls and commercial agents "at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States." By the prior Act of August 11, 1848, consuls in China and Turkey were charged with power to "arraign and try," in pursuance of treaty stipulations, "all citizens of the United States charged with offences against law," "which shall be committed in the dominions of China" "and Turkey."

A similar jurisdiction was assumed by us by the Act of January 30, 1799, making it a misdemeanor for an American citizen abroad to negotiate with foreign governments.

That at common law this principle holds good is illustrated by the numerous cases which hold that corporeal presence at a crime is not necessary to convict an accessory before the fact, or even the principal in the second degree. Nor can we by any other mode of construction explain the jurisdiction already mentioned as assumed by us in cases of offences against our sovereignty committed by false swearing before our consuls abroad, and forgery of our securities abroad. The

sion of an overt act. Of course, it would be a defence to him that he committed such acts in obedience to his own sovereign, on whom the responsibility then shifts.¹ jury before
consular
officers.

crime takes effect in this country though the perpetrator was at the time in another land. The same reasoning applies to the jurisdiction assumed in most of our States over homicide where the death was within the boundary, though the offender at the time stood outside of the boundary. Statutory, if not common law, jurisdiction is in like manner claimed over larcenies and embezzlements effected intra-territorially by an agent at the time extra-territorially resident. And it is now settled that he who organizes abroad an offence consummated within our borders is responsible to us though he may never have trod our soil. Thus, he who abroad employs an agent to obtain by false pretences goods in one of our States is responsible to such State for obtaining the goods by false pretences; *People v. Adams*, 3 Denio, 190, 1846, (affirmed 1 Comst. 173); *S. P., R. v. Garrett*, 6 Cox C. C. 260, 1854; see *State v. Grady*, 34 Conn. 119, 1866; and he who abroad incites an agent to commit perjury in one of our States is liable to indictment in such State for the perjury. *Com. v. Smith*, 11 Allen, 243, 1866. It is true that in some cases we have intimations that this jurisdiction is only to be exercised where the agent is ignorant of the character of the offence he is employed to perpetrate, or at least is innocent of any guilty purpose as to such perpetration. *State v. Wyckoff*, 2 Vroom, 65, 1864. But this does not in any way touch the question before us, which is, whether a person who at the time of the concoction and perpetration of an offence was not present in the State where it was committed is penally amenable to such State. And there can be no question that the rulings before us—whose authority is undisputed, and which, as we have seen, have been followed in similar cases hereafter arising in England and the United States—establish such amenability. See *supra*, § 278.

We have, therefore, in our Constitution, our statutes, and our judicial decisions, repeated affirmations of the principle, that where an offence takes effect within our borders, or is directed against our laws, then we have jurisdiction to punish it, irrespective of the residence of the offender at the time of consummation. The place of such residence has jurisdiction over the attempt or conspiracy as the case may be. The place of consummation has jurisdiction of the offence consummated on its soil. *Infra*, §§ 287–288.

To the United States these considerations are peculiarly important. On our southwest boundary lies Mexico, with whom, if we have a treaty for extradition, it is a treaty of very recent adoption, and of capricious application; while the state of municipal law in Mexico is such that it is hopeless to look to Mexican courts to punish offences concocted in Mexico for execution in our own land. Even if we should ask for justice in such cases the answer would be: "Take care of yourselves. The crime was to be done on your territory; it was, therefore, a crime on your soil; how can we punish a man for something done in another State?" Even should this pre-

¹ *Supra*, § 288; *infra*, § 310; Whart. Conf. of Laws, §§ 871–7.

§ 286. Is the punishment to be assigned to an alien, for political offences committed abroad, to be the same as would be inflicted by the offended sovereign for similar offences by his own subjects? This subject is hereafter discussed, but it

Punish-
ment in
such cases.

text fail, corruption, or national prejudice, or common interest would succeed in rendering abortive any prosecution that might be instituted. In the meantime, if we announce the principle that Mexico alone has jurisdiction in such cases, what would become of us? The Mexican side of our boundary would be the undisturbed abode of hordes of depredators, who would make our country a desert for many miles deep. Parties of armed marauders could come down in a swoop, pillage, ravish, and murder in every village or farm-house, as far as swift horses could travel, and then return over the line unmolested, and there, in their security, laugh insolently at the cries of their victims for vengeance. The plea of necessity was considered by England sufficient to justify the destroying of the *Caroline*, an insurgent steamer, in a port of the State of New York; and we did not, at the time, hesitate to admit that if the case had not been one in which redress could have been obtained by application to our own courts, the necessity set up would have been a justification of the act. But if so, there can be no question of the application of the same plea of necessity to Mexico, so that, under its protection, we could cross the boundary line, arrest the criminals, and try them in the place of the consummation of their crime within our borders. See this view sustained in *Hanks v. State*, 13 Tex. App. 289, 1882.

Another interesting application of the same principle may be drawn from our relations to Indian tribes. With several of these tribes we have executed treaties conceding to them sov-

ereignty over certain tracts of land. Within this sovereignty, crimes perpetrated by Indians upon Indians are tried by Indian authorities, in conformity to Indian laws. But no one has ever claimed that, even within his own territory, an Indian can assail the rights of United States citizens without making himself liable to United States laws. *Supra*, 282 a.

I have thus attempted to show the inadequacy of the personal and of the territorial theories as limits of criminal jurisdiction. Of course, I do not mean to say that the State has not a claim to the obedience of its subjects, wherever they may be; all that I here argue is that the State can prosecute others than its subjects when they assail its rights. Nor do I dispute the right of the State to exercise penal discipline over all abiding within its borders; all that I claim is that the right of the State to exercise such discipline is not limited to those who were corporeally within its borders at the time of the commission of any offence for which it is incumbent on it to exact retribution. What I say is that the right of the State to exact such retribution, whenever its rights have been invaded, is not limited by the corporeal presence of the invader at the time of the invasion. And that this is the true view the following summary may be adduced to show:

It is the duty of the State to protect not merely its territory, but its rights. These rights are:

1. Its political integrity.
2. The life, safety, and property of its subjects.

When these rights are assailed on our own soil by offenders who either

may be here mentioned that it is argued with great justice, by Bar, an eminent German jurist, that the punishment a sovereign can thus inflict can be only that which he would impose upon offences of the same grade committed by his own subjects against a foreign sovereignty. For there is a great difference in the degree of guilt between treason by a subject, and invasion of neutrality by an attack on the government of a foreign State.¹

§ 287. As has been seen, accessaries, in treason and in misdemeanors, are principals.² The common law rule is that the accessory is to be tried at the place where his guilty act of accessoryship took place;³ though now, by statutes in several of the United States, he may be tried in the

Accessaries and co-conspirators liable in place of overt act.

remain at the time of the offence on foreign soil, or return to such soil when the offence is committed, we may exercise our jurisdiction over the crime in two ways. We may say to the foreign State within whose boundaries the offenders lurk, "Execute justice for us in this case. Be our agent in trying, in your own courts, these offenders." If such an appeal would be fruitless, then we have one or two remaining remedies. We may resort to a demand for extradition; or, in a case of necessity, where redress can in no other way be had, we can enter the State where the offenders are harbored, destroy their engines of destruction, and arrest the offenders themselves, with a view to their trial in our own courts.

In *Ham v. State*, 4 Tex. App. 645, 1878, the Supreme Court of Texas held that a statute of Texas providing that persons forging land titles to lands in that State should be liable to indictment whether the offence should be committed in or out of the State, was constitutional, and the conviction of one who committed a forgery in Missouri sustainable thereunder.

The Massachusetts Bill of Rights prescribes that in "criminal prosecutions the verification of facts in the vicinity where they happen is one of the

greatest securities of the life, liberty, and property of the citizen." This would seem to favor the *objective* rather than the *subjective* theory; in other words, the theory that the venue is the place of the act done, rather than the place where the agent was at the time of the act. See, as to this interpretation, *Com. v. Parker*, 2 Pick. 550, 1824; and see *R. v. Jones*, 1 Den. C. C. 551; *T. & M.* 270; *Com. v. Corlies*, 8 Brews. 575, 1869; *Mooney v. State*, 8 Ala. 328, 1855; *State v. Ayers*, 8 Baxt. 96, 1874; *Francis v. State*, 7 Tex. App. 501, 1880; and cases cited *infra*, §§ 288, 1206.

In the United States we have acts of Congress expressly asserting jurisdiction over offences on the Indian Territory and on Guano Islands. *Rev. Stat. U. S.* 1878, 2128, 2150, 5576.

¹ This latter point is decided in conformity with the text by Henke, i. § 90, and Heffter, § 26. To the same effect is the Roman law, *L. 4 D. ad. leg. Jul. Maj.* 48, 4, that *crimen majestatis* could only be committed by a subject against his own sovereign.

² *Supra*, §§ 223-4.

³ That an accessory before the fact may be tried in the place of accessoryship, see, further, *State v. Moore*, 6 Fost. 448, 1854; *People v. Hall*, 57

place having jurisdiction of the principal act,¹ and by more recent statutes, making all accessaries before the fact principals, the accessary before the fact, or instigator, is triable in the place of perpetration. In conspiracies, by the common law, each conspirator is responsible in any place where any overt act by any of his co-conspirators is done,² as well as in the place where the crime is concocted and started.³ It is so, also, according to the

How. Pr. 342, 1879; *State v. Wyckoff*, 2 Vroom, 65, 1864; *Johns v. State*, 19 Ind. 421, 1862; *State v. Knight*, 1 Taylor, (N. C.) 65, 1799; *Riley v. State*, 9 Humph. 646, 1848; *State v. Chapin*, 17 Ark. 561, 1856; *People v. Hodges*, 27 Cal. 340, 1865. And so of accessaries after the fact, *Tully v. Com.*, 13 Bush, 142, 1877.

¹ See Wendell's Blackstone, iv. p. 305; *Com. v. Pettes*, 114 Mass. 307, 1873; *Hatfield v. Com.*, (Ky.) 12 S. W. Rep. 309, 1889; *Carlisle v. State*, 81 Tex. Cr. 537, 1893. Under the 2 & 3 Ed. VI. an accessary after the fact, it is said, is triable in the county in which he was accessary, but not in that where the principal offence was committed. 1 Hale P. C. 623; *Baron v. People*, 1 Parker C. R. 246, 1854; *Tully v. Com.*, 13 Bush, 142, 1877; though see 1 East P. C. 361, intimating that the trial may be in the place of vicinage, or in that of the principal crime. And to that effect see *State v. Grady*, 34 Conn. 118, 1866; *Cf. State v. Hamilton*, 13 Nev. 386, 1878, cited *supra*, §§ 209, 213, 214, 219.

² *Supra*, §§ 205-248, 279; *infra*, § 1397; *R. v. Ferguson*, 2 Stark. N. P. C. 489; *Com. v. White*, 123 Mass. 430, 1877; *Ex parte Rogers*, 10 Tex. App. 655, 1881; *Rogers v. State*, 11 Tex. App. 288, 1882; Whart. Crim. Ev. § 111.

³ *U. S. v. Howell*, 56 Fed. Rep. 21, 1892. The prevalent view now is, that a conspiracy in England, even by aliens, to commit a crime abroad is cognizable in England. Lord Camp-

bell, in his autobiography (Life, 2d ed. 1881, p. 357), says: "I have had a fierce war with Sir Richard Bethell, Attorney-General of the late government (Lord Palmerston's, in 1857), upon the attempt to assassinate the Emperor of the French. I had laid down the law of conspiracy as it applied to foreigners residing in England. The government, by his advice, having determined on legislation, to make out the necessity for legislation, Bethell pretended that 'aliens, by conspiring in England to commit an offence beyond the seas, would not be subject to English law.' In the discharge of my duty, and by the advice of Lord Lyndhurst, I exposed this misrepresentation. All the law lords, *seriatim*, agreed with me. Bethell attacked us all scurrilously in the House of Commons, and I was obliged last night (March 2, 1858,) to vindicate myself in the House of Lords." The opinions of the law lords are given in 148 Hans. Parl. Deb. 1851-4. The proceedings are noticed by me in detail in an article in the Crim. Law Mag. for March, 1885.

R. v. Bernard, 1 F. & F. 240, 1858, which was for participation in the Orsini conspiracy, was under a statute; but Lord Campbell, who tried the case, while holding the statute covered the offence, did not hesitate in the House of Lords to declare that the offence was indictable at common law. As the defendant was acquitted, the question did not receive final judicial revision.

English common law, with treason.¹ "If," said Chief Justice Marshall, in Burr's case, "an army should be actually raised for the avowed purpose of carrying on an open war against the United States, and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases who never saw the army, but who, knowing its object, and leaguering himself with the rebels, supplied that army with provisions; or by a recruiting officer, holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him." The same view was taken by the English and Irish courts in dealing with the Fenian prisoners in 1868.² But whatever may be the technical rule in this respect in particular States, it is clear that where the offence can be divided into successive stages, any participant may be prosecuted for his particular act in the place of such act.³ This, in reference to homicides, is in several States affirmed by statute.⁴

§ 288. Conflicts of jurisdiction also arise when an offence is begun in one country to take effect in another.⁵ Supposing a libellous or forged writing be mailed in one place to be published in another, or an explosive package be expressed in one place to be opened in another, or a gun shot in one place and the shot takes effect in another,⁶ which is the place of the commission of the offence? Arguing by

In continuous offences each place of overt act has cognizance.

During the civil war in the United States the British government frequently asserted the jurisdiction of its courts to punish persons engaged on British soil in conspiracies to commit crimes in the United States. This was held in reference to the "Greek fire" attempts in Canada, and to the alleged attempts to send infected clothing from Bermuda to New York. See North Am. Rev. for June, 1884, (p. 527), and Crim. Law Mag. for March, 1885.

The question of venue in conspiracy is further discussed *infra*, § 1397. In accordance with the views of the text, persons sending from one of our States dynamite to injure property or life in England, would be indictable in the State from which the dynamite is sent.

See Crim. Law Mag. March, 1885. As to libel on foreign sovereign, see *infra*, § 1612 *a*. As to perjury to take effect abroad, see *Phillipi v. Bowen*, 2 Pa. 20, 1845.

¹ *Infra*, § 1793.

² U. S. Diplom. Cor. 1868, pt. i. pp. 51, 193, 342; Whart. Conf. of Laws, § 878.

³ Whart. Crim. Ev. §§ 111-12. *Infra*, §§ 292, 512.

⁴ *Ibid.* *Infra*, § 292.

⁵ The question of conflict of jurisdiction generally is discussed by me in 1 Crim. Law Mag. 689; and in the same Magazine for March, 1885.

⁶ In *U. S. v. Davis*, 2 Sumner, 482, 1837, homicide by shooting a ball from a gun in a United States vessel in a foreign port, killing a person in

analogy from the law which makes the place of performance the seat of a contract,¹ it might be said that the place of consummation is the peculiar seat of the crime. So, in fact, under the common law, it has frequently been decided,² though it is settled that a concurrent jurisdiction exists in the place of starting the offence,³ supposing that the offence is indictable in the place of consummation.⁴ The same distinctions apply to obtaining goods by false pretences by letter.⁵ As has been already seen, attempts to commit

a foreign ship, was held not to be indictable in a United States court. But this may be sustained on the ground that the shooting as well as the death was in the foreign port. That the place where the shot takes effect is the place of trial, see *State v. Hall*, (N. C.) 19 S. E. Rep. 602, 1892. See *supra*, § 279.

¹ Whart. Conf. of Laws, § 397. See *infra*, § 1621; Whart. Crim. Ev. § 113.

² *Ibid.*; *supra*, § 280; *infra*, § 292a; *R. v. Girdwood*, 1 Leach, 169; *R. v. Johnson*, 7 East, 65, 1807; *Com. v. Blanding*, 3 Pick. 304, 1824; *People v. Griffin*, 2 Barb. 427; *People v. Rathbun*, 21 Wend. 533, 1839; *Com. v. Gillespie*, 7 S. & R. 469, 1821; *Hatfield v. Com.*, (Ky.) 12 S. W. Rep. 309, 1889; *U. S. v. Horner*, 44 Fed. Rep. 677, 1891; *Horner v. U. S.*, 12 Sup. Ct. Rep. 407; 143 U. S. 207, 1892. An offer of a bribe sent by mail is triable where received. *In re Palliser*, 10 Sup. Ct. Rep. 1034; 136 U. S. 257, 1890. Where a forged instrument is mailed in one county to another, venue of offence is in latter county. *State v. Hudson*, 13 Mont. 112, 1893. As to abortion, see *State v. Morrow*, (S. C.) 18 S. E. Rep. 853, 1893. A person is not indictable in one State for obtaining money under false pretences where the property is obtained outside of the State through pretences made in the State. *Connor v. State*, 29 Fla. 455, 1892; *State v. Shaeffer*, 89 Mo. 271, 1886. As to libel, see *Dana's Case*, 7 Ben. 1, 1873.

In *Rogers v. State*, 11 Tex. App. 608, 1881, it was held that a party co-operating out of Texas in forging a deed to take effect in Texas, is indictable in Texas. See *Ex parte Rogers*, 10 Tex. App. 655, 1881. But this does not exclude jurisdiction of the place of forgery.

³ *Infra*, § 1620; *U. S. v. Worrall*, 2 Dall. 384, 1798; Whart. St. Tr. 189; *R. v. Burdett*, 4 B. & A. 95, 1820; *Perkins's Case*, 2 Lewin, 150; 2 East - P. C. 1120; Wend. Blackst. iv. p. 305. See *R. v. Jones*, 4 Cox C. C. 198, 1849; 1 Den. C. C. 551; *Johns v. State*, 19 Ind. 421, 1862; *Green v. State*, 66 Ala. 40, 1880, (cited *infra*, § 292); *State v. Chapin*, 17 Ark. 561, 1857. Compare Whart. Crim. Ev. § 113. That in libels sent by mail, the venue may be laid either in the place of mailing or in the place of reception, see *infra*, § 1620.

⁴ See *Lavina v. State*, 63 Ga. 513, 1879; *Ex parte Rogers*, 10 Tex. App. 655, 1881; *infra*, § 292a.

⁵ *Infra*, § 1206; *R. v. Jones*, 1 Den. C. C. 551, 1849; T. & M. 270. In *R. v. Holmes*, L. R. 12 Q. B. D. 23; 15 Cox, 343, 1881; 49 L. T. (N. S.) 540, it was held that where A. posted in England a letter to France, containing a false pretence, which induced the receiver of the letter to send money to A., A. was indictable in England for the false pretence. See *supra*, § 279; *State v. House*, 55 Iowa, 466, 1881. That the offender is only indictable in State where money was obtained by false pre-

crimes are cognizable in the place of the attempt,¹ and such, also, is the case with conspiracies and accessoryships.² But there can be no question that all parties concerned are also responsible at the place where the offence is consummated.³ The mere fact, however, that a forged cheque has been drawn on a Kansas bank, does not give Kansas jurisdiction when the cheque was drawn and paid in Missouri.⁴

Since, however, a crime may be organized in one country, advanced in a second, and executed in a third, it is necessary to conceive of the crime in question as broken up into several sections, committed in distinct jurisdictions, and severally cognizable in each. That such is the case is the opinion of several eminent jurists;⁵ and such would, no doubt (*e. g.*, under indictments for treason or conspiracy,⁶ where every overt act would give the local court jurisdiction), under similar circumstances, be the practice of the English common law. And the same reasoning applies to all offences which are carried on in two or more jurisdictions. At the same time it must be kept in mind that an attempt to commit in a foreign State an act lawful in such State, though unlawful in the place of the attempt, may not be punishable in the latter State.⁷

The jurisdiction in cases of embezzlement is hereafter specially noticed.⁸

When a *nuisance* is created in one jurisdiction and operates in

tence, and not where pretence was written and mailed, see *Connor v. State*, 29 Fla. 455, 1892; *State v. Shaeffer*, 89 Mo. 271, 1886. As will presently be more fully seen, where a letter containing a fraudulent non-accounting of goods by an agent is received by his employers in M. county, the latter county has jurisdiction of the offence. *R. v. Rogers*, 14 Cox C. C. 22; *L. R. 3 Q. B. D.* 28, 1878. See *R. v. Treadgold*, 14 Cox C. C. 220, 1878; 89 L. T. (N. S.) 291. Where statute makes indictable the offence of "sending and delivering" letters to extort money, the offence of sending is only triable in county from which letter is sent. *Landa v. State*, 26 Tex. App. 580, 1888.

¹ *Supra*, § 195; *State v. Terry*, 109 Mo. 601, 1891.

² See *infra*, § 1397; *supra*, § 287.

³ *Supra*, § 280.

⁴ *In re Carr*, 28 Kan. 1, 1882. See, also, *State v. Shaeffer*, 89 Mo. 271, 1886.

⁵ Cited Whart. Conf. of Laws, § 927; P. Voet, xi. c. i. note 8; Ortolan, No. 951; Jul. Clarus, Sent. v. § fin. qu. 32, note 9; Pütter, § 98; and see, also, reasoning of court in *Pearson v. McGowran*, 3 B. & C. 700, 1825; 5 D. & R. 616; *State v. Hatch*, 91 Mo. 568, 1887.

⁶ *Infra*, 1397.

⁷ *Infra*, § 292 a. See Whart. Conf. of Laws, §§ 482-489, 925. To this effect are decisions rendered in 1856 by the Supreme Court at Berlin. See Bar, § 142, note 3 a; and see *infra*, § 1621; Whart. Cr. Ev. § 113.

⁸ *Infra*, § 1040.

Continuing
nuisance.

another jurisdiction, the courts of both jurisdictions, according to the better opinion, have cognizance of the offence,¹ though in some States it is held that where the injury is exclusively to real estate the redress must be sought in the jurisdiction of the real estate.²

Bigamy in this relation is hereafter discussed.³

Adjust-
ment
of punish-
ment in
such
cases.

§ 289. It has been held that in such cases, in adjusting the sentence, the grade of the consummated offence will be taken into consideration, and a punishment adequate to the whole imposed, allowing for what may have been inflicted by other tribunals.⁴ But on this point there is some conflict. Foreign jurists have, and not without reason, held, that when an illegal transaction has been carried on in several territories, each territory can only punish for that segment of the crime committed within its own bounds.⁵ In the United States this is a question of growing importance, as will be elsewhere seen.⁶

§ 290. In England, by statute, wherever a felony or misdemeanor is begun in one county and completed in another, the venue may be laid in either county;⁷ and offences committed when travelling may be laid in any county through which the passenger, carriage, or vessel passes. A statute which provided that where an offence is

¹ That a diversion of water made in one State which does injury in another is cognizable in the former State, see Judge Story in *Slack v. Walcott*, 3 Mason, 508, 1825.

² *Watts v. Kinney*, 23 Wend. 484, 1840; 2 Hill, 82; *Eachus v. Canal Co.*, 17 Ill. 534, 1856; *Howard v. Ingersoll*, 17 Ala. 780, 1849. See *Wooster v. Manfg. Co.*, 37 Me. 246, 1854.

³ *Infra*, § 1685. As to the jurisdiction in bastardy proceedings, see *Com. v. Lloyd*, 141 Pa. 28, 1891; *Sheay v. State*, 74 Md. 52, 1891; *Moore v. State*, 47 Kans. 772, 1892.

⁴ Whart. Conf. of Laws, § 920. See particularly, as to concurrent jurisdictions, Whart. Pl. & Pr. §§ 441 *et seq.*

⁵ *Ibid.*, citing Carpzov, Prac. iii. qu. 110, n. 23; Pütter, p. 203; Holtzendorff, 1870, p. 548. As to Massachusetts, see special statute.

⁶ *Infra*, § 293; Whart. Crim. Pl. & Pr. §§ 441, 453.

⁷ 7 Geo. IV. c. 64, § 13; 1 Vict. c. 36, § 37.

¹ That a diversion of water made in one State which does injury in another is cognizable in the former State, see *Stillman v. Manfg. Co.*, 3 Wood. & M. 538, 1849; *Fort v. Edwards*, 3 Blatch. 310, 1857; *Rundle v. Canal Co.*, 14 How. 80, 1852; *Miss. & Mo. R. R. v. Ward*, 2 Black, 485, 1862; *Worster v. Lake Co.*, 5 Fost. 525, 1853; *State v. Lord*, 16 N. H. 357, 1844; *Maureli Co. v. Worcester*, (Sup. Ct. Mass.) 30 Alb. L. J. 409, 1884; *State v. Babcock*, 30 N. J. L. (1 Vroom,) 29, 1864; *Com. v. Lyons*, 3 Penn. L. J. Rep. 167; 1 Clark, 497, 1843; *Oliphant v. Smith*, 3 Pen. & Watts, 180, 1831; *In re Eldred*, 46 Wis. 530, 1879; *Thayer v. Brooks*, 17 Ohio, 489, 1848; *Pilgrim v. Miller*, 1 Bradw. 448, 1878; *Armendiaz v. Stillman*, 54 Tex. 623, 1880 (where the water was diverted in Texas and the injury done in Mexico). *State v. Smith*, 82 Iowa, 423, 1891. See remarks of

committed on a railroad car passing through the State, and it cannot readily be determined in what county the offence was committed, the offender may be tried in any county through which such car passed, was held constitutional in Illinois.¹ Embezzlement or larceny can, therefore, in England be tried in any county into which the spoils of the offence are brought.² And similar statutes exist in most of the United States, and have been held constitutional.³

Offences
in car-
riages
and
boats.

§ 291. As will be hereafter more fully seen, when goods are stolen in one country and brought by the thief into another country, the latter country by the English common law has no jurisdiction.⁴ In the United States, however, it has been ruled to be within the constitutional province of each State to pass statutes giving the place of arrest, into which the goods are so brought, jurisdiction.⁵ And as between the several United States, this jurisdiction has been ruled in many States to exist at common law.⁶ In other States, such jurisdiction

In larceny
thief is
liable
wherever
goods are
brought.

¹ *Watt v. People*, 126 Ill. 9, 1888. L. R. 3 Q. B. D. 28; 14 Cox C. C. 22,

² See *infra*, § 1040; *Harrington v. State*, 31 Tex. Cr. 577, 1893. 1878. See *Com. v. Uprichard*, 3 Gray, 434, 1854.

³ See *People v. Dowling*, 84 N. Y. 478, 1881; *Powell v. State*, 52 Wis. 17, 1881. ⁵ *People v. Burke*, 11 Wend. 129, 1834; *Hemmaker v. State*, 12 Mo. 453, 1849; *State v. Williams*, 35 Mo. 229, 1862; *Cummings v. State*, 1 Har. & J. 340, 1808; *McFarland v. State*, 4 Kans. 68, 1867; *State v. Levy*, 3 Stew. 123, 1830; *La Vaul v. State*, 49 Ala. 44, 1878; *State v. Johnson*, 38 Ark. 568, 1881; *Hanks v. State*, 13 Tex. App. 289, 1882; *State v. Hatch*, 91 Mo. 568, 1887.

⁴ *Butler's Case*, 13 Co. 55; 3 Inst. 113; *R. v. Prowes*, 1 Mood. C. C. 349, 1833; *R. v. Debraid*, 11 Cox C. C. 207, 1869. See *infra*, § 930; and see Whart. Cr. Ev. § 111. In an English case decided in 1875, it was the prisoner's duty as country traveller to collect moneys and remit them at once to his employers. On the 18th April he received money in county Y.; on the 19th and 20th he wrote to his employers from Y., not mentioning that he had received the money; on the 21st April he wrote to them again from Y., thereby intending them to believe that he had not received the money. The letters were addressed to and received by his employers in county M., and written and posted in county Y. It was held that the prisoner might be tried in county M. for the offence of embezzling the money. *R. v. Rogers*, 1808; *Worthington v. State*, 58 Md. 318.

In *Cummins v. State*, 12 Tex. App. 121, 1882, a statute, providing that a thief bringing stolen goods into Texas from another State shall be indictable in Texas where the offence was larceny in such other State, was assumed to be constitutional, but it was held that in such case the law of the latter State should be proved as a fact. ⁶ *State v. Underwood*, 49 Me. 181, 1860; *Com. v. Andrews*, 2 Mass. 14, 1807; *Com. v. Holder*, 9 Gray, 7, 1857; *Cummings v. State*, 1 Har. & J. 340, 1808; *Worthington v. State*, 58 Md.

is held not to exist without a statute;¹ and statutes conferring the jurisdiction have been held to be constitutional.² By several courts it has been held that when the goods are stolen in Canada and brought into a State, the State courts have jurisdiction;³ but this view is rejected in Massachusetts and Ohio,⁴ as well as in those States which hold that at common law there is no liability for a larceny in a sister State.⁵ In Connecticut the same rule is applied to receivers of stolen goods.⁶

§ 292. *Jurisdiction of place of wound.*—By the early English common law, the place in which the mortal stroke was given had jurisdiction in cases of homicide. As there seemed, however, to be doubts in cases in which the blow was in one jurisdiction and the death in another, the statute of 2 & 3 Edward VI. c. 24 was passed, the effect of which, though very inartificially drawn, is to give the place of death jurisdiction.⁷ This statute has

In homicide place of wound and, by statute, place of death may have jurisdiction.

403, 1881; *Ferrill v. Com.*, 1 Duvall, 153, 1873; *Thomas v. Com.*, 15 S. W. Rep. 861, 1891; *Hamilton v. State*, 11 Ohio, 435, 1842; *State v. Ellis*, 3 Conn. 186, 1819; *State v. Hill*, 19 S. C. 435, 1883; *Watson v. State*, 36 Miss. 593, 1863; *State v. Williams*, 35 Mo. 229, 1862; *Meyers v. People*, 26 Ill. 173, 1801; *State v. Bennet*, 14 Iowa, 479, 1862; *Graves v. State*, 12 Wis. 591, 1861; *State v. Johnson*, 2 Oreg. 115, 1871; *State v. Newman*, 9 Nev. 48, 1874. See *infra*, § 930.

¹ *People v. Gardner*, 2 Johns. 477, 1807; *People v. Schenck*, 2 Johns. 479, 1807; *State v. Le Blanche*, 2 Vroom, 82, 1865; *Simmons v. Com.*, 5 Binn. 617, 1813; *Lee v. State*, 64 Ga. 203, 1880; *Simpson v. State*, 4 Humph. 456, 1843; *State v. Brown*, 1 Hayw. 100, 1814; *Beal v. State*, 15 Ind. 378, 1860; *Kiser v. Woods*, 60 Ind. 538, 1878; *People v. Loughridge*, 1 Nebr. 11, 1872; *State v. Reonals*, 14 La. An. 278, 1859; *State v. McCoy*, 42 La. An. 228, 1890. That the property must be brought into the State of process with felonious intent, see *State v. Johnson*, 38 Ark. 568, 1882.

² *Simpson v. State*, 4 Humph. 461, 1843; *People v. Williams*, 24 Mich. 156, 1871; *Beal v. State*, 15 Ind. 378, 1860; *McFarland v. State*, 4 Kans. 68, 1865; *State v. Adams*, 14 Ala. 486, 1847; *La Vaul v. State*, 40 Ala. 44, 1867; *State v. Butler*, 67 Mo. 59, 1878. As to New York statute, see *People v. Burke*, 11 Wend. 129, 1833.

³ *Infra*, § 930; *State v. Bartlett*, 11 Vt. 650, 1838; *State v. Underwood*, 49 Me. 181, 1861; *State v. Williams*, 35 Mo. 229, 1862.

⁴ *Com. v. Uprichard*, 3 Gray, 440, 1855; *Com. v. White*, 123 Mass. 433, 1877; *Stanley v. State*, 24 Ohio St. 166, 1873.

⁵ *Simpson v. State*, 4 Humph. 456, 1843; *State v. Brown*, 1 Hayw. 100, 1814; *Beal v. State*, 15 Ind. 378, 1860; *People v. Loughridge*, 1 Nebr. 11, 1872.

⁶ *State v. Ward*, 49 Conn. 429, 1881.

⁷ That this jurisdiction is concurrent, see 1 Hale P. C. 426; 1 East P. C. 361; *R. v. Sattler*, D. & B. 52; 7 Cox C. C. 431, 1856.

been held to be part of the common law in several States in this country ; but even where it is in force, it does not, according to the better opinion, divest the jurisdiction of the place where the blow was struck.¹

Jurisdiction of place of death.—Unless by statute, such jurisdiction has been generally held not to exist.²

¹ *R. v. Hargrave*, 5 C. & P. 170, 1831, where it was held that the blow was the offence ; *U. S. v. Guiteau*, 1 Mackey, 498, 537, 1881, where the same position was taken where the blow was in the District of Columbia, and the death in New Jersey (overruling *U. S. v. Bladen*, 1 Cranch C. C. 548, 1823 ; *U. S. v. Rolla*, 2 Am. L. J. 688) ; *Riley v. State*, 9 Humph. 646, 1848 ; *Stevenson v. State*, 10 Mo. 503, 1846 ; *State v. Blunt*, 110 Mo. 322, 1892 ; *Green v. State*, 66 Ala. 40, 1880, where it was held that Alabama had jurisdiction, independently of the statute, when the blow was given in Alabama and the death was in Georgia ; and see *Robbins v. State*, 8 Ohio St. 131, 1858 ; *State v. Gessert*, 21 Minn. 369, 1875 ; *People v. Gill*, 6 Cal. 637, 1856, to the same effect.

In New Jersey, in 1878, it was held that when a mortal blow is given within the jurisdiction of that State, and the death occurs in Pennsylvania, New Jersey has jurisdiction by statute. *Hunter v. State*, 40 N. J. L. 495, 1878, in which case the court left the common law question open, resting the decision on the New Jersey statute.

In *State v. Kelly*, 76 Me. 331, 1884, it was held that where the defendant died in the State of Maine from a wound inflicted on him in a United State fort, the State of Maine did not have jurisdiction. "The modern and more rational view," said the court, "is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, can-

not change the locality of the crime. . . . How then can a State court take jurisdiction ? Clearly it cannot, unless when a mortal blow is inflicted in a fort, and the person struck or wounded dies out of the fort, the crime is regarded as committed where the person dies ; and this, as we have already stated, is a doctrine which we cannot sustain."

The decision in *U. S. v. Guiteau*, it should be added, has the implied sanction of the Supreme Court of the United States. In that court it has been the practice to review sentences in themselves erroneous by a writ of *habeas corpus*. This writ was applied for after the sentence in *Guiteau's* case, in a petition to Judge Bradley, who, after examining the briefs on both sides, refused the writ. Judge Bradley was the only judge of the Supreme Court then in Washington, but others were accessible, and there is little doubt that it was understood by the defendant's counsel that by no one of them would the writ be granted.

² 1 Hawk. P. C. 23, § 13 ; 31, § 13 ; Starkie's C. P., 2, 3, *note*, where the common law doubts on this subject, which led to the statute of Edward VI., are explained on the ground that juries were, by the old law, required to be *witnesses* of the material facts of the case ; which condition was, in some cases, supposed to be satisfied by bringing the dead body to the county of the wound and having the trial there. In England, the statutes 8 & 9 Geo. IV., giving jurisdiction to England in cases of deaths occurring in

In the federal courts it is held that the place of death has no such jurisdiction (without a statute), unless such place is the place of the wound.¹ The jurisdiction is now conferred by statute.² In several States, statutes giving jurisdiction to the place of death (the wound being extra-territorial) have been held constitutional.³ In New Jersey, in 1859, in a case where the constitutional power to pass such a statute did not on the record arise, it was declared that there is no common law jurisdiction to this effect, that the New Jersey statutes did not cover the case of manslaughter, and that an indictment charging a felonious assault and battery in New York, and that the party injured came into and died in New Jersey, charged no crime in New Jersey.⁴ In Massachusetts, in a case in 1869, the defendants, one a citizen of Maine, and the other a British subject, were convicted in the county of Suffolk of the manslaughter of a man who died within the county of injuries inflicted by them on board a British merchant ship on the high seas. The Massachusetts statute under which the defendants were convicted, provided, that "if a mortal wound be given, or other violence or injury inflicted, or poison is administered, on the high seas, or on land either within or without the limits of the State, by means of which death ensues in any county thereof, such offence may be prosecuted in the county where the death happened." It was held by the Supreme Court that the statute was constitutional and the conviction right.⁵

England from wounds inflicted abroad negligent homicide the place of the has been held not to apply to the negligent misconduct must have jurisdiction. case of a foreigner dying in England

from wounds received on a foreign vessel on the high seas. *R. v. Lewis*, D. & B. 182; 7 Cox C. C. 277; see *Atty.-Gen. v. Kwok-a-Sin*, L. R. 5 P. C. 179; *R. v. Anderson*, L. R. 1 C. C. 164, 1869; cited *supra*, §§ 269, 275, 277; *R. v. Seberg*, L. R. 1 C. C. 264, 1869. As to common law, see Co. Lit. 74 b; 3 Inst. 48; 1 East P. C. 361; 1 Hale P. C. 426; 2 Ibid. 20, 163.

¹ *U. S. v. McGill*, 4 Dall. 427, 1806; 1 Wash. C. C. 463; *U. S. v. Armstrong*, 2 Curt. C. C. 446, 1857.

² *U. S. Stat.* 1825, c. 65, 1857, c. 116; see *Rev. Stat.* 1042-1047.

In *U. S. v. Doig*, 4 Fed. Rep. 193, 1879, it was held that in a case of

³ *State v. Carter*, 27 N. J. L. (3 Dutch.) 499, 1874; *Com. v. Linton*, 2 Va. Cas. 205, 1819; *Riggs v. State*, 26 Miss. 511, 1855; *Turner v. State*, 28 Miss. 684, 1856; *Tyler v. People*, 8 Mich. 326, 1860.

⁴ *State v. Carter*, 3 Dutch. 500, 1859.

⁵ *Com. v. Macloon*, 101 Mass. 1, 1869. If, however, the defendants were foreigners, and the crime was committed out of the jurisdiction (as it was by the rule in *Guiteau's Case*), it is hard to see how the statute making the crime cognizable in Massachusetts can be held constitutional.

See *Walls v. State*, 33 Ark. 365, 1878; *infra*, § 1685.

§ 292 a. An agreement to do an act in a State where such an act is not unlawful, is not made unlawful by the fact that the agreement is unlawful in the place where it is made.¹ It is otherwise when the *lex fori* pronounces the contract illegal.² But, as we have seen, the place of performance has co-ordinate jurisdiction of the offence, no matter where the offender may have been at the time of such performance.³ Thus, in addition to illustrations elsewhere given, it may be noticed that the place where a forged document is uttered has jurisdiction of the offence of uttering;⁴ and when there are indications coupling the forger with the utterer, has jurisdiction of the offence of forging the uttered document.⁵ It has also been held that there is jurisdiction in liquor cases in the place where the liquor is delivered to the vendee or his agent.⁶ And this is in conformity with the rule already stated that a place where a crime takes effect has concurrent jurisdiction of the crime.⁷

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¹ *Supra*, § 288, and cases there cited; *Whitehead v. Smithers*, L. R. 2 C. P. D. 553. In *People v. Noelke*, 94 N. Y. 137, 1883, it was held that statutes prohibiting the sale of lotteries organized in other States are constitutional.

² *Grell v. Levy*, 16 C. B. N. S. 73, 1864.

³ *Supra*, § 278. See *Com. v. Eggleston*, 128 Mass. 414, 1880.

⁴ *Lindsey v. State*, 38 Ohio St. 507, 1882. As to jurisdiction over forgery in Texas under Penal Code, see *Mason v. State*, 32 Tex. Cr. 95, 1893.

⁵ *Infra*, § 757.

⁶ *State v. Hughes*, 22 W. Va. 743, 1883. But see *Pilgreen v. State*, 71 Ala. 368, 1881; *Bryant v. State*, 89 Tenn. 581, 1891.

⁷ See *supra*, §§ 271, 279; Whart. Conf. of Laws, §§ 871-921. See remarks of Sir J. F. Stephen, on Keyn's Case, *supra*, § 269.

It has been held in Massachusetts that a statute prohibiting the sale of game in certain seasons does not apply to game killed outside of the State. *Com. v. Hall*, 128 Mass. 410, 1880. A contrary view has been taken of a similar statute in Illinois; *Magner v. People*, 97 Ill. 320, 1880, citing

Whitehead v. Smithers, L. R. 2 C. P. D. 553. In *People v. Noelke*, 94 N. Y. 137, 1883, it was held that statutes prohibiting the sale of lotteries organized in other States are constitutional. At common law in prosecutions for the illegal sale of lottery tickets, it is no defence that the lottery was authorized by the laws of another State. *Com. v. Dana*, 2 Metc. (Mass.) 329, 1807, and cases cited *infra*, §§ 1491 *et seq.* In *State v. Lovell*, 39 N. J. L. 463, 1877, it was held that to bet or hold stakes on horse races to be run out of the State is indictable in New Jersey. A letter written in one State, inciting N. to commit perjury in another State, renders the writer indictable in the latter State, although the contents of the letter were communicated to the person to whom it was addressed by an agent who participated in the offence. The writer of the letter is, under these circumstances, triable in the State to which the letter was sent. *Com. v. Smith*, 11 Allen, 243, 1866. An information at common law for a conspiracy between the captain and purser of a

§ 293. As is elsewhere more fully shown, the same offence may be in one aspect cognizable by one sovereign, and in another aspect by another sovereign.¹ On the same principle an offence may in

one aspect be cognizable by the State in its sovereignty, and in others by a municipal corporation.² Where a particular offence as an entirety is cognizable by two sovereigns, the first sovereign that takes possession of the defendant, and undertakes the prosecution of the offence, absorbs the case, as a general rule, which action, if *bona fide* and complete, is a bar to the action of the other sovereign.³ But as to offences

man-of-war, for planning and fabricating false vouchers to cheat the crown (which planning and fabrication were done upon the high seas), has been held in England triable in Middlesex, upon proof there of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there of a third person, a holder of one of such vouchers (a bill of exchange), for payment, which he there received. *R. v. Brisac*, 4 East, 164, 1804; see *infra*, § 1397.

¹ *Supra*, §§ 266, 284; Whart. Cr. Pl. & Pr. §§ 441, 453; *U. S. v. Marigold*, 9 How. 560, 1850; *Coleman v. State*, *infra*; *State v. Bergman*, 6 Oreg. 341, 1875; *State v. Augustine*, 23 La. An. 119, 1871.

² Whart. Cr. Pl. & Pr. § 440.

³ Whart. Cr. Pl. & Pr. §§ 441-442, 453; *Taintor v. Taylor*, 16 Wall. 367, 1872; *State v. Horn*, 70 Mo. 466, 1879. See *Sizemore v. State*, 3 Head, 26, 1859. In *Coleman v. State*, 97 U. S. 309, 1878, it was held that a prior conviction by a United States military court in Tennessee, in 1865, of a soldier in the federal army, of murder, with a sentence that he should be hung, which sentence, however, was never executed, divested the State court of jurisdiction. Of a subsequent prosecution in the State court,

Field, J., giving the opinion of the Supreme Court of the United States, thus speaks: "The judgment and conviction in the criminal court should have been set aside and the indictment quashed for want of jurisdiction. Their effect was to defeat an act done under the authority of the United States, by a tribunal of officers appointed under the law enacted for the government and regulation of the army in time of war, and whilst that army was in a hostile and conquered State. The judgment of that tribunal at the time it was rendered, as well as the person of the defendant, were beyond the control of the State of Tennessee. The authority of the United States was then sovereign, and their jurisdiction exclusive. Nothing which has since occurred has diminished that authority or impaired the efficacy of that judgment. In thus holding, we do not call in question the correctness of the general doctrine asserted by the Supreme Court of Tennessee, that the same act may, in some instances, be an offence against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be

partly against one and partly against another sovereign, if the defendant is convicted and sentenced under one sovereign, the better opinion, as we have seen, is, that both have jurisdiction; and in such case the punishment inflicted under the first prosecution is to be taken into account in adjusting the sentence under the second prosecution.¹

7. *Courts Martial and Military Courts.*

§ 294. The subject of courts martial and military courts falls more properly, so far as it concerns their practical relations, in another volume.² The positions there taken may be summed up as follows: (1) Martial law is law imposed on an army as such, governing it and its antagonists under arms, and is enforced by courts of officers under the authority of the commander-in-chief. It is not inconsistent with this principle that spies are tried by court martial. A spy puts himself more or less completely in the position of a member of the army within whose lines he is penetrating; and he cannot, therefore, dispute the jurisdiction of the court to which he has subjected himself. Military law, on the other hand, is the law imposed by the commander-in-

Martial law is law for an army; military law is law imposed by the army on a subjected country.

that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee. But here there is no case presented for

the application of the doctrine. The laws of Tennessee with regard to offences and their punishment, which were allowed to remain in force during its military occupation, did not apply to the defendant, as he was at the time a soldier in the army of the United States, and subject to the articles of war." In *James's Case*, 5 *Crim. Law Mag.* 216, it was held by the U. S. Dist. Ct. for the West. Dist. of Missouri, that a prisoner in the custody of his bondsmen on a State charge, cannot be taken from such custody by federal process, or for other kinds of offence against the federal government.

453. *Supra*, § 289; *U. S. v. Amy*, 14 Md. 152 *n.*; *U. S. v. Cashiel*, 1 Hughes, 552, 1873; *Com. v. Tenney*, 97 Mass. 50, 1867; *Jett v. Com.*, 18 Gratt. 958, 1862.

"Conviction and punishment of an accused in one sovereignty is no bar to his conviction and punishment in another, in which the offence was originally committed." *McAllister, J., Phillips v. People*, 55 Ill. 433, 1870; citing *State v. Brown*, 1 Hayw. 116, 1814; *U. S. v. Amy*, *ut supra*; *Com. v. Andrews*, 2 Mass. 14, 1807; *Com. v. Green*, 17 Mass. 540-7, 1820. See *Whart. Cr. Pl. & Pr. ut supra*. In *Marshall v. State*, 6 Nebr. 120, 1877, it was intimated that when the penalty inflicted was in full satisfaction for the whole offence, the second prosecution might be barred.

² *Whart. Cr. Pl. & Pr.* §§ 439, 979,

¹ *Whart. Cr. Pl. & Pr.* §§ 441, 442, 997.

§ 293. As is elsewhere more fully shown, the same offence may be in one aspect cognizable by one sovereign, and in another aspect by another sovereign.¹ On the same principle an offence may in

one aspect be cognizable by the State in its sovereignty, and in others by a municipal corporation.² Where a particular offence as an entirety is cognizable by two sovereigns, the first sovereign that takes possession of the defendant, and undertakes the prosecution of the offence, absorbs the case, as a general rule, which action, if *bona fide* and complete, is a bar to the action of the other sovereign.³ But as to offences

man-of-war, for planning and fabricating false vouchers to cheat the crown (which planning and fabrication were done upon the high seas), has been held in England triable in Middlesex, upon proof there of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there of a third person, a holder of one of such vouchers (a bill of exchange), for payment, which he there received. *R. v. Brisac*, 4 East, 164, 1804; see *infra*, § 1397.

¹ *Supra*, §§ 266, 284; Whart. Cr. Pl. & Pr. §§ 441, 453; *U. S. v. Marigold*, 9 How. 560, 1850; *Coleman v. State*, *infra*; *State v. Bergman*, 6 Oreg. 341, 1875; *State v. Augustine*, 23 La. An. 119, 1871.

² Whart. Cr. Pl. & Pr. § 440.

³ Whart. Cr. Pl. & Pr. §§ 441-442, 453; *Taintor v. Taylor*, 16 Wall. 367, 1872; *State v. Horn*, 70 Mo. 466, 1879. See *Sizemore v. State*, 3 Head, 26, 1859. In *Coleman v. State*, 97 U. S. 309, 1878, it was held that a prior conviction by a United States military court in Tennessee, in 1865, of a soldier in the federal army, of murder, with a sentence that he should be hung, which sentence, however, was never executed, divested the State court of jurisdiction. Of a subsequent prosecution in the State court,

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JURISDICTION.

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Whart. Cr. Pl. & Pr.

chief of an army on a province which he has subjugated. While it is in force it is supreme, not only in military, but in civil affairs, so far as concerns non-belligerents. A military governor, for instance, does not interfere with the affairs of the army. These are governed by the commander-in-chief through his proper military machinery. The commander-in-chief, on the other hand, does not, after a military governor is appointed, interfere in the affairs of non-belligerents in the subject province. Courts martial are constructed under fixed principles of selection of officers of suitable rank assisted by a judge advocate. Military courts are selected in any way the military commander of the province may determine, and may consist, more or less entirely, of civilians learned in the law. Courts martial are conducted in subordination to martial law, as an international system. Military courts are conducted in subordination to such a system of jurisprudence as the policy of the occupying forces prescribes, incorporating as much of the civil law of the conquered province as may be most convenient. Martial law excludes police control of civilians except so far as they interfere in military affairs. With the police control of civilians, military law is chiefly concerned. Courts martial are permanent, and run in parallel lines with civil courts; are not only consistent with, but essential to constitutional and liberal government; and are subject, so far as their right to imprison and punish is concerned, to the jurisdiction of the judiciary of the land.¹ Military law for the time being absorbs the local civil law and deposes the local judiciary, except so far as the military governor may allot to them authority. Martial law is permanent, cosmopolitan, and administered by courts special to each case. Military law is special, provincial, limited in duration to the period of military occupancy, yet usually administered while it lasts by a permanent court, hearing all cases of litigation that arise.²

Such is the primary meaning of martial law, as distinguished

¹ The King's Bench has always assumed this position in England (*e.g.*, in Governor Wall's Case); and in this country a similar supremacy has been maintained by the federal courts. It is no answer to this position, that the action of courts in granting writs of *habeas corpus* in reference to persons under martial control has been held inoperative. This is in subordination

to the law of the land as pronounced by the Supreme Court of the United States, which, in all federal matters, involving the control of the federal army, is supreme. See *In re Davison*, 21 Fed. Rep. 618, 1884.

² See Whart. Cr. Pl. & Pr. § 979, note; Whart. Com. Am. Law, §§ 37, 579.

from military law. The term martial law, however, is used in a secondary sense, to denote the law imposed by the supreme authority of the country for the preservation of order in periods of insurrection, or other great public emergency.¹

§ 295. (2) The judgment of a military court, having *de facto* authority in a province under military control, is a bar to further prosecutions for the same offence in civil tribunals in the same country.² Whether the judgments of courts martial are a bar depends upon the question whether by the local applicatory civil law such courts have jurisdiction.³

¹ See Whart. Com. Am. Law, §§ 37, § 283; that they may defend on ground of necessity, or superior order, see 38.

² See *Coleman v. State*, 97 U. S. 309, 1878, cited *supra*, § 293; *State v. Hibdom*, 23 Fed. Rep. 795, 1885. Whart. Cr. Pl. & Pr. §§ 435, 439.

On the topic of the text see Benet on Military Law; De Hart, Military Law; Finlason on Martial Law; Poland's Military Dig.

³ That belligerents, when acting without authority of law, are subjected to penal discipline, see *infra*, § 439.

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of necessity, or superior order, see *supra*, §§ 95, 283; *infra*, § 310; that seizure by them of goods is not larceny, see *infra*, § 890. The New York Penal Code of 1882, does not by its own exceptions apply to any power conferred by law on military authorities to punish offenders. That military and naval officers are subject to the law of the land, see *infra*, § 431. See cases in Whart. Cr. Pl. & Pr.

BOOK II.

CRIMES.

PART I.—OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE.

I. DEFINITIONS.

Murder is killing with malice aforethought, § 303.

Voluntary manslaughter is intentional killing in hot blood, § 304.

Involuntary manslaughter is negligent killing, § 305.

Excusable homicide is either non-negligent, non-malicious killing, or killing in self-defence or necessity, § 306.

Justifiable homicide is homicide in discharge of a duty, § 307.

In verdict there is no distinction between excusable and justifiable homicide, § 308.

II. CERTAIN REQUISITES OF HOMICIDE IN GENERAL.

Deceased must have been living at mortal blow, § 309.

Death must be imputable to defendant's act, § 309 *a*.

Accelerating death is homicide, § 309 *b*.

The homicide must not have been in legitimate public war, § 310.

There must be proof of *corpus delicti*, § 311.

Death must have been within a year and a day, § 312.

Malice is to be inferred from circumstances, § 313.

When there is deliberate unlawful killing, malice is inferred, § 314.

If intent be only to inflict a slight offence, killing is but manslaughter, § 315.

Killing when intending to produce miscarriage is murder, § 316.

When unintended person has been killed by mistake, it has been ruled that offence is the same as if intended person had been killed, § 317.

Objections to this view, § 318.

Malice to a class covers malice to an individual, § 319.

By older writers killing with intent to commit collateral felony is murder, § 320.

This conclusion is incompatible with reason, § 321.

Proper course is to indict for attempt and for manslaughter, § 322.

Unintentional homicide incidental to an unlawful act is manslaughter, § 323.

So in respect to assault, § 324.

So in respect to miscarriages, § 325.

So as to riots, § 326.

So as to illicit intercourse, § 327.

So as to suicide, § 328.

III. NEGLIGENT HOMICIDE.

Omission in discharge of lawful duty is indictable, § 329.

Omission to perform acts of charity not indictable, § 330.

Otherwise as to lawful duties; father and child, § 331.

Husband and wife, § 332.

Keepers, jailers, etc., § 333.

Incapacity a defence, § 334.

So is capacity on part of person neglected, § 335.

Conscientious opinion as to duty, when a defence, § 336.

Engineers and other officers liable for omissions, § 337.

So of persons employed to give warning as to danger, § 338.

No indictment lies for failure in discretionary duty, § 339.

Must be causal connection between the negligence and the injury; contributory negligence, § 340.

Master liable for servant, § 341.

No defence that business was lawful, § 342.

Negligent use of dangerous agencies indictable, § 343.

Fire-arms and powder, § 344.

Poison, § 345.

Intoxicating liquors, § 347.

Officers of railroads liable for death ensuing from their want of care, § 348.

When there is duty there is liability, § 349.

But duty must be specific, § 350.

Killing by negligently dropping articles is manslaughter, § 351.

Liability of steamboat officers, § 352.

Death produced by careless driving is manslaughter, § 353.

Rapidity which puts horse out of control is negligence, § 354.

Care to be that of prudent drivers, § 355.

All concerned liable as principals, § 356.

Letting loose noxious animals, § 357.

Killing of helpless person by negligent act is manslaughter, § 358.

Death of child by parent's negligent act is manslaughter, § 359.

So as to master and apprentice and master and servant, § 360.

So of jailers and other guardians, § 361.

Physicians responsible for lack of ordinary diligence and skill, § 362.

Not responsible if patient were direct cause of injury, § 363.

No difference between licensed and unlicensed practitioner, § 364.

Culpable ignorance imposes liability, § 365.

Careless or ignorant use of dangerous agencies is negligence, § 366.

Gratuitousness does not affect case, § 367.

Apothecaries and chemists liable on same principles, § 368.

By persons running machinery care must be exercised in proportion to danger, § 369.

So when death is caused by negligent desertion of post, § 370.

IV. KILLING IN ATHLETIC SPORTS.

Prize-fighters liable for manslaughter in cases of non-malicious killing, § 371.

And so of participants in unlawful sports, § 372.

But not so in lawful athletic sports, § 373.

In practical jokes responsibility attaches, § 373 *a*.

V. CORRECTION BY PERSONS IN AUTHORITY.

Killing by undue correction is manslaughter, § 374.

VI. STATUTORY DISTINCTIONS.

Old English law indifferent to grades of guilt, § 375.

Analysis of statutes, § 376.

Pennsylvania and cognate statutes leave distinction between murder and manslaughter untouched, making specific intent to take life the general feature of murder in first degree, § 377.

"Wilful" means specifically willed, § 378.

"Deliberate" to be regarded as qualifying "killing," § 379.

"Premeditated" an essential incident, § 380.

Facts from which premeditation may be inferred, § 381.

Killing B. when intent was to kill C. is murder in the first degree, § 382.

Grade of homicide when the individual killed is one of a group generally attacked is determined by the general intent, § 383.

Killing in perpetration of enumerated felonies not necessarily murder in the first degree, § 384.

And so of homicide by poison and lying in wait, § 385.

Homicide incidental to unenumerated felony is manslaughter, § 386.

Under the statutes "attempt" must be a substantive offence, § 387.

Murder in second degree includes murder where there was no specific intent to take life, § 388.

Murder in drunkenness is murder in second degree, § 389.

Killing a woman with intent to produce abortion may be murder in the second degree, § 390.

Murder in second degree a compromise courts unwilling to disturb, § 391.

In cases of doubt presumption is for murder in second degree, § 392.

Common law indictment for murder sufficient to sustain either degree, § 393.

Verdict should specify degree, § 394.

VII. RIOTOUS HOMICIDES.

In cases of killing in war against government for private purposes indictment should be for murder, § 395.

Co-rioters principals in riotous killing, § 396.

But not in collateral crimes, § 397.

Presence without intent to kill involves manslaughter, § 398.

Killing by lynch-law is murder in first degree, § 399.

If there be cooling-time, offence may be murder, § 399 a.

Private persons may kill in suppression of riot, § 400.

VIII. HOMICIDE BY OFFICERS OF JUSTICE.

Killing in obedience to warrant justifiable, § 401.

And so when necessary to effect an arrest, § 402.

Murder for officer intentionally to kill a person flying from civil arrest, § 403.

Otherwise in respect to felonies, § 405.

Killing by officer in prevention of escape justifiable, § 406.

So when necessary to preserve peace, § 407.

Lawful arrest unlawfully executed imposes responsibility, § 408.

Legal warrant necessary, § 409.

Private persons interfere at their own risk, § 410.

So as to military and naval officers, § 411.

Officer in danger of life may take life, § 412.

IX. HOMICIDE OF OFFICERS OF JUSTICE AND OTHERS AIDING THEM.

Intentional killing of officer lawfully arresting is murder, § 413. But manslaughter when arrest is illegal, § 414.

Constables and policemen have authority to arrest when public order is threatened, § 415.

Bailiff's powers limited to arrest, § 416.

Officer executing process must be within jurisdiction, § 417.

Notice may be inferred from facts, § 418.

If there be no notice, killing in self-protection is not murder, § 419.

Warrant must be executed by party named or his assistant, § 420.

Warrant continues in force until executed, § 421.

Erroneous or blank warrant inoperative, § 422.

Falsity of charge no alleviation, § 423.

Warrant without seal is void, § 424.

But not so as to informality not amounting to illegality, § 425.

Warrant need not be shown, § 426.

Arrest on charge of felony unlawful without warrant, § 427.

Arrest may be made during offence without warrant, § 428.

For past offences limited to felonies and breaches of the peace, § 429.

Killing of officer arresting on probable felony is murder, § 430.

Military and naval officers subject to same rules, § 431.

Persons aiding officers entitled to protection of officers, § 432.

So as to private person lawfully arresting independently of officer, § 433.

Pursuer must show that felony was committed, etc., § 434.

Private person may interfere to prevent crime, § 435.

Indictment found, good cause of arrest by private person, § 436.

Railway officer may arrest misbehaving passenger, § 437.

Arrest for breach of peace illegal without *corpus delicti*, § 438.

In cases of public disorder officers may enter houses to arrest, § 439.

Private persons interfering to quell riots should give notice, § 440.

Must be reasonable grounds to justify arrest of vagrants, § 441.

Time of execution of arrest, § 442.

Manslaughter when officers take opposite parts, § 443.

A. aiding B. in resisting is in the same position as B., § 444.

X. INFANTICIDE.

When death occurs before child has independent circulation, offence is not homicide; otherwise when the child is born alive and dies after birth, § 445.

Birth a question of fact, § 446.

Negligent exposure of children is manslaughter, § 447.

XI. SUICIDE.

Surviving principal in suicide indictable for murder, § 448.

At common law no conviction of accessories before the fact, § 449.

Killing when assisting in producing abortion, § 450.

Consent of deceased no bar to prosecution, § 451.

Killing another with his consent to avoid greater evil, § 452.

Killing another incidentally to suicide is manslaughter, § 453.

Attempt to commit suicide is misdemeanor, § 454.

XII. PROVOCATION AND HOT BLOOD.

Loss of self-control essential to defence, § 455.

Words of reproach no adequate provocation for an assault with intent to kill, § 455 *a*.

When person is touched with apparent insolence, then provocation reduces degree, § 456.

Interchange of blows induced by insulting words reduces to manslaughter, § 457.

A slighter provocation extenuates when intent is only to chastise, § 458.

Husband in hot blood killing adulterer, guilty of manslaughter, § 459.

Same principle to be extended in cases of punishment, when in hot blood, of attacks on the chastity of persons under the rightful protection of defendant, § 460.

Killing to redress a public wrong is murder, § 461.

A bare trespass on property not an adequate provocation in cases of intentional killing, § 462.

Exercise of a legal right no just provocation, § 463.

Spring-guns illegal when placed on spots where innocent trespassers may wander, § 464.

For master of house knowingly to kill visitor is murder, § 465.

When such killing is in hot blood it is manslaughter, § 466.

When such killing is in self-defence it is excusable, § 467.

Manslaughter to kill master of house expelling defendant with unnecessary violence, § 468.

Killing a person having legal right to enter room is murder, § 469.

A blow is sufficient provocation when parties are equal, § 470.

In sudden quarrels immaterial who struck the first blow, § 471.

But the blow must have been apparently intended, and naturally calculated to arouse the passions, § 472.

Cool and deliberate use of disparity to kill is murder, § 473.

Malice implied from concealed weapon, § 474.

Where mortal blow was given after deceased was helpless, offence is murder, § 475.

And so where attack was sought by person killing, § 476.

Question of continuance of old grudge is for jury, § 477.

Malicious killing in another's quarrel is murder, but killing in hot blood is manslaughter, § 478.

In interference by friends, hot blood extenuates in proportion to the nearness of the relationship, § 479.

Cooling-time dependent upon circumstances, § 480.

Restraint or coercion is adequate provocation, § 481.

Killing in duel is murder, § 482.

And this extends to the seconds, § 483.

XIII. EXCUSE AND JUSTIFICATION.

1. *Repulsion of Felonious Assault*, § 484.

Force of defence to be proportioned to force of attack, § 484.

Conflict provoked by defendant is no defence, § 485.

But where defendant withdraws from such conflict, then his right of self-defence revives, § 486.

Retreat is necessary when practicable, § 486 *a*.

Prior malice by defendant does not abrogate defence, § 486 *b*.

Attack cannot be anticipated when the law can be resorted to, § 487.

Otherwise when there is no organized government, § 487 *a*.

Whether the danger is apparent is to be determined from the defendant's standpoint, § 488.

Impracticable to take ideal "reasonable man" as a standard, § 489.

Analogy from cases of interference in others' conflicts, § 490.

On principle, the test is the defendant's honest belief, § 491.

But although the defendant believes he is in danger of life, he is guilty of manslaughter if this belief is imputable to his negligence, § 492.

Apparent attack, to be an excuse, must have actually begun, and must be violent, § 493.

Right extends to parent and child, husband and wife, and master and servant, § 494.

2. *Prevention of Felony*, § 495.

Bonâ fide non-negligent belief that a felony is about to be perpetrated excuses homicide in its prevention, § 495.

Right cannot usually be exercised when there is an opportunity to secure offender's arrest, § 496.

If felonious attempt is abandoned and offender escapes, killing him without warrant in pursuit is murder, § 497.

No killing is excusable if the crime resisted could be prevented by less violent action, § 498.

Felonies and riots may be thus prevented, § 499.

Trespass no excuse for killing trespasser, § 500.

Owner may resist violent removal of property, or attack upon his

rights, but not attack on his honor, § 501.

3. *Protection of Dwelling-house*, § 502.

A person when attacked in dwelling-house need retreat no further, § 502.

House may be defended by taking life, § 503.

But right is only of self-defence and prevention, § 504.

Friends may unite in such a defence, § 505.

Right does not excuse killing intruder in house, § 506.

Killing by spring-guns, when necessary to exclude burglars, excusable, § 507.

4. *Execution of Laws*, § 508.

Killing under mandate of law justifiable, § 508.

5. *Superior Duty*, § 509.

Risk of killing another to be, in extreme cases, preferred to certain death, § 509.

6. *Necessity*, § 510.

Defence only good when danger is immediate, and when the life of the defendant can only be saved by the sacrifice of the deceased, § 510.

Self-preservation in shipwreck, § 511.

XIV. INDICTMENT.

Venue must aver jurisdiction, § 512.

Deceased must be individuated, § 512 *a*.

Averment of relationship between deceased and defendant when such is necessary, § 513.

When variance as to intent to kill is fatal, § 514.

"In the peace of God," etc., is not a necessary averment, § 515.

Deceased must have been living at time of blow, § 516.

"Feloniously" and "of malice aforethought" are necessary at common law, § 517.

Allegation of assault necessary in violent homicides, § 518.

At common law general character of instrument of death must be correctly given, § 519.

Variance in this respect is fatal, § 520.

When death is alleged to have been by compulsion, circumstances must be averred, § 521.

Acts of agent or associate may be averred as acts of principal, § 522.

Variance in description of poison not fatal, § 523.

Scienter requisite in poisoning, § 524.

Unknown instrument need not be averred, § 525.

When counts are inconsistent, verdict should be taken on good counts, § 526.

Value of instrument need not be proved, § 527.

Allegation of hand of defendant need not be made, § 528.

Averment of time need not be repeated, § 529.

Word "struck" is essential when there has been a blow, § 530.

But not necessary in cases of poisoning, § 531.

General description of place of wound is sufficient, § 532.

Term "wound" to be used in a popular sense, § 533.

Exactness no longer necessary in description of wound, § 534.

When two mortal wounds are averred, either may be proved, § 535.

Death must be averred, § 536.

Must have been within a year and a day, § 537.

Place of death must be averred, § 538.

Omission of "malice aforethought" and "murder" reduces offence to manslaughter, § 539.

Varying counts may be joined, § 540.

XV. VERDICT.

Conviction or acquittal of manslaughter acquits of murder, § 541.

Jury may convict of minor degree, § 542.

Verdict must specify degree, § 543.

At common law can be no conviction of assault on indictment for murder, § 544.

In excusable homicide verdict is not guilty, § 545.

May be accessory to murder in second degree, § 546.

When requisite verdict must designate punishment, § 547.

§ 302. HOMICIDE, at common law, is divided into the following heads:

I. Murder.

II. Manslaughter.

III. Excusable Homicide.

IV. Justifiable Homicide.

I. DEFINITIONS.

§ 303. Murder, as defined at common law, is where a person of sound memory and discretion unlawfully and feloniously kills any human being, in the peace of the sovereign, with malice prepense or aforethought; either express or

Murder is killing with malice aforethought.

implied.¹ So far, however, as this definition is distinctive it is inconclusive. Murder is distinguished from other kinds of killing by the condition of malice aforethought; but malice is a term which requires, as has been already seen, peculiar exposition and limitation.² Nor do the words "premeditation" or "aforethought" relieve the definition from ambiguity. What is "premeditation" or "aforethought"? Can the mental processes by which conclusions are reached be measured by the flow of time? Does not intention itself logically include prior thought? Under these circumstances we must hold that the definition just given, authoritative as it is, does not exhaustively describe the offence of murder.³ And we must reach, also, a second conclusion: if the sagacity of our jurists working on this important topic for so long a series of years has been unable to construct a terse, satisfactory definition of murder, this is because such a definition cannot, from the nature of the thing to be defined, be constructed. In order, therefore, to understand what murder is, we must study the subject in the concrete. When each particular case is presented to the jury, terms can readily be found, in aid of the common law or statutory definition, to reach the merits of such case. But a definition which is large enough to cover all cases in advance must be necessarily so general that each of its leading terms will require a new definition to make it exact.⁴

¹ Inst. 47, 51; 2 Ld. Raymond, death of, or grievous bodily harm to, 1487; 1 Hale, 425; 1 Hawk. c. 13, any person, whether such person is ss. 3, 8; Kel. 3d ed. p. 171; Fost. 256; the person actually killed or not.

⁴ Bl. Com. 198; Lewis C. L. 353, "(b) Knowledge that the act which 394. See *State v. Thomas*, 78 Mo. causes death will probably cause the 327, 1883; *People v. Schmidt*, 63 Cal. death of, or grievous bodily harm to, 28, 1882. As to malice, see *supra*, some person, whether such person is § 106. the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

² *Supra*, §§ 106 et seq.

³ As to malice, see *supra*, §§ 106 et seq.; *infra*, §§ 313, 314.

⁴ See Whart. on Hom. § 2, and notes; and see *Firt v. State*, 3 Baxt. 358, 1869.

According to Sir J. F. Stephen, "Malice aforethought means any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused, and it may exist where that act is unpremeditated.

"(a) An intention to cause the

"(c) An intent to commit any felony whatever.

"(d) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty

of keeping the peace or dispersing an

§ 304. Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought.¹ Voluntary manslaughter is an intentional killing in hot blood, and differs from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice aforethought, which is the essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionately lenient.²

Voluntary manslaughter is intentional killing in hot blood.

§ 305. Involuntary manslaughter, according to the old writers, is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed.³ Hence it is involuntary manslaughter where the death of another occurs through the defend-

Involuntary manslaughter is negligent killing.

unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed.

"The expression 'officer of justice' in this clause includes every person who has a legal right to do any of the acts mentioned, whether he is an officer or a private person." Dig. C. L. 5th ed. art. 244; *Stout v. State*, 90 Ind. 1, 1883.

¹ 1 Bl. Com. 191; 1 Hale, 449; 1 Hawk. c. 12, ss. 1, 2. See *Bailey v. State*, 70 Ga. 617, 1883; *People v. Jamarillo*, 57 Cal. 111, 1880. See *State v. Spendlove*, 47 Kans. 160, 1891, for manslaughter under statutes of Kansas. See, also, *State v. Munchrath*, 78 Iowa, 268, 1889.

² 1 East P. C. 232. *R. v. Mawgridge*, Kel. 3d ed. 166, 1709; *Lord Cornwallis's Case*, Dom. Proc. 1678; 2 St. Tr. 730; *Parker, J., Selfridge's Case*, 158; *Ex parte Tayloe*, 5 Cow. 39, 1825; *Com. v. Buron*, 4 Dall. 125, 1792; *Pennsylvania v. Lewis*, Addis. 279, 1796; *Com. v. Drum*, 58 Pa. 9, 1868; *Erwin v. State*, 29 Ohio St. 186, 1876; *Stout v. State*, 90 Ind. 1, 1883; *Com. v. Mitchell*, 1 Va. Cas. 716, 1817; *State v. Smith*, 10 Rich. (Law) 341, 1855; *Stokes v. State*, 18 Ga. 17, 1853;

Perry v. State, 43 Ala. 21, 1870; *Murphy v. State*, 31 Ind. 511, 1869; *People v. Freel*, 40 Cal. 436, 1871; *Williams v. State*, 15 Tex. App. 617, 1884; *Smith v. People*, 142 Ill. 117, 1892; *Davis v. People*, 114 Ill. 86, 1885; *Sullivan v. State*, (Ala.) 15 So. Rep. 264, 1894; *Boatwright v. State*, 89 Ga. 140, 1892; *Von Gundy v. Com.*, (Ky.) 12 S. W. Rep. 386, 1889.

By § 189 of the New York Penal Code of 1882 only two degrees of manslaughter are recognized: 1st. Homicides in commission of misdemeanors or in the heat of passion, but in a cruel or unusual manner; 2d. All other forms of homicide not murder, or excusable, or justifiable.

It is no defence to an indictment for manslaughter that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was, therefore, murder; but the defendant in such case may, notwithstanding, be properly convicted of the offence of manslaughter. *Com. v. M'Pike*, 3 Cush. 181, 1849.

³ *Infra*, §§ 329 *et seq.*, 371 *et seq.* See *Buckner v. Com.*, 14 Bush, 601, 1878.

ant's negligent use of dangerous agencies;¹ and so where death incidentally but unintentionally results in the execution of a trespass.²

The distinction, however, between voluntary and involuntary manslaughter is now obsolete, in most jurisdictions, so far as concerns the common law.³ Unless it should be required by statute, the terms "voluntary" and "involuntary" are not now introduced either in indictment, verdict, or sentence. But where the distinction is made by statute, there can be no conviction of involuntary manslaughter on an indictment for voluntary manslaughter.⁴

§ 306. *Excusable homicide* is of three kinds: 1st. Where a man doing a *lawful* act, without any intention of hurt, non-negligently kills another; as, for instance, where a man is hunting in a park, and unintentionally kills a person concealed. This is called homicide *per infortuniam*, or by misadventure.⁵ 2d. *Se defendendo*, or in self-defence, which exists where one is suddenly assaulted, and, in the defence of his person, where immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant. By the older text-writers this species of homicide is sometimes called chance medley or *chaud medley*, words of nearly the same import. As will hereafter be explained more fully, the same right of self-defence is extended to the relations of master and servant, parent and child, and husband and

¹ *Infra*, §§ 329 *et seq.* *R. v. Murray*, Center, 35 Vt. 378, 1862. That there can be no aiders or abettors in involuntary manslaughter, see *Adams v. State*, 65 Ind. 565, 1879.

² See, however, *contra*, *Price v. Com.*, 38 Gratt. 819, 1879; *Brown v. State*, 34 Ark. 232, 1879.

³ *Com. v. Gable*, 7 S. & R. 423, 1821; *Walters v. Com.*, 44 Pa. 135, 1862; *Bruner v. State*, 58 Ind. 159, 1878. See *Lyman v. State*, 89 Ga. 337, 1892; *Handly v. State*, (Ky.) 24 S. W. Rep. 609, 1894; *State v. Gile*, 8 Wash. 12, 1894.

⁴ *1 Hale*, 449; *Fost.* 270; *R. v. Archer*, 1 F. & F. 351, 1858; *State v. Turner*, Wright, 20, 1801; *State v. Smith*, 32 Me. 369, 1851; *State v.*

wife; and to those cases where homicide is committed in the defence of important rights; and where no more force is used and no other instrument or mode is employed, than is necessary and proper for such purpose.¹ 3d. Killing from necessity, which is elsewhere discussed.²

§ 307. *Justifiable homicide* is that which is committed, either, 1st. In discharge of a duty, such as by an officer executing a criminal pursuant to the death warrant and in strict conformity to the law;³ 2dly. In prosecution of public justice, as where officers or their assistants kill as a necessary incident to an arrest;⁴ or 3dly. For the prevention of any atrocious crime, attempted to be committed by force, such as murder, robbery, house-breaking in the night-time, rape, mayhem, or any violent act of felony against the person.⁵ But in such cases the attempt must be not merely suspected but apparent, and the danger must be apparently imminent, and the opposing force or resistance apparently necessary to avert the danger or defeat the attempt.⁶

Justifiable homicide is homicide in discharge of a duty.

§ 308. The distinction, in result, between justifiable and excusable homicide is now practically abandoned.⁷ In former times, in the latter case, as the law presumed that the slayer was not wholly free from blame, he was punished, at least by forfeiture of goods. But in this country such a rule is not known ever to have been recognized; it having been the practice here, as it now is in England, where the grade does not reach manslaughter, for the jury, under the direction of the court, to acquit of the homicide.⁸

In verdict there is no distinction between excusable and justifiable homicide.

¹ *Infra*, §§ 484 *et seq.*

² *Supra*, §§ 95 *et seq.*; *infra*, § 510.

³ *Infra*, § 401.

⁴ See *infra*, §§ 401 *et seq.*

⁵ *U. S. v. Wiltberger*, 3 Wash. C. 515, 1818; and see *State v. Rutherford*, 1 Hawks, 78, 457, 1822; *State v. Roane*, 2 Dev. 58, 1829.

⁶ 4 Bl. Com. 182; 1 Russ. on Crimes, 9th Am. ed., 893-899. *Infra*, § 484.

⁷ According to Sir J. F. Stephen, "the ancient law was that in cases where homicide was proved to be

strictly justifiable, the jury might acquit, but that in cases of homicide *per infortuniam* and *se defendendo*, they were to give a special verdict, and the prisoner was to be pardoned as of course, the reason being that the party forfeited his goods at common law." 3 Steph. Hist. Crim. Law, 76.

But this gave way early in the last century to the practice of taking "general verdicts of acquittal in plain cases of death *per infortuniam*, and also, it seems, of *se defendendo*." Ibid.

⁸ See *infra*, § 545.

II. CERTAIN REQUISITES OF HOMICIDE IN GENERAL.

§ 309. It is essential in all cases to show that the deceased was living at the time when the alleged mortal blow was struck.¹ Thus where it was doubtful, in a case where a mother was charged with throwing a child overboard, whether it was living or dead at the time, it was held that it rested on the government to show it was living at the time, it appearing that the mother was laboring under puerperal fever, and the idea of malice being thereby excluded.² The presumption that a person proved to have been alive at a particular time is still so, holds until it is rebutted by the lapse of time, or other satisfactory proof.³ Hence it follows that in cases of infanticide it must be shown that the child was born alive.⁴ And for this purpose proof of an independent circulation on the part of the child is necessary.⁵

Deceased must have been living at mortal blow.

Death must be imputable to defendant's act.

Accelerating death of dying is homicide.

§ 309 *a*. As has been already fully illustrated, the death must be traced to the blow charged to the defendant.⁶

§ 309 *b*. It follows from what has been said that accelerating a death of a person diseased or wounded is homicide.⁷

§ 310. The words, "in the peace of God and the said Commonwealth, then and there being," as used in the indictment, and in the definition of murder, mean merely that it is not murder to kill an alien enemy in course of war;⁸ at the same time it must be remembered that killing even an alien enemy, unless such killing occur in the actual exercise of war, is murder.⁹

The homicide must not have been in legitimate public war.

¹ See *supra*, § 155; *infra*, § 516; and Ind. 317, 1892; State *v.* Hambright, see Whart. on Crim. Ev. § 327. As 111 N. C. 707, 1892; McDaniel *v.* to assaults on a dead body supposed State, 76 Ala. 1, 1884; Denman *v.* to be alive, see *supra*, § 128. State, 15 Nebr. 138, 1883.

² U. S. *v.* Hewson, 7 Boston Law Rep. 361, per Story, J., 1844.

³ Com. *v.* Harman, 4 Barr, 269, 1846; Whart. on Crim. Ev. §§ 324, 810.

⁴ See Whart. on Crim. Ev. § 327.

⁵ State *v.* Winthrop, 43 Iowa, 519, 1876. See *infra*, § 445.

⁶ *Supra*, §§ 153 *et seq.*, 159; and see *infra*, § 340. See People *v.* Ah Luck, 62 Cal. 503, 1882; Hall *v.* State, 132

⁷ *Supra*, § 155 *a*. See State *v.* Castello, 62 Iowa, 404, 1883; Baker *v.* State, 30 Fla. 41, 1892; People *v.* Lanagan, 81 Cal. 142, 1889.

⁸ Whart. Conf. of Laws, § 911; 3 Inst. 50; 1 Hale, 433. *Supra*, § 271; *infra*, § 575.

⁹ 1 Hale, 433; 3 Inst. 50; State *v.* Gut, 13 Minn. 341, 1867.

The plea of an Indian war with the United States cannot avail as an excuse for murder committed by "friendly" Indians, of "Indians at war," and in a part of the country not involved in hostilities.¹

But homicide by any person forming part of a belligerent army, recognized as such, is not murder when committed in due course of war.² In such case the rule *respondeat superior* applies.³ And this immunity has been extended to acts done within the territory of one sovereign, under command of a foreign sovereign, in time of peace.⁴

§ 311. The *corpus delicti*, in all cases of homicide, must be proved as an essential condition of conviction. To the *corpus delicti*, in this sense, as is elsewhere seen, it is requisite: 1st, that the deceased should be shown to have died from the effect of a wound; 2d, that it should appear that this

There
must be
proof of
*corpus
delicti*.

¹ *Jim v. Territory*, 1 Wash. Ter. 76, 1859; and see proceedings in the *Modocs' Case*, June, 1873. In *Pennsylvania v. Robertson*, Addis. 246, 1794, the defendant, who was charged with killing an Indian, was permitted to set up, as showing that he had apparent ground for self-defence, that the Indian belonged to a hostile tribe and was himself hostile. Whether a subject of a foreign State is indictable for hostile acts directed by his sovereign is elsewhere considered. *Supra*, §§ 94, 283.

² *Supra*, § 283; *Buron v. Denman*, 2 Ex. 167, 1848; *Secretary of State v. Kamachee*, 13 Moore P. C. 22, 1859; *Smith v. Brazleton*, 1 Heisk. 44, 1870; *Sequestration Cases*, 30 Texas, 688, 1868, and other cases cited in an interesting review of this topic in *Southern Law Rev.* Ap. 1873, 337.

³ *Supra*, §§ 94 *et seq.*, 283. This question is discussed in 2 Steph. Hist. Crim. Law, pp. 63 *et seq.*

The right to kill in war is limited to combatants in contending armies. None but a recognized soldier can ex-

ercise it, and only against recognized soldiers in arms. It is, therefore, homicide for a soldier to kill a citizen unarmed, or even a disarmed enemy; and, on the other hand, it is homicide for a private citizen to kill a soldier belonging to a hostile army. But when a nation is roused to guerilla resistance to an invader, and when the public passion is in continuous excitement, the offence may be but manslaughter. Whether or no a State can call forth its citizens as individuals to resist an invasion or rebellion, so as to justify such citizens in killing, otherwise than in open battle, members of the hostile army, is a question that will be decided one way if it comes up before the military tribunals of the army thus assailed, and another way if it comes up before a jury of the country that invokes this private warfare. On general principles, it has been argued, such killing is felonious homicide, though as committed in hot blood, not murder unless it were the cover for the wreaking of private revenge. But the better

⁴ *Supra*, § 283.

wound was unlawfully inflicted, and that the defendant was implicated in the crime. The evidence on these points is discussed in another volume.¹

The death
must have
been
within a
year and a
day from
the injury.

§ 312. By the English common law the death must have occurred within a year and a day from the date of the injury received;² and, hence, an indictment which does not aver the death to have occurred within this limit is fatally defective.³

Malice to
be inferred
from cir-
cum-
stances.

§ 313. The old distinction between express and implied malice cannot be logically maintained.⁴ There is no case of malicious homicide in which the malice is not inferred from the attendant circumstances; no case in which it is demonstrated as express. We have no power to ascertain the cer-

opinion, as is shown by Holtzendorff, 633; State v. Flanagan, 26 W. Va. 116, 1885; Zoldoske v. State, 82 Wis. 580, 1892; Dreessen v. State, 38 Nebr. 375, 1893; McBride v. People, (Colo.) 37 Pac. Rep. 953, 1894. Motive need not be shown in first instance. State v. Schieler, (Idaho) 37 Pac. Rep. 272, 1894; Harris v. State, 30 Tex. App. 549, 1891; Jackson v. State, 29 Tex. App. 458, 1891; Melcik v. State, (Tex.) 24 S. W. Rep. 417, 1893. See Com. v. Johnson, (Pa.) 29 Atl. Rep. 280, 1894; People v. Downs, 123 N. Y. 558, 1890; State v. Roberts, 63 Vt. 139, 1890; Welsh v. State, 97 Ala. 1, 1893.

is, that however a State may violate the law of nations by calling all its subjects to join in destroying an invader by private as well as by public warfare, yet as the subject is bound to obey his sovereign, and as the home law overrules, intra territorially, the law of nations, such command is an absolute defence before the home tribunals, unless personal malice be shown. Holtz. Straf. iii. 423.

¹ Whart. on Crim. Ev. §§ 324-25. See, also, 3 Whart. & St. Med. Jur. §§ 776 *et seq.* This definition of *corpus delicti* has been contested, it being assumed that *corpus delicti* means the dead body of the deceased. But the true meaning of the words is not "body of the deceased," but "body of the crime;" and this involves the essential features of the crime as bearing on the issue. Any other meaning of the term would render nugatory the limitations that the burden of the *corpus delicti* is on the prosecution, and that accomplices are to be corroborated as to the *corpus delicti*. As

adopting the definition of the text, see State v. Dickson, 78 Mo. 439, 1883; Love v. State, 14 Tex. App. 518, 1883; State v. Stowell, 60 Iowa, 535, 1883; Whart. Crim. Ev. §§ 324-5,

² 3 Inst. 53. *Infra*, § 537. See Clark v. Com., (Va.) 18 S. E. Rep. 440, 1893; Thomas v. State, 67 Ga. 460, 1881.

³ State v. Orrell, 1 Dev. 139, 1828; State v. Mayfield, 66 Mo. 125, 1877; People v. Aro, 6 Cal. 207, 1856; People v. Kelley, 6 Cal. 210, 1856. See Whart. on Hom. § 15, for notes. This limitation is not contained in the definition of murder in the New York Penal Code of 1882.

As to causal relations, see *supra*, §§ 153, 157-58.

⁴ *Supra*, § 113. As to what malice is, see *supra*, §§ 106 *et seq.* See State v. Scheele, 57 Conn. 307, 1889; Lovett

tain condition of a man's heart. The best we can do is to infer his intent, more or less satisfactorily, from his acts.¹

Malice in this sense may be considered under the following heads:

1. Intent to kill.

2. Intent to do bodily harm.

§ 314. Where there is a deliberate intent to kill, unless it be in the discharge of a duty imposed by the public authorities, or in self-defence, or in necessity, and killing follows, the offence is murder at common law. And, as will hereafter be more fully seen, an intermediate provocation just prior to the offence forms no defence.² The reason of this is obvious. If all that was necessary for a man to do to relieve himself from the guilt of murder were such provocation, there would rarely be a case of homicide without such provocation being intentionally provoked.³

When there is deliberate, unlawful killing, malice is inferred.

The mode of proving malice, as is elsewhere more fully shown,⁴ is that of the ordinary inductive syllogism: from certain facts, malice

v. State, 30 Fla. 142, 1892; *Moon v. Com.*, 83 Pa. 131, 1876; *People v. State*, 68 Ga. 687, 1882; *Taylor v. Harris*, 136 N. Y. 423, 1893; *People State*, (Tex.) 26 S. W. Rep. 627, 1894; *v. Sliney*, 137 N. Y. 570, 1893; *People Powell v. State*, 28 Tex. App. 393, *v. Martell*, 138 N. Y. 595, 1893; *Com. 1890*; *Page v. State*, (Tex.) 24 S. W. *v. Holmes*, 157 Mass. 233, 1892; *Com. Rep. 420*, 1893; *Boyd v. State*, 28 *v. Buccieri*, 153 Pa. 535, 1893; *Weath-Tex. App. 137*, 1889; *Gallaher v. erman v. Com.*, (Va.) 19 S. E. Rep. 778, 1894; *Johnson v. State*, 90 Ga. 441, 1892; *Gallery v. State*, 92 Ga. 463, 1893; *State v. Ariel*, 38 S. C. 221, 1893; *Sterling v. State*, 89 Ga. 807, 1892; *Grissom v. State*, 62 Miss. 167, 1884; *State v. Levelle*, 34 S. C. 120, 1891; *State v. Deschamps*, 41 La. An. 1051, 1890; *Whitaker v. Com.*, (Ky.) 17 S. W. Rep. 358, 1891; *State v. Ingram*, 23 Oreg. 434, 1893; *Territory v. Bryson*, 9 Mont. 32, 1889; *State v. Rose*, 47 Minn. 47, 1891; *State v. Lentz*, 45 Minn. 177, 1891; *Harris v. State*, 8 Tex. App. 90, 1880; *State v. Ching Ling*, 16 Oreg. 419, 1888; *Murphy v. People*, 9 Colo. 435, 1887.

v. State, 30 Fla. 142, 1892; *Moon v. Com.*, 83 Pa. 131, 1876; *People v. State*, 68 Ga. 687, 1882; *Taylor v. Harris*, 136 N. Y. 423, 1893; *People State*, (Tex.) 26 S. W. Rep. 627, 1894; *v. Sliney*, 137 N. Y. 570, 1893; *People Powell v. State*, 28 Tex. App. 393, *v. Martell*, 138 N. Y. 595, 1893; *Com. 1890*; *Page v. State*, (Tex.) 24 S. W. *v. Holmes*, 157 Mass. 233, 1892; *Com. Rep. 420*, 1893; *Boyd v. State*, 28 *v. Buccieri*, 153 Pa. 535, 1893; *Weath-Tex. App. 137*, 1889; *Gallaher v. erman v. Com.*, (Va.) 19 S. E. Rep. 778, 1894; *Johnson v. State*, 90 Ga. 441, 1892; *Gallery v. State*, 92 Ga. 463, 1893; *State v. Ariel*, 38 S. C. 221, 1893; *Sterling v. State*, 89 Ga. 807, 1892; *Grissom v. State*, 62 Miss. 167, 1884; *State v. Levelle*, 34 S. C. 120, 1891; *State v. Deschamps*, 41 La. An. 1051, 1890; *Whitaker v. Com.*, (Ky.) 17 S. W. Rep. 358, 1891; *State v. Ingram*, 23 Oreg. 434, 1893; *Territory v. Bryson*, 9 Mont. 32, 1889; *State v. Rose*, 47 Minn. 47, 1891; *State v. Lentz*, 45 Minn. 177, 1891; *Harris v. State*, 8 Tex. App. 90, 1880; *State v. Ching Ling*, 16 Oreg. 419, 1888; *Murphy v. People*, 9 Colo. 435, 1887.

malice" and "malice aforethought" have same meaning. *Smith v. State*, 81 Tex. Cr. 14, 1892; *Moody v. State*, 30 Tex. App. 422, 1891; *Ellis v. State*, 30 Tex. App. 601, 1892; *Martinez v. State*, 30 Tex. App. 129, 1891. See *Gonzalez v. State*, 30 Tex. App. 203, 1891, for definition of express malice. *Callahan v. State*, 30 Tex. App. 275, 1891; *Sherar v. State*, 30 Tex. App. 349, 1891; *Baltrip v. State*, 30 Tex. App. 545, 1891.

¹ *Supra*, § 122. See, for a full discussion of this question, Whart. Crim. Ev. § 734; and as to inference to be drawn from other crimes, Whart. Crim. Ev. § 30; and see *Meyers v.*

² *Infra*, § 476.

³ *Mason's Case*, Fost. 132; *East P. C. c. 5*, s. 53.

⁴ Whart. Crim. Ev. § 734.

is to be inferred ; here these facts exist ; hence here malice is to be inferred. The question is one of logic, not of formal law.¹ The inferences to be drawn from the weapons used are also elsewhere distinctively discussed.² As is noticed in a former section, it is not necessary to prove prior evil purpose in order to constitute malice.³ Hence the term “malice aforethought” does not require proof of malice for any prior appreciable period.⁴

§ 315. At common law, the intent to do “enormous” or “severe” bodily harm, followed up by homicide, constitutes murder ; though, as will be seen hereafter, such an offence falls, in those States where this distinction exists, under the head of murder in the second degree. Homicides of this character are numerous ; and it is easy to suppose a homicide in a duel that may be so ranked, *e. g.*, where the intention was to *maim*, not to *kill*. The distinction in a case of this kind is often slight ; and where a statutory line is to be followed, it has been held that when the damage intended was such as would probably result in death, it is murder in the first degree, even though death may have been but incidental to the offender’s purpose.⁵ In all cases of such outrageous hurt as to make the death a natural consequence, we have a right to infer such an intent ;⁶ but it is otherwise when the hurt was less serious, and the presumption of an intent to kill less violent.⁷ Independently of the statutes, it has been said that though A., in anger, from preconceived malice, intend only to severely *beat* B., and happen to kill him, it will be no excuse that he did not intend all the mischief that followed ; for what he did was *malum in se*, and he must be answerable for its consequences. He beat B. with an intention of doing him great bodily harm, and is therefore answerable for all the harm he did.⁸ So if a large stone

If intent
be only to
inflict a
slight
hurt,
offence is
but man-
slaughter.

¹ *Small v. Com.*, 91 Pa. 304, 1879 ; cited *supra*, §§ 116, 117 ; *infra*, § 380. *Pointer v. U. S.*, 151 U. S. 396, 1893. See *Territory v. Roberts*, 9 Mont. 12,

² *Whart. Cr. Ev.* §§ 765, 768, 774–9 ; 1889.

Bishop v. State, 62 Miss. 289, 1884 ; ⁵ *Com. v. Green*, 1 Ashm. 289, 1826 ; *Smith v. People*, (Ill.) 142 Ill. 117, *Mayes v. People*, 106 Ill. 306, 1883. 1892 ; *People v. Chapleau*, 121 N. Y. 266, 1890 ; *Brown v. Com.*, (Va.) 19 S. E. Rep. 447, 1894 ; *State v. Whitson*, 111 N. C. 695, 1892. *Vance v. Com.*, (Va.) 19 S. E. Rep. 785, 1894 ; *State v. Murdy*, 81 Iowa, 603, 1891.

³ *Supra*, § 314.

⁶ See *Wellar v. People*, 30 Mich. 16,

⁴ *Ibid.* See *U. S. v. Cornell*, 2 U. S. 1874 ; *State v. Ah Lee*, 8 Oreg. 214, *Mason*, 90, 1820 ; *People v. Clarke*, 7 N. Y. (3 Selden,) 385, 1852 ; *Green v. State*, 13 Mo. 382, 1850 ; and cases

⁷ *Mayes v. People*, 106 Ill. 306, 1883.

⁸ *Fost.* 259. See *supra*, §§ 108–122.

be thrown at one with a deliberate intent to seriously hurt, though not to kill him, and it actually kills him, this is murder.¹ But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in such cases. If the intent be merely to inflict a slight chastisement, and death arises from some peculiarity in the deceased's constitution (*e. g.*, inflammation from a scratch), then the offence is but manslaughter; and so where the injury is only mischievously inflicted, with no intention seriously to hurt.²

§ 316. Under this head we may class attempts to produce miscarriage, resulting in the death of the mother. Killing of this character, when incidental to great bodily harm to the mother, or death to the child, has been held murder at common law.³ It is otherwise, as will hereafter be seen, when there was no intent to do a severe injury, or where the result is attributable merely to negligence.⁴

Killing when intending to produce miscarriage is murder.

§ 317. Where A. aims at B. with a malicious intent to kill B., but by the same blow unintentionally strikes and kills C., this has been held by authorities of the highest rank to be murder;⁵ though if A.'s aim at B. was without malice,

When unintended person is killed by

¹ 1 Hale, 491.

² *Infra*, § 323. See, as taking a more stringent view, *State v. Smith*, 2 Strobh. 77, 1847.

In Vermont, in a case showing peculiar depravity, where a man, in order to have unlawful sexual intercourse with a girl, used artificial means, with her consent, to make such connection practicable, as a result of which the girl died, the killing was held but manslaughter. *State v. Center*, 35 Vt. 378, 1862. This case, supposing the girl was old and intelligent enough to consent, may be sustained on the ground of *Volenti non fit injuria*. See *supra*, § 141. But not otherwise. *R. v. Cox*, R. & R. C. C. 362, 1818; 1 Leach, 71. For to constitute grievous bodily harm, it is not necessary that the injury should be either permanent or dangerous; if it is such as seriously to interfere with comfort or health, the allegation is

sustained. *R. v. Ashman*, 1 F. & F. 88, 1858.

³ *Smith v. State*, 33 Me. 48, 1851; *Com. v. Jackson*, 15 Gray, 187, 1860; *Com. v. Keeper*, 2 Ashm. 227, 1838; *State v. Moore*, 25 Iowa, 128, 1868. See *R. v. Gaylor*, D. & B. C. C. 288; 7 Cox C. C. 253, 1857; and see *infra*, § 390. In Missouri the indictment in such case must, it is said, aver that the woman was quick with child. *State v. Emerick*, 13 Mo. App. 492, 1883. But see *infra*, § 592; *supra*, §§ 185-6.

⁴ *Infra*, §§ 325, 390.

⁵ *Supra*, §§ 107-111, 121, 128; 1 Hale, 379, 439, 466; *Dyer*, 128; *Kel.* (3d ed.) 157, 158, 164; *Pult. de Pace*, 124 b; *Fost.* 261; *R. v. Plummer*, 12 Mod. 627, 1701; *R. v. Holt*, 7 C. & P. 518, 1836; 1 Hawk. c. 13, 44; *State v. Gilman*, 69 Me. 163, 1878; *Com. v. Dougherty*, 7 Smith's Laws, (Pa.) 695, 1807; *State v. Dugan*, 1 Houst.

mistake, it has been ruled that offence is same as if intended party has been killed. the offence would have been but manslaughter.¹ Thus A. gives poison to B., intending to poison her, and B., ignorant of it, gives it to a child, who eats it and dies; this is said to be murder in A., but no offence in B.; and this, though A. who was present at the time endeavored to dissuade B. from giving it to the child.² So where B., a policeman, is lawfully endeavoring to arrest A., and A. shoots at the policeman, and accidentally kills C., this has been held to be murder in A.³ The same rule has been applied, as will be hereafter

C. C. 563, 1873; Callahan v. State, 21 Phil. L. (N. C.) 233, 1867. *Supra*, Ohio, 306, 1871; Wareham v. State, § 120; *infra*, § 346.
25 Ohio, 601, 1874; State v. Benton, In Plummer's Case, where Plummer and seven others opposed the king's officers in the act of seizing wool, one 2 Dev. & Bat. 196, 1837; State v. Fulkerson, 1 Phil. L. (N. C.) 233, 1867; of the prisoners shot off a fusee and Durham v. State, 70 Ga. 264, 1882; killed one of his own party. The Tidwell v. State, 70 Ala. 26, 1881; court held, in giving judgment upon Golliher v. Com., 2 Duvall, 163, 1875; a special verdict, that as the prisoner Angell v. State, 36 Tex. 542, 1871; was upon an unlawful design, if he State v. Raymond, 11 Nev. 98, 1876; had in pursuance thereof discharged State v. Brown, 7 Oreg. 186, 1879; the fusee against any of the king's State v. Johnson, Ibid. 210, 1879. See officers that came to resist him, in the prosecution of that design, intending Lacefield v. State, 31 Ark. 275, 1878. to kill such officer, and by accident In Halbert v. State, 3 Tex. App. 656, had killed one of his own accomplices, 1878; Taylor v. State, Ibid. 387, 1878; it would have been murder in him; McConnell v. State, 13 Ibid. 390, 1883. the reason being that if a man out of malice to A. shoot at him, but miss Cases of this class are held to be murder in the second degree. *Infra*, § 382. Where two conspire to murder another and one of them kills an unintended person by mistake, the co-conspirator is guilty. Jennings v. Com., (Ky.) 16 S. W. Rep. 348, 1891. See Holtz v. State, 76 Wis. 99, 1890.

¹ *Supra*, §§ 120, 121, 128; Levett's Case, Cro. Car. 538; Fost. 262; 1 Hawk. c. 13, s. 47; Leach, 151; R. v. Connor, 7 C. & P. 438, 1836; Morris v. Platt, 32 Conn. 75, 1863; Com. v. Dougherty, 7 Smith's Laws, (Pa.) 695, 1807; Bratton v. State, 10 Humph. 103, 1849; Aaron v. State, 31 Ga. 167, 1861. Killing another while defending self, see Pinder v. State, 27 Fla. 370, 1891.

² 1 Hale, 230; R. v. Saunders, 2 Plowd. Com. 474; R. v. Jarvis, 2 M. & R. 40, 1837; State v. Fulkerson, ³ Angell v. State, 36 Tex. 542, 1871.

seen, to cases of killing in riots. A rioter intends to kill an enemy, but kills a friend. The killing in such case, according to some authorities, is to be treated as of the same grade as it would have been if the person killed was the one whom the defendant intended to kill. Even where the intent was to inflict only serious bodily harm, this rule has been enforced.¹ Under the present usual statutory provisions, the offence in the last case would be murder in the second degree.²

§ 318. The decisions just given may be too firmly settled to be shaken ; but it is not to be denied that in principle they are beset by serious difficulties.³ The reason given is ^{Objections to this view.} that in the killing C. was substituted for B., and that the killing of C. is to be treated, on the basis of this substitution, just as we would treat the killing of B.⁴ But, as has been argued, we cannot positively affirm that B. would have been killed had not C. intervened. It may be, for instance, in a case of shooting of this class, that the very faltering which led to the mis-shot was caused by a want of resolute purpose ; it may be that a great distance was taken at which to shoot at B. as the result of an unwillingness to make a sure shot.⁵ At all events, so it is objected, we have here the spectacle of an attempt—an offence which has a milder punishment—visited with the severe punishment of the consummated offence, simply because the defendant has accidentally committed a distinct offence. When A. sees C. approaching whom he mistakes for B., and says, “This is B., whom I will kill,” and then kills C. thus intervening, A. is guilty of murder as to C., since it was at C. that he aimed.⁶ But if he did not aim at C., but C. was killed by a glance shot, then the offence is but negligent homicide as to the person killed, and an attempt as to the other person. To attempts a milder punishment is assigned, on the ethical ground that as a usual thing a consummated crime supposes greater care in preparation and a greater firmness in execution, and therefore involves a higher degree of criminality, than does an unconsummated crime. The question is not to be confounded with that of *dolus alternativus*, which exists when A., intending to shoot either B. or C., shoots C.,

¹ State v. Smith, 2 Strobb. 77, 1847. Bar, in his treatise on Causalzusammenhange. As to variance in respect

² See *infra*, §§ 375 et seq.

³ See discussion in 10 Cent. L. J. to intent, see Whart. Cr. Ev. §§ 149, pp. 57 et seq. 150.

⁴ See this discussed more fully in Whart. on Homicide, §§ 48-9 ; and by

⁵ See *supra*, §§ 107-14-120-128.

⁶ See *supra*, § 120.

and which is murder, for in such case there is at once a killing and an intent to kill the person killed.¹ Nor can we fall back, it is insisted, on *a priori* reasoning based on the defendant's intent, and hold that because the defendant intended to kill and a killing followed, therefore the intent to do one thing and the doing another are to be fused into one malicious killing. A., for instance, manufactures shells to be exported in violation of neutrality statutes, when a shell explodes and kills C. This, on the principle here contested, is murder, and there is no way, so it is argued, on this hypothesis, of preventing an attempt to kill from coalescing with any collateral accidental homicide which may occur through the instrumentality put in motion to carry out the intent. Yet it is not only possible that in the meantime the defendant may have repented and abandoned his intent, but the law, until the intent is consummated, always assumes such repentance and abandonment as possible, and hence assigns a lighter punishment to the attempt. Supposing the actual homicide to be a mere accident, to which no blame is imputable, we thus use this accident, which occurs to an object wholly collateral, to change an attempt into a murder. The defendant is convicted of killing C. with malice to C. of which he was not guilty, and is not prosecuted for that of which he was guilty, the attempt on B.

Such are some of the points which are raised in reply to the doctrine that in cases of aberration, as they are called, the killing of one person is to be tacked to the intent to kill another, so as to form one complete murder. Were the question still open we might hold it to be the true view, that so far as concerns B., the person whom A. intends to kill, but does not actually kill, A. is guilty only of an attempt to kill. What A.'s offence is as to C., who is not seen by A., but who accidentally interposes, and receives a fatal wound, depends upon whether the shooting was of such a character (*e. g.*, from the place of firing being one in which persons are accustomed to pass) as implies either malice or negligence in A.² If killing C. was within the range of A.'s survey, when he undertook to effectuate his evil intent, the case is murder;³ if not, but the killing arose from the negligent use of the instrument by A., the case is manslaughter.⁴ That the intent to kill B. and the actual killing of C.

¹ See *supra*, § 186; and see *R. v. Holt*, 7 C. & P. 518, 1836; *R. v. Lament*, 6 Cox C. C. 204, 1853.

² See *supra*, §§ 107, 121, 128.

³ See *State v. Lee Vines*, 34 La. An. 1079, 1882.

⁴ This view is accepted by Bramwell, J., in *R. v. Horsey*, cited *infra*, § 320.

cannot be lumped so as to make one offence, when the death of one does not ensue, as a natural consequence, from the attack on the other, is illustrated by the fact that even supposing B. to have been killed, and the shot to have pierced him and then killed C., then the killing of B. and C. are distinct offences, to be separately tried.¹ We may further illustrate the difficulties attending the prevailing doctrine by the case of an executioner, who, when intending to kill a condemned prisoner on the gallows, negligently kills a bystander. On principle, such killing ought to be manslaughter. But on the rulings before us it is justifiable homicide in execution of the law. A., to take another case, in aiming, in self-defence, a blow at B., negligently kills C. According to the prevalent view, A. should be acquitted,² while on principle he should be convicted of manslaughter. On the other hand, if A. kills C., whom he mistakes at the time of the attack for B., this, as we have seen, is murder as to C.³

§ 319. When an action unlawful in itself was done with deliberation, and with intention of killing, or inflicting grievous bodily harm, though the intention be not directed to any particular person, and death ensues, it will be murder at common law;⁴ though if such an original intention does not appear, which is matter of fact, and to be collected from circumstances giving in evidence, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death; because the act upon which death ensued was unlawful.⁵ Thus, if a person breaking in an unruly horse wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder at common law.⁶ If, also, a man recklessly and maliciously throw

Malice to a class covers malice to an individual.

¹ *R. v. Champneys*, 2 M. & R. 26, well, L. & C. 443, 1864; 9 Cox C. C. 1843; *State v. Benham*, 7 Conn. 414, 471; *Hopkins v. Com.*, 50 Pa. 9, 1865; 1829; *People v. Warren*, 1 Parker C. Com. v. Drum, 58 Pa. 9, 1868; *Jack-R.* 338, 1854; *Vaughan v. Com.*, 2 Va. man v. State, 71 Ind. 149, 1880; *Wright Cas.* 273, 1821; *State v. Standifor*, 5 v. Com., 75 Va. 914, 1882; *Robinson v. Porter*, 523, 1837; *Manier v. State*, 6 State, 54 Ala. 86, 1875. See this *Baxt.* 595, 1875. See, also, cases cited question discussed *supra*, §§ 111-113; *Whart. on Cr. Ev.* § 587; *Whart. Cr. infra*, §§ 382-83. Pl. and Pr. § 468.

² *Plummer v. State*, 4 Tex. App. (9th Am. ed.); *Fost.* 261; *Golliher v.* 310, 1878. Com., 2 Duv. 163, 1875; *Lewis v.*

³ See, to this effect, *Barcus v. State*, State, 96 Ala. 6, 1892.

49 Miss. 17, 1873; *supra*, §§ 109, 120. ⁶ 1 Hale, 476; 4 Bl. Com. 200; 1

⁴ 1 Hawk. c. 29, s. 12; *R. v. Fret-East P. C.* 231. *Infra*, § 353.

from a roof into a crowded street, where passengers are constantly passing and repassing, a heavy piece of timber, calculated to produce death to such as it might strike, and death ensue, the offence is murder at common law.¹ It is also murder to kill by firing maliciously into a crowd,² or by maliciously putting an obstruction on a railway track.³ And upon the same principle, if a man, knowing that people are passing along the street, maliciously throw a stone likely to kill, or shoot over a house or wall with intent to do serious harm, and one is thereby slain, it is murder on account of previous malice, though not directed against any particular individual; it is no excuse that the party was bent upon mischief generally.⁴

Where, however, the injury is inflicted negligently, without such recklessness as implies malice, as in negligently letting a piece of timber fall from a roof,⁵ or in negligently driving in the public streets,⁶ or in negligently driving a locomotive engine;⁷ then the offence is but manslaughter.

But when
act is
negligent,
offence is
but man-
slaughter.

¹ *Com. v. Dougherty*, 7 Smith's Laws, (Pa.) 695, 1807; *Boles v. State*, 9 Sm. & M. 284, 1848; *infra*, § 351.

² *Golliher v. Com.*, 2 Duv. 163, 1875; *State v. Edwards*, 71 Mo. 312, 1880; *R. v. Fretwell*, L. & C. 443, 1864; 9 Cox C. C. 471; *Brown v. Com.*, 91 Ky. 472, 1891. *Supra*, § 120; *infra*, §§ 344, 383. That malice is to be inferred in such cases, see *Smith v. Com.*, 100 Pa. 324, 1882.

"A., for the purpose of rescuing a prisoner, explodes a barrel of gunpowder in a crowded street, and kills a number of persons, intending to explode the barrel of powder in the crowded street. A. commits murder, although he may have no intention at all about the people in the street, or may hope that they will escape injury." *R. v. Desmond*, 1868, cited by Sir J. F. Stephen, Dig. Crim. Law, (5th ed.) art. 244. On this Sir J. F. Stephen thus comments: "In this case Lord Chief Justice Cockburn said: 'If a man did an act, more especially if that were an illegal act, although its immediate purpose might

not be to take life, yet if it were such that life was necessarily endangered by it—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it,' that was murder. Times' Report, April 28, 1868. It is singular that this case is noticed in Cox's Reports only for the sake of a point about evidence not the least worth reporting. See 11 Cox C. C. 146, 1868."

This case is further discussed in the London Law Times for May 20, 1882.

³ *Presley v. State*, 59 Ala. 98, 1878; see *Jackmon v. State*, 71 Ind. 149, 1880.

⁴ 1 Hale, 475; 3 Inst. 57; 1 East P. C. 231; *Boles v. State*, 9 Sm. & M. 284, 1848.

⁵ *R. v. Hull*, Kel. (3d ed.) 1664; *R. v. Rigmaidon*, 1 Lewin, 180, 1833. *Infra*, § 351.

⁶ *R. v. Timmins*, 7 C. & P. 499, 1836; *R. v. Grout*, 6 C. & P. 629, 1834; *R. v. Dalloway*, 2 Cox C. C. 273, 1847. *Infra*, § 353.

⁷ See *infra*, § 348.

§ 320. So far as the intent to commit a collateral felony concerns the homicide of one person where the intent was to slay another, the subject has been already discussed; and so far, also, as concerns homicide committed in the perpetration of arson, rape, robbery, or burglary, it will be discussed under the head of statutory homicide.¹ Independently of these points, it is declared by the old English text-writers, as a general rule, that if the act on which death ensues be *malum in se*, it will be murder or manslaughter, according to the circumstances; if done in prosecution of a felonious intent, but death ensues against or beside the intent of the party, it will be murder; but, on the other hand, if the intent goes no further than to commit a bare trespass, it will be manslaughter. The illustration usually given is that where A. shoots at the poultry of B., and, by accident, kills B. himself; if A.'s intent were to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent; but if it were done wantonly and without that intent, it will be merely manslaughter.² It is true that in England the rule is not infrequently so shaded as to bring it into harmony with the principle maintained in these pages. Thus we find that Bramwell, J., after stating in a homicide case the rule as given by the old writers, goes on to say that the law, however, is that a man is not answerable except for the natural and probable result of his own act, and announcing that unless the death was a "natural and probable result" of the felony primarily in view, the defendant could not be convicted of the murder.³ It may also be confidently asserted that, if a man should now be tried for a homicide, which though consequent on killing a tame fowl, was not only unintended by the defendant, but was in no way a "natural or probable result" of an intended larceny, there is no English or American judge who would not say that the homicide was not murder but manslaughter. Yet, nevertheless, the old common law⁴ rule continues to be pro-

By older writers killing with intent to commit collateral felony is murder.

¹ *Infra*, § 384.

² *R. v. Horsey*, 3 F. & F. 287, 1862.

³ *Fost.* 258-9; *Plummer's Case*, 1 *See supra*, § 318.
Hale, 475; 3 *Inst.* 56; *Kel.* (3d ed.) 164; 6 *St. Tr.* 222; 1 *Hawk. c.* 13, s. 44. In *Barrett's Case*, 1868, we have the rule affirmed by Cockburn, C. J., cited in *Stephen's Dig. Crim. Law*, (5th ed.) art. 244; and Sir J. F. Stephen tells us that if "A. shoots at a domestic fowl, intending to steal it, and accidentally kills B.," this is murder. *Ibid.*

⁴ See, particularly, *Smith v. State*, 33 Me. 48, 1851; *State v. McNab*, 20 N. H. 160, 1848; *Com. v. Dougherty*, 7 *Smith's Laws*, 695, 1807; *State v. Cooper*, 1 *Green*, (N. J.) 381, 1833; *State v. Smith*, 2 *Strobh.* 77, 1847; *State v. Shelledy*, 8 *Iowa*, 477, 1859; *State v. Moore*, 25 *Iowa*, 128, 1867; *Weller v. People*, 30 *Mich.* 16, 1874.

claimed as unquestioned law by courts in the United States, incompatible as it is both with logic and with humanity.¹

§ 321. Where a legislature creates a statutory offence, the statutory definition is absolute ; but when there is no statutory enactment, the doctrine that the intent to commit a felony, when collateral to an accidental homicide, constitutes murder, must be rejected for the following reasons :

At common law, this doctrine is unsustainable by reason.

A man who does not intend to commit murder is held guilty of murder, an offence to which a malicious intent to take life or to do grievous bodily harm is essential. The indictment avers a malicious intent to kill the deceased, and a conviction is directed, although the case on both sides shows that there was no such intent, but that the blow was given with an intent entirely different. The only excuse to be given for this is that when all felonies were capital, it made no difference to the defendant what was the felony he was charged with committing. But this reason, such as it is, no longer exists. Larceny and murder have assigned to them distinct punishments ; and it is no longer a matter of indifference to the defendant for which he is to be tried. Nor is it a matter of indifference to juries. A jury must feel itself far more willing to convict a man of larceny than to convict him of murder simply because he intended to steal a tame fowl. Of course, this assumes that the killing of the owner of the fowl was purely accidental, and that so far from it being intended, it was an act against the offender's will. If so, a jury will revolt at conviction ; and the testimony of the judges examined by the English Homicide Amendment Committee shows that rather than permit such a conviction, judges who persist in holding the old rule "contrive" to find for the jury some collateral excuse for acquittal.

§ 322. Wherever the question is still open, the true course, when a homicide negligently takes place in the attempt to commit a felony, is to indict the defendant for an attempt to commit the felony, in one indictment, and for manslaughter in another indictment. Two offences have been committed by him. He must be indicted for them separately.

Proper course is to indict for attempt and for manslaughter.

¹ See note to Whart. on Hom. § 56. Greaves, 1 Russ. on Cr. 740, *note x*, That the English rule in this respect (9th Am. ed.). As illustrating the way in which the rule is practically evaded, authorities is shown by an article in see R. v. Horsey, 3 F. & F. 287, 1862. the London Law Times for August As bearing on the question collaterally, see Thompson v. Dashwood, L. 24, 1878. See, however, article in same paper for July 19, 1884, p. 215. R. 11 Q. B. D. 43, 1883. The rule is strangely vindicated by Mr.

A part of one cannot be broken off and joined to a part broken off from the other, so as to make a new offence. No such new offence can be constituted; for intending to do one thing and then doing another cannot make up one intentional crime. But the negligent homicide, which is manslaughter, may be properly prosecuted in one indictment, and the attempt to commit the felony in another. To join these in one indictment is not permissible; and *a fortiori* it is not permissible to join pieces of the two so as to make up one offence.¹

§ 323. None of the difficulties which beset the last topic attend that which we are now about to notice. Manslaughter necessarily excludes the hypothesis of deliberate malicious killing, and includes all cases where killing takes place in execution of an unlawful design not involving such deliberate malicious intent to kill. We may, therefore, properly hold that where a homicide is unintentionally committed when in the performance of an unlawful act, the offence is manslaughter. Under this head the following cases may be noticed:

Uninten-
tional
homicide
incident to
an unlaw-
ful act is
man-
slaughter.

§ 324. Death unintentionally happening from a mere assault is manslaughter. Thus, where the defendant violently struck A.'s horse, which started and killed B., the defendant was held liable for the manslaughter of B.² So where the defendant, having the right to the possession of a gun, which gun he knew to be loaded, carelessly attempted to snatch it from the hands of the deceased, and during the process the gun was discharged and killed the deceased, this was held manslaughter, and rightfully, for to seize carelessly a dangerous weapon from another is an unlawful act.³

So in re-
spect to
assaults.

§ 325. Supposing a miscarriage be attempted in a way not to inflict serious injury on the mother, and the mother dies from negligence in the operation, there being no intent to kill, or to inflict serious injury, and no likelihood of such result, the offence, on the reasoning above given, is but manslaughter.⁴ It is otherwise when the intent is to seriously injure the

So in re-
spect to
miscar-
riages.

¹ See on this topic *supra*, §§ 109–11. *People v. Olmstead*, 30 Mich. 431,

² 1 Hale, 475; 1 Hawk. c. 29, s. 11; 1874; *State v. Glass*, 5 Oreg. 73, 1873. c. 13, s. 44. *Supra*, § 167; *infra*, § 617. As to Massachusetts statute, see Com.

³ *R. v. Archer*, 1 F. & F. 351, 1837. *v. Brown*, 121 Mass. 69, 1876; Com.

⁴ *Yundt v. People*, 65 Ill. 372, 1872. *v. Blair*, 123 Mass. 242, 1877; s. c. 126 See *Willey v. State*, 46 Ind. 363, 1864; Mass. 40, 1878.

mother, or the act is likely seriously to injure her. In this case her killing is murder.¹

§ 326. Homicide in riots, when there is no intent to kill or to inflict serious bodily harm, is in like manner manslaughter.²

§ 327. The same rule was applied, as has been seen, where a man, in order to have sexual intercourse with a girl, used artificial means, with her consent, to make such intercourse practicable, in consequence of which she died.³

§ 328. It has also been held that whoever, in attempting to commit suicide, unintentionally kills another, is guilty of manslaughter.⁴

III. NEGLIGENT HOMICIDE.

§ 329. We have already seen⁵ that an omission is not the basis of penal action unless it constitutes a defect in the discharge of a responsibility specially imposed. And the converse is true, that when a lawful duty is imposed upon a party, then an omission on his part in the discharge of such duty, when acting injuriously on the party to whom the duty is owed, is an indictable offence.⁶

§ 330. As, in conformity with the definition just stated, the responsibility must be one specially imposed on the defendant, the omission to perform acts of mercy, even though

¹ See *supra*, § 316; *infra*, § 450. 1685; 2 Rol. Ab. 559; 1 Hawk. c. 60, § 23. And it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his death, is guilty of criminal homicide, and, at the least, of manslaughter." See *infra*, § 453.

² See *infra*, § 395.

³ State v. Center, 35 Vt. 378, 1862. See *supra*, §§ 315-16.

⁴ Commonwealth v. Mink, 123 Mass. 422, 1877.

"Suicide," said Gray, C. J., "being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Every one has the same right and duty to interpose and save a life from being so unlawfully and criminally taken, that he would have to defeat an attempt unlawfully to take the life of a third person. Fairfax, J., in 22 E. 4, 45, pl. 10; Marler v. Ayliff, Cro. Jac. 134,

⁵ *Supra*, § 130.

⁶ See this discussed in Whart. on Hom. § 73, in notes. For negligence generally, see *supra*, §§ 125, 130. Compare U.S. v. Knowles, 4 Sawy. 517, 1877; Chrystal v. Com., 9 Bush, 669, 1872; Robins v. State, 9 Tex. App. 666, 671, 1880, and cases in following sections.

An omission to discharge a duty as to drainage may be indictable. R. v. Wharton, 12 Mod. 510.

death to another result from such omission, is not within the rule.¹ One man, for instance, may see another starving, and may be able, without the least inconvenience to himself, to bring food to the sufferer, and thus save the latter's life; but the omission to do this is not indictable, unless there be a special responsibility to this effect imposed on the defendant. Thus it has even been ruled that where the defendant permits an idiot brother, residing in his house, to die from want of food, the defendant, on this evidence alone, is not penally responsible, he not having undertaken the special support of the deceased;² and the same reasoning has been applied to a mother who neglects to supply the wants of a lunatic illegitimate child.³ But the law would be otherwise if it should appear that the defendant, no matter what was his relation to the deceased, had so secluded the deceased that he could be relieved by no one else.⁴

Sir J. F. Stephen states the rule as follows: "Every person under a legal duty, whether by contract or by law, or by the act of taking charge, wrongfully or otherwise, of another person, to provide the necessaries of life for such other person, is criminally responsible if death is caused by the neglect of that duty, and if the person to whom the duty is owing, is, from age, health, insanity, or any other cause, unable to withdraw himself from the control of the person from whom it is due; but not otherwise."⁵

¹ *Supra*, § 132. See *Connaughty v. State*, 1 Wis. 159, 1853; *Burrell v. State*, 18 Tex. 713, 1857.

² *R. v. Smith*, 2 C. & P. 449, 1826. It is otherwise if the control be exclusive. *R. v. Porter*, L. & C. 394, 1864; 9 Cox C. C. 449. *Supra*, §§ 152-169. See, also, *State v. Preslar*, 3 Jones, (N. C.) 421, 1855.

³ *R. v. Pelham*, 8 Q. B. 959, 1846.

⁴ *R. v. Smith*, L. & C. 607, 1865; 10 Cox C. C. 82. *Supra*, §§ 152-169; *infra*, §§ 447, 1563.

⁵ Dig. Crim. Law, (5th ed.) art. 234.

He gives the following illustrations:

(1) A. neglects to provide proper food and lodging for her servant B. (who is of weak mind, but twenty-three years old); B.'s life is shortened by such neglect. A. is criminally responsible if B. was in such an enfee-

bled state of body and mind as to be helpless and unable to take care of herself, or was under the dominion and restraint of A., and unable to withdraw herself from A.'s control; otherwise, not. *R. v. Smith*, L. & C. 607, 1865.

(2) B., a girl of eighteen, comes from service to the house of her mother, A., and is there confined of a bastard child. A. does not provide a midwife, in consequence of which B. dies. A. is not criminally responsible for this omission. *R. v. Shepherd*, L. & C. 147, 1862.

(3) A. persuades B., an aged and infirm woman, to live in his house, and causes her death by neglecting to supply her properly with food and fire, she being incapable of providing for herself from age and infirmity.

§ 331. By the distinction before us we are able to support the decisions making the father or the master penally responsible for omission to supply food and clothing to child or apprentice;¹ but

holding that the mother, unless she assumes such exclusive charge, is not so responsible.² Thus, an unmarried woman, eighteen years of age, who usually supported herself by her own labor, being about to be confined, returned to the house of her stepfather and her mother. She was taken in labor (the stepfather being absent at his work), and in consequence of the mother's neglect to use ordinary diligence in procuring the assistance of a midwife, the daughter died in her confinement. There was no proof that the mother had any means of paying for the services of a midwife. It was held that no legal duty was cast upon the mother to procure a midwife, and therefore that she could not be convicted of the manslaughter of her daughter.³

It should be remembered that when food is wilfully withheld from a helpless person, under the defendant's special charge, with the intention to kill, the offence is murder.⁴ And the same rule applies where a child is unjustifiably exposed to the weather.⁵

§ 332. A husband is responsible for his wife's death caused by her want of necessities; though to support such an indictment it should appear that the wife was in such a helpless state as to be unable to appeal elsewhere for aid, and that the death was the natural and likely consequence of the husband's withdrawal of aid.⁶ And so a husband is indictable for homicide, who sees without interference his wife take a poison he knows to be

A. is criminally responsible for his neglect. *R. v. Marriott*, 8 C. & P. 425, 1838. See *R. v. Wagstaffe*, 10 Cox C. C. 530, 1868; *R. v. Downes*, L. R. 1 Q. B. D. 25, 1877.

¹ *R. v. Waters*, T. & M. 57; 1 Den. C. C. 356, 1848; *R. v. Edwards*, 8 C. & P. 611; *R. v. Middleship*, 5 Cox C. C. 275; *R. v. Squire*, 1 Russ. on Cr. (9th Am. ed.) 677, 1799; *R. v. Lowe*, 4 Cox C. C. 449; 3 C. & K. 123; *R. v. Ryland*, L. R. 1 C. C. 99; 10 Cox C. C. 569; 1 Ben. & H. Lead. Cas. 49; *State v. Hoit*, 3 Fost. 355, 1851. As to parents' duty to child, see *supra*, § 156; *infra*, §§ 359, 447, 1563-67.

² *R. v. Saunders*, 7 C. & P. 277; *R.*

v. Edwards, 8 C. & P. 611; *R. v. Shepherd*, 9 Cox C. C. 123, 1862; L. & C. 147. *Infra*, §§ 359 *et seq.*

³ *R. v. Shepherd*, 9 Cox C. C. 123, 1862; L. & C. 147. *Infra*, § 359.

⁴ *R. v. Conde*, 10 Cox C. C. 547, 1867; *R. v. Bubb*, 4 Ibid. 455, 1850. *Infra*, §§ 359, 1563-67.

⁵ *Infra*, § 1562; *Griffith v. State*, 90 Ala. 583, 1891. As to neglect of child by mother in birth, see *infra*, § 445.

⁶ *Infra*, §§ 358, 1563; *R. v. Plummer*, 1 C. & K. 600, 1844; *State v. Presslar*, 3 Jones L. (N. C.) 421, 1855.

deadly, the case being one in which his interference would have prevented the wrong.¹

§ 333. The keeper of an asylum or prison, who undertakes to the exclusion of others, to take care of a pauper, or lunatic, or prisoner, is penally responsible for the death of such ^{Keepers jailers, etc.} pauper, lunatic, or prisoner, naturally resulting from the defendant's reckless neglect.² And a person who accepts the guardianship of another is bound adequately to discharge such guardianship,³ and is indictable for death caused by his reckless neglect.⁴

§ 334. In cases, however, where the party charged is unable to supply the necessary succor, he ceases to be responsible.⁵ But this responsibility is not divested, in countries where ^{Incapacity a defence.} poor-houses exist, by poverty: for in such cases the person owing the duty is bound to report the case to the public authorities for their relief.⁶ And in an indictment against a parent for neglecting to provide sufficient food and clothing for a child of tender years, for whom he is bound by law to provide, it is not necessary to aver that the parent was, at the time of the alleged offence, of sufficient ability to perform the duty so imposed upon him.⁷

§ 335. A parent is not indictable for the death by starvation of a child competent to assist itself,⁸ unless the parent in some way shut the child off from obtaining assistance;⁹ nor a master under like conditions for the death of a ^{So is capacity on part of person neglected.} servant.¹⁰

¹ R. v. Paine, *infra*, § 1563.

Vann, 8 Eng. L. & E. 596; 2 Den.

² *Infra*, §§ 334, 1585. See R. v. Hugins, 2 Stra. 882, 1796; 2 Ld. Raym. 1574; R. v. Treeve, 2 East P. C. 821, 1780; R. v. Barrett, 2 C. & K. 343, 1846; R. v. Porter, L. & C. 394; 9 Cox C. C. 449, 1864; R. v. Pelham, 8 Q. B. 959, 1846; 1 Whart. & St. Med. Jur. § 242.

C. C. 325, 1851. See *infra*, §§ 359 *et seq.*

³ R. v. Mabbett, 5 Cox C. C. 339, 1851; R. v. Chandler, Dears. C. C. 453, 1856; though see R. v. Shepherd, Leigh & C. 147; 9 Cox C. C. 123, 1862. See *infra*, §§ 359 *et seq.*

⁴ R. v. Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569, 1867.

⁵ See R. v. Bubb, 4 Cox C. C. 455, 1850; R. v. Hook, *Ibid.* 455, 1850.

⁶ R. v. Friend, R. & R. 20, 1802;

⁷ R. v. Nicholls, 13 *Ibid.* 75, 1874.

R. v. Shepherd, 9 Cox C. C. 123, 1862;

⁸ R. v. Hogan, 5 Eng. L. & E. 553;

L. & C. 147.

2 Den. C. C. 277; 5 Cox C. C. 255, 1851; Saunders's Case, 7 C. & P. 277, 1836; R. v. Phillpot, 20 Eng. L. & E. 591; 6 Cox C. C. 140, 1853; R. v.

⁹ R. v. Waters, T. & M. 57; 1 Den. C. C. 356; 2 C. & K. 864, 1849. *Supra*, § 156; *infra*, § 459.

¹⁰ Anon. 5 Cox C. C. 279, 1851; R.

§ 336. Where from a conscientious conviction that God would heal the sick, and not from any intention to avoid the performance of their duty, the parents of a sick child refused to call in medical assistance, though well able to do so, and the child consequently died, this was held at common law not culpable homicide,¹ though otherwise under statute.² And even under statute the death, in order to convict, must be imputable to the neglect.³

§ 337. When we come to omissions by those in charge of machinery, ships, and railways, the question arises, Was the defendant specially charged with a particular office? Did injury to another ensue as a regular and usual consequence from his omission? If so, the defendant is to be held penally responsible.⁴ Hence such responsibility has been held to attach where an engineer leaves a steam-engine in charge of an incompetent person;⁵ where the officers of a vessel omit to keep a proper lookout;⁶ where a pilot omits to make himself properly understood by a foreign helmsman;⁷ where the officer in charge omits to ventilate a mine;⁸ where a railway tender omits to give the proper signal;⁹ where an iron founder, employed to supply a cannon for a public celebration, instead of recasting a piece that had burst, fills up the crevice with lead;¹⁰ where a mechanic, employed for the purpose in a colliery, omits to plank up a shaft;¹¹ where a

v. Smith, 8 C. & P. 153, 1837; *R. v. 4 Cox C. C. 449*, 1850; but merely to *Smith*, L. & C. 607; 10 Cox C. C. 82, leave a machine at rest does not *per se* 1865; *infra*, § 360; though see *R. v. confer responsibility. Hilton's Case*, 2 Lewin, 214. But see *infra*, § 370, for *Ridley*, 2 Camp. 650.

¹ *R. v. Wagstaffe*, 10 Cox C. C. 530, criticism. 1868; *R. v. Hines*, cited Whart. on ⁶ *R. v. Lowe*, 4 Cox C. C. 449, 1850; Hom. § 131, 1874. See *supra*, § 156. 3 C. & K. 123; *R. v. Spence*, 1 Cox C. C. 352, 1846, modifying *R. v. Allen*, 7 C. & P. 153, 1835; and *R. v. Green*, 1857; *infra*, §§ 1563 *et seq.* Ibid. 156, 1835.

² *R. v. Downes*, L. R. 1 Q. B. D. 25; 13 Cox C. C. 111, 1875. ⁷ *R. v. Spence*, 1 Cox C. C. 352, 1846.

³ *R. v. Morby*, L. R. 8 Q. B. D. 571; 15 Cox C. C. 35, 1882; 45 L. T. (N. S.) 288. See report in Cent. Law Journ. for June 2, 1882. ⁸ *R. v. Haines*, 2 C. & K. 368, 1847. *Infra*, § 360.

⁴ *Supra*, § 133; *R. v. Hughes*, D. & 1848. ⁹ *R. v. Pargeter*, 3 Cox C. C. 191,

B. C. C. 248, 1857; *R. v. Haines*, 2 C. & K. 368, 1847; *R. v. Lowe*, 4 Cox C. C. 449, 1850; and see cases cited *infra*, §§ 343, 369, 1586. ¹⁰ *R. v. Carr*, 8 C. & P. 163, 1837, cited *supra*, § 154. *Infra*, § 369.

¹¹ *R. v. Hughes*, 7 Cox C. C. 301, 1857.

⁵ See *supra*, §§ 152-69; *R. v. Lowe*,

switch-tender omits properly to turn a switch ;¹ and where a conductor of a street car, whose duty it is to look out and to stop the car if it is likely to do damage, neglects to keep a proper lookout.² And the same liability attaches to the omission of the captain of a vessel to stop or lower boats so as to save the life of a seaman falling from a ship.³ But, as has been seen, *the duty of the defendant which he thus fails to discharge must be one to which he is specifically subject.*⁴ A stranger who sees that unless a railway switch is turned or the car stopped an accident may ensue, is not indictable for not turning the switch or stopping the car.⁵

§ 338. The test as to giving warning of danger is, is such notice part of an express duty with which the defendant is specifically charged? If so, he is responsible for injury which is the regular and natural result of his omission: but if not so bound, he is not so responsible.⁶ A man, for instance, working with snow or shingles on a roof, may throw such snow or shingles on a street, if he give proper notice to the passers-by, and he is indictable for injury accruing from failure to give notice.⁷ The reason is that, from the very nature of the work in which he is engaged, such warning can only be accurately given by himself. A stranger, on the other hand, who sees the snow or timber about to fall, is not so indictable, because on him rests no special responsibility. By the same process may we solve other questions which not unfrequently arise. A railway subaltern

So of persons employed to give notice of danger.

¹ State v. O'Brien, 3 Vroom, 169, give A. notice where an air heading is 1865. See R. v. Pardenton, 6 Cox C. C. 247, 1853. *Infra*, § 369.

² Com. v. Metrop. R. R., 107 Mass. 236, 1871. See, also, as to negligence of railroad subalterns, R. v. Ledger, 2 F. & F. 857, 1862; R. v. Trainer, 4 F. & F. 105, 1864; R. v. Smith, 11 Cox C. C. 210, 1869; R. v. Birchall, 4 F. & F. 1087, 1866; R. v. Gray, 4 F. & F. 1098, 1865.

³ U. S. v. Knowles, 4 Sawy. 517, 1864.

⁴ R. v. Gray, 4 F. & F. 1098, 1865; R. v. Barrett, 2 C. & K. 343, 1846.

⁵ See Whart. on Hom. § 80.

⁶ R. v. Smith, 11 Cox C. C. 210, 1869. It is the duty of A. to put up air headings in a colliery where they are required. It is the duty of B. to

from B.'s report, of knowing whether such air headings are required or not. A. omits to put up an air heading. B. omits to give A. notice that one is wanted. An explosion follows, and C. is killed. Both A. and B. have killed C. R. v. Haines, 2 C. & K. 368, 1847, as cited Steph. Dig. (5th ed.) art. 241.

⁷ Archbold's C. P. (9th ed.) 9; 3 Inst. 70; Fost. 263. So, also, the case in Pauli Rec. Sent. v. 23, § 12. "*Si putator ex arbore, cum ramum dejiceret, non proclamaverit, ut vitaretur, atque ita praeteriens ejusdem ictu homo perierit, etsi in legem non incurrit, in metallum damnatur.*"

neglects to give the proper signal, and a collision results; and here, if the subaltern in question was specially charged with the duty of signalling, he is criminally responsible; otherwise not.¹ A light-house keeper permits his light to go out and a vessel is consequently wrecked. Is he penally responsible? Certainly so, if he is specially charged with the office of light-house keeper at that point, and if this is the kind of light on which seamen depend for guidance. But supposing a number of persons residing on the shore are in the habit of keeping lights in their windows, the omission of one of these persons to light his windows, from which serious mischief ensues, would not be indictable. The same distinction may be applied to parties employed to give fire-alarms.² In such cases, also, the party employed to give notice is not indictable for the omission when he had no knowledge of the danger, such want of knowledge not being imputable to his negligence.³

§ 339. If the duty is one merely discretionary, no indictment lies for its non-performance. Hence, trustees having power to repair roads are not criminally responsible for the death of a person resulting from an omission on their part to repair.⁴

§ 340. The distinction in this respect between a *condition* and a *cause* has been already discussed.⁵ A condition is a prior act without which a subsequent act cannot exist. A. sells to B. an explosive oil, which afterward, from omission on B.'s part to take due care, explodes. The sale from A. to B. is a condition of the subsequent explosion, but A. is not the cause of the explosion, if it be shown that the oil when sold was in the condition in which oils of the same class are regularly brought to market. On the other hand, if the oil was not in such condition, but was of such a character that it would explode unless precautions unusual and unnecessary in regular business were taken by the purchaser, then A. by his misconduct in selling the oil in such a state is the cause of the explosion, and is penally responsible for its results. So the city of B. distributes

¹ R. v. Pargeter, 3 Cox C. C. 191, 5 Cox C. C. 172. See *supra*, § 154, 1848; R. v. Spence, 1 Ibid. 352, 1846; for Sir J. F. Stephen's summary of R. v. Bengue, 4 F. & F. 504, 1865. this case. And see distinction taken, *Infra*, §§ 348-9, 1585. *supra*, § 130.

² See Whart. on Hom. § 81.

³ Com. v. Hartwell, 128 Mass. 415, see, also, R. v. Pelham, 8 Q. B. 959, 1880. ⁵ See *supra*, §§ 130, 153 *et seq.*; and 1846.

⁴ R. v. Pocock, 17 Q. B. 34, 1851;

unwholesome water which it obtains from C. under a contract made with the latter. C. is the *condition* of the distribution, but he is not the *cause*, unless the water which he supplied the city was unwholesome at the time of the supply.¹

A husband and a wife, to take another illustration, disagree, and she subsequently, when he has left her, wanders from the house and perishes in the woods. Here the disagreement may be the *condition* of the wife's death, but not its *cause*, if she leaves the house of her free will and not paralyzed by terror produced by his violence.²

A physician acts negligently in the treatment of a wound. The person wounding is responsible for the death, if the physician's negligence was such as is ordinarily incidental to medical practice.³ The physician's negligence was a *condition* of the death; the wound its *cause*.⁴

Even if an injury be given by A., which puts B. in a position in which he receives a fatal wound, this is not homicide in A., unless the wound was the natural and probably result of his act.⁵

§ 341. In all that relates to the management of the master's business the servant is to be regarded as the master's instrument; and as the master is responsible for the defective or mischievous action of his machine, so is he responsible for the defective or mischievous action of his servant.⁶ When, however, the servant leaves the orbit prescribed by his master and undertakes excursions on his own account, then the master's responsibility ceases. We here fall back on the principle elsewhere invoked, that there must be a direct causal connection between the defendant's malfeasance or nonfeasance and the injury. The interposition of a human will acting independently of the defendant and in an eccentric orbit, or the interposition of some extraordinary natural phenomenon, breaks this causal connection.⁷ Hence where A., through

Master
liable for
servant.

¹ *Stein v. State*, 37 Ala. 123, 1864. 1422, 1503; *Com. v. Metrop. R. R.*, 107 Mass. 236, 1871; *Com. v. Boston*

² *State v. Preslar*, 3 Jones, (N. C.) 421, 1855. *Supra*, § 334; and see as to causal relation *supra*, §§ 152-69. *R. R.*, 126 Mass. 61, 1879,—cases under a special statute making corporations indictable for negligence of

³ *Supra*, § 164. *McDaniel v. State*, 76 Ala. 1, 1884; *Crum v. State*, 64 Miss. 1, 1886. servants. *Supra*, §§ 91 *et seq.* And see *R. v. Medley*, 6 C. & P. 292, 1834; *R. v. Dixon*, 3 Maule & S. 11, 1813; *Tuberville v. Stampe*, 1 Ld. Raym. 264; *Com. v. Nichols*, 10 Metc. 259, 1845; *Com. v. Morgan*, 107 Mass. 199, 1871.

⁴ As to contributory negligence, see *supra*, § 163.

⁵ *Supra*, § 169.

⁶ See *supra*, §§ 135, 247; *infra*, §§

⁷ *Supra*, § 246.

his servants, makes fireworks in his house, contrary to statute, the master is not responsible for an injury caused by an independent culpable mismanagement of the fireworks by one of the servants.¹

§ 342. To an indictment for negligence it is no defence that the defendant's business was lawful. If he acts negligently, and from his negligence, as a natural, usual, and likely result, death follows, it is undoubtedly manslaughter.² Such also is the law with regard to manufacturers and workmen;³ to persons having charge of children or dependents,⁴ and to officers of steam and other vessels.⁵

§ 343. Whoever possesses a dangerous agency must take such care of it as good business men, under such circumstances, are accustomed to apply; and if from his neglecting to exercise such care death ensue to another, he is liable for manslaughter.⁶ Illustrations of this principle will be given in the following sections.

§ 344. Wantonly, though without malice, and without considering the probable consequences, to discharge firearms, the shot from which will pass a place where persons are likely to be, is negligence, whose results are imputable to the person offending.⁷ *A fortiori* is it manslaughter in the common law if one negligently discharge a gun in, or toward a public

¹ Bennett's Case, Bell C. C. 1, 1858. 1830; Collier v. State, 39 Ga. 31, 1869; Bizzell v. Booker, 16 Ark. 308, 1869.
² *Supra*, §§ 152-169.
³ *Infra*, § 359. See R. v. Bennett, 1856; State v. Emery, 68 Mo. 77, 1878. See *supra*, §§ 161, 166; Pool v. State, 87 Ga. 526, 1891. See Smith v. Com., 93 Ky. 318, 1892, as to involuntary manslaughter. Com. v. Carr, 8 C. Matthews, 89 Ky. 287, 1889. In & P. 163, 1837; R. v. Hutchinson, 9 State v. Hardie, 47 Iowa, 647, 1877, a revolver was fired playfully for the object of frightening a lady. The revolver was loaded, and she was killed. This was held manslaughter. See Johnson v. State, 94 Ala. 35, 1891. For other illustrations of practical jokes, see State v. Roane, 2 Dev. 58, 1830; Collier v. State, 39 Ga. 31, 1869. *Infra*, § 373 a. And see Erington's Case, 2 Lew. 217, 1835; R. v. Conner, 7 C. & P. 438, 1836; Adams v. State, 65 Ind. 565, 1879; Robertson v. State, 2 Lea, 239, 1879.
⁴ *Infra*, §§ 351, 1563 *et seq.*
⁵ *Infra*, §§ 352 *et seq.*
⁶ See *supra*, §§ 133, 154, 161, 166; *infra*, § 369; and see R. v. Carr, 8 C. Matthews, 89 Ky. 287, 1889. In & P. 163, 1837; R. v. Hutchinson, 9 State v. Hardie, 47 Iowa, 647, 1877, a revolver was fired playfully for the object of frightening a lady. The revolver was loaded, and she was killed. This was held manslaughter. See Johnson v. State, 94 Ala. 35, 1891. For other illustrations of practical jokes, see State v. Roane, 2 Dev. 58, 1830; Collier v. State, 39 Ga. 31, 1869. *Infra*, § 373 a. And see Erington's Case, 2 Lew. 217, 1835; R. v. Conner, 7 C. & P. 438, 1836; Adams v. State, 65 Ind. 565, 1879; Robertson v. State, 2 Lea, 239, 1879.
⁷ Burton's Case, 1 Stra 481, 1734; People v. Fuller, 2 Parker C. R. 16, 1855; Sparks v. Com., 3 Bush, 111, 1868; State v. Roane, 2 Dev. 58, 1830; Collier v. State, 39 Ga. 31, 1869. *Infra*, § 373 a. And see Erington's Case, 2 Lew. 217, 1835; R. v. Conner, 7 C. & P. 438, 1836; Adams v. State, 65 Ind. 565, 1879; Robertson v. State, 2 Lea, 239, 1879.

place or street, and kill one whom he does not see.¹ Where the shooting is malicious the offence is murder.² Of course if the discharge was in performance of any legal duty the law is otherwise.³

¹ *Supra*, § 161; *R. v. Campbell*, 11 Cox C. C. 323, 1869; *R. v. Jones*, 12 Ibid. 628, 1874; *People v. Fuller*, 2 Parker C. R. (N. Y.) 16, 1855; *Sparks v. Com.*, 3 Bush, 111, 1867; *State v. Vance*, 17 Iowa, 138, 1864. See *R. v. Hutchinson*, 9 Cox C. C. 555, 1864; *R. v. Archer*, 1 F. & F. 351, 1858—a case of unlawful snatching of a loaded gun, when it accidentally went off; *R. v. Salmon*, L. R. 6 Q. B. D. 79; 14 Cox C. C. 494, 1880, where the defendant was firing a rifle at a target, and killed a boy in a garden 393 yards distant, the boy being out of sight, and where the conviction was affirmed by the court of Crown Cases Reserved. See Comments in London Law Times, Dec. 11, 1880, p. 95; Whart. on Neg. §§ 92, 836, 853. See *Haack v. Fearing*, 5 Rob. (N. Y.) 528, 1868.

² See *supra*, § 319; *Golliher v. Com.*, 2 Duv. (Ky.) 163, 1865. In *R. v. Noon*, 6 Cox C. C. 137, 1854, the defendant fired a pistol at C. on horseback and killed D. This was held murder, though it was said that if the object had been by "appropriate" means (*e. g.*, firing in the air) to frighten C.'s horse, the offence would have been manslaughter. See *infra*, § 373 *a*.

³ *R. v. Hutchinson, supra*.

Where deer had entered a cornfield, and were beating down the corn, the owner went with his servant to watch at night with a gun, and charged him to fire when he heard anything rush into the standing corn; and upon the owner rushing into the corn in another part of the field, the servant fired and killed him. In the first passage wherein Lord Hale mentions this case,

he seems to think that it amounted to manslaughter, for want of due diligence and care in the servant in shooting upon such a token as might befall a man as well as a deer; however, he says, it was a question of great difficulty. But in a subsequent part of his work, as is noticed by Mr. East, the learned author relating the same case, which had been determined by himself at Peterborough, says, that he had ruled it only to be misadventure; for the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. But it seemed to him that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter; because of the want of due caution in the servant to shoot before he discovered his mark.

So in the case above cited, where a gentleman on alighting from a chaise fired his pistols into the street, which, by accident, killed a woman, it was ruled manslaughter; for the act was likely to breed danger, and manifestly improper. 1 Hale, 475; *Burton's Case*, 1 Stra. 481, 1734.

Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent; and, therefore, if a bystander be killed by the shot, such killing would be manslaughter. Fost. 258.

It has, however, been held that a person who unlawfully keeps powder in his house is not responsible for mischief caused by negligent meddling with it by his servants. *R. v. Bennett*, Bell C. C. 1; 8 Cox C. C. 74, 1858.

Nor is it manslaughter when the person using the weapon (there being no negligence) is not aware that it was loaded.¹

§ 345. Whoever negligently exposes poison in such a way that as an ordinary consequence it produces death is guilty of manslaughter;² though, as has been already seen, his penal responsibility ceases if the poison was taken through the negligence of the deceased, or of that of an independent responsible third person.³

§ 346. It is also settled that he who administers poison negligently to another, causing death, is guilty of manslaughter; and it is sufficient to establish negligence in this respect that he ought to have known the pernicious character of the drug he administered. *Cui facile est scire, ei detrimento esso debet ignorantia sua.*⁴ This principle has been frequently recognized in our criminal jurisprudence.⁵ Thus, it is manslaughter in a nurse to produce the death of a child by negligently administering it laudanum with the intention of quieting it;⁶ and for an apothecary negligently to label "laudanum" as "paregoric," thereby causing death.⁷ To make a person liable, however, for the consequences of communicating poison, or other deleterious matter, he must either be cognizant of its dangerous properties, or be in a position in which he ought to be so cognizant.⁸

§ 347. When an overdose of intoxicating liquors is negligently administered, producing death in the recipient, the person administering is guilty of manslaughter.⁹

¹ Nelson v. State, 6 Baxt. 595, 1876. See Burton v. State, 92 Ga. 449, 1893, where there was negligence. Embry v. Com., (Ky.) 12 S. W. Rep. 383, 1889.

² See *supra*, §§ 133, 161, 166; 1 Hale, 431; R. v. Chamberlain, 10 Cox C. C. 486, 1867. When a man lays poison to kill rats, and another man takes it and it kills him, if the poison was laid in such a manner and place as to be mistaken for food, it is manslaughter; if otherwise, misadventure only. 1 Hale, 431. See Butler v. State, 92 Ga. 601, 1893. See R. v. Michael, 9 C. & P. 356, 1840; 2 Mood. C. C. 120, where it is held murder to maliciously administer poison through an unconscious agent.

³ See *supra*, §§ 152-169.

⁴ See Whart. on Neg. §§ 91, 440, 441, 853, and *supra*, §§ 107, 111, 128, 317; *infra*, § 369.

⁵ Tessymond's Case, 1 Lew. 169, 1828.

⁶ Ann v. State, 11 Humph. 159, 1851.

⁷ Tessymond's Case, 1 Lew. 169, 1828. See *supra*, §§ 107, 111, 128, 317.

⁸ *Infra*, § 524.

⁹ R. v. Martin, 3 C. & P. 211, 1827; R. v. Packard, 1 C. & M. 236, 1841.

See, fully, Whart. on Hom. § 93.

§ 348. Those conducting or driving a locomotive engine are bound to show in their calling the diligence that good and prudent officers in such departments are accustomed to exercise. If, from lack of such diligence, death ensues either to a passenger in the train or a traveller on the road, the officer guilty of the neglect is liable for manslaughter.¹ In carrying out this principle, where the switch-tender of a railroad was indicted in New Jersey for manslaughter in neglecting properly to move a switch whereby loss of life ensued, it was held not necessary to prove that the neglect was wilful or reckless; and that the question whether due care was shown was for the jury.²

Officers of railroads liable for death ensuing from their want of care.

§ 349. When a collision occurs on a railroad, and death is caused, the person responsible, by the English rule, is the man actually in charge of the engine, and whose negligence caused the accident at the time of the collision;³ and he is responsible if he leave the engine in charge of an incompetent person.⁴ But it has been ruled in England, that unless the law imposes a duty on the owners of a railroad to watch a crossing, they are not responsible for injuries which might have been avoided by having a guard at the crossing. Thus where the private servant of the owner of a tramway, crossing a public road, was intrusted to watch it, while he was absent from his duty, an accident happened, and a person was killed. The charter did not require the owner to watch the tramway. It was held that there was no duty between the owner and the public, and therefore his servant was not guilty of negligence, so as to make him guilty of manslaughter.⁵ But it is otherwise when a railway tender or watchman undertaking to act as such, to the exclusion of others, neglects to give the proper signal.⁶

Where there is duty there is liability.

¹ See topic discussed at large in quence of which a collision and death Whart. on Neg. §§ 645, 798. As to ensued. See N. Y. Times, Jan. 13, statutory penalties on corporations, 1875.

see *supra*, § 91.

² R. v. Birchall, 4 F. & F. 1087,

³ State v. O'Brien, 3 Vroom, 169, 1866. When there is malice, it is murder. See Golliher v. Com., 2 1865. In the Hudson County (New Jersey) Court of Quarter Sessions, on Duv. (Ky.) 163, 1865.

Tuesday, January 12, 1875, John S.

⁴ R. v. Lowe, 4 Cox C. C. 449, 1850.

McClelland, a telegraph operator,

⁵ R. v. Smith, 11 Cox C. C. 210,

was convicted of negligence in giving a wrong signal to the conductor

1869.

of an approaching train, in conse-

⁶ *Supra*, §§ 125, 130, 133, 329.

On an indictment in England against

§ 350. In such cases a specific personal duty must be proved.

But must
be specific
duty.

Thus, where the prisoner was the driver and the deceased was the fireman of a steam-engine on a railway and the death of the latter was caused by the engine coming into collision with a train standing on the same line of rails, owing to a neglect on the part of the person in charge of the engine to keep a sufficient lookout, and there was evidence that it was the duty of the prisoner or of the deceased to keep a lookout, but there was no evidence as to which of the two was charged with the duty at the time of the collision; it was held that as there was no specific duty

an engine-driver, and a fireman of a railway train, for the manslaughter of persons killed while travelling in a preceding train by the prisoner's train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger, so as to make it mean not "stop," but "proceed with caution;" that the trains were started by the superior officers of the company irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to the prisoners except the signal for caution; and that their train was being driven at an excessive rate of speed; and that then they did not slacken immediately on perceiving the signal, but almost immediately, and that as soon as they saw the preceding train, they did their best to stop, but without effect. It was held, *first*, that the special rules, so far as not consistent with the general rules, superseded them; *secondly*, that if the prisoners honestly believed they were observing them, and they were not obviously illegal, they were not criminally responsible; and, *thirdly*, that the fireman being bound to obey the directions of the engine-driver, and, so far as appeared, having done so, there was no case against him. *R. v. Trainer*, 4 F. & F. 105, 1864. See as to engineer, *Com. v. Kuhn*, 1 Crumrine, (Pittsburg) 13, 1853. *Infra*, § 1586. As to causal relation, see *supra*, §§ 152-169, 338.

Where a fatal railway accident had been caused by one train running off the line, at a spot where rails had been taken up, without allowing sufficient time to replace them, and also without giving sufficient, or, at all events, effective warning to the engine-driver; and it was the duty of the foreman of the plate-layers to direct when the work should be done, and also to direct effective signals to be given; it was held, that though he was under the general control of an inspector of the district, the inspector was not liable, but that the foreman was, even although there had also been negligence on the part of the engine-driver in not keeping a sufficient lookout. *R. v. Bengel*, 4 F. & F. 504, 1865. And clearly where an officer charged with the duty neglects to give the proper signs, whereby a collision occurs, causing death, such officer is guilty of manslaughter. *R. v. Pargeter*, *supra*, §§ 337, 338; *infra*, § 1586. But the indictment must aver the omission to give due signals, to make evidence to this point admissible. *Com. v. Fitchburg R. R.*, 126 Mass. 472, 1879.

proved on the defendant, he was entitled to an acquittal.¹ Nor where a statute imposes penal liability for injury to passengers is a railway corporation indictable for an injury sustained by a person who, the train having overshot a station, has left the train when in motion, and is struck by another train while making his way to the station.²

§ 351. It is manslaughter negligently to drop articles on a thoroughfare by which a person passing is struck and killed. Of this a pointed illustration is given in a case tried in the Old Bailey, in 1664. The defendant was employed upon a building, thirty feet from the highway, and threw down a piece of timber, having first cried out to stand clear. The timber fell upon a person who happened to go out of the way to pass underneath, and killed him. It was held misadventure only, though it was said that if the house had been on a constant thoroughfare, it would have been manslaughter, supposing the warning given to have been imperfect.³

Killing by negligently dropping articles manslaughter.

On the other hand, a merchant, who was raising a cask of wine to a third story, over a crowded street, and who let the cask slip whereby two women were killed, was held guilty of manslaughter, as, under the circumstances, the method taken of raising the cask was not sufficiently guarded and no due notice was given.⁴

§ 352. By the Act of Congress of July 7, 1833, § 12, it was provided that "every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or part by steam, by whose misconduct, negligence, or inattention to his or their respective duties the life or lives of any person or persons on board such vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court of the United States, shall be sentenced to confinement at hard labor for a period not more than ten years." Under this act it has been held that there must be a causal connection between the negligence and the injury, and that the former must appear to be the proximate cause of the latter.⁵ *Intent*, in accordance with the principles already stated, does

Liability of steamboat officers for negligence.

¹ R. v. Gray, 4 F. & F. 1098, 1865.

⁴ R. v. Rigmaidon, 1 Lew. 180,

² Com. v. Boston & Me. R. R., 129 1833.

Mass. 500, 1881. See, however, as to contributory negligence, *supra*, §§ on Hom.; and see, also, U. S. v. Warner, 4 McL. 463, 1850; U. S. v.

³ R. v. Hull, Kel. (3d ed.) 60, 1664. Taylor, 5 Ibid. 242, 1851; S. P., R. v.

not enter into the issue; it is enough if the defendant, being an officer charged with the particular duty, neglected such duty.¹ A part owner, assuming the duty of an officer, is responsible under the act;² but one officer is not liable for another's negligence, unless participating in or promoting such negligence.³ *Casus*, or inevitable accident, is, of course, a good defence.⁴ If the death is imputable to the imprudence of the deceased, the defendant is not liable unless such imprudence was a natural result of the defendant's negligence.⁵

The responsibility of steamboat officers for collisions is gauged by the same tests as that of other persons wielding dangerous agencies.⁶

§ 353. Independently of the principles just announced which bear with as equal force upon land as upon water collisions, it must be remembered that there are cases in which the driving of an unsafe horse, like the navigating of an unsafe ship, makes the offending party guilty of manslaughter if death ensue. Thus if a person, breaking an unruly horse, ride him amongst a crowd of people and death ensue from the viciousness of the animal, though this appear to have been done heedlessly and incautiously, and not with an intent to do mischief, the crime will be manslaughter;⁷ while it would be murder if the rider intended to divert himself with the fright of the crowd,⁸ or to have seriously injured any one whom he might strike.⁹

Green, 7 C. & P. 156, 1836. "By negligence or inattention in the management of steamboats is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter what may be the degree of misconduct, whether it is slight or serious, if the proof satisfy that the setting fire to the boat was the necessary or most probable cause of it." Ingersoll, J., in U. S. v. Collyer, citing charge in U. S. v. Farnham, 2 Blatch. 528, 1853.

¹ U. S. v. Warner, 4 McL. 463, 1850; U. S. v. Keller, 19 Fed. Rep. 633, 1883. See *Steamboat New World v. King*, 16 How. U. S. 469, 1853. In U. S. v. Doig, 4 Fed. Rep. 193, 1880,

it was held that the place of misconduct has in such cases jurisdiction. *Supra*, § 292.

² U. S. v. Collyer, *ut supra*.

³ *Ibid.*; S. P., R. v. Allen, 7 C. & P. 153, 1835; R. v. Birchall, 4 F. & F. 1087, 1866.

⁴ U. S. v. Warner, 4 McL. 463, 1850.

⁵ Whart. on Hom. § 105; U. S. v. Warner, 4 McL. 463, 1850.

⁶ R. v. Taylor, 9 C. & P. 672, 1840; R. v. Allen, 7 *Ibid.* 153, 1835; R. v. Green, *Ibid.* 156, 1835.

⁷ 1 East P. C. 231.

⁸ 1 Hawk. P. C. c. 13, s. 68.

⁹ 1 Hale, 475; Foster, 263; *Lee v. State*, 1 Cold. (Tenn.) 62, 1865. *Supra*, §§ 111, 113, 319.

§ 354. Certain particular conditions, however, must be maintained in driving, which it is well to keep in mind. Any degree of rapidity on a thoroughfare, inconsistent with the degree of check with which the horses may be held, may make the owner responsible; and this rule applies though it appears that prior caution by the person struck might have kept him out of danger, unless such want of caution was the immediate cause of the disaster.¹

Rapidity which puts the horse out of control imposes liability.

§ 355. The care to be exercised is that which careful drivers are accustomed to use.² Hence, a driver who fails to exercise such care and thereby injures another is penally responsible.³ As a rule, care is to be proportioned to danger. To drive rapidly on an open country highway, where the danger of collision is slight, is not negligence. On the other hand, rapid driving in a thronged street invokes a peculiar degree of caution.⁴

Care to be that usual to prudent drivers.

¹ Whart. on Neg. §§ 306, 323, 388; *R. v. Walker*, 1 C. & P. 320, 1824; *R. v. Mastin*, 6 Ibid. 396, 1834; *R. v. Timmins*, 7 Ibid. 499, 1836; *R. v. Swindall*, 2 Carr. & Kir. 229, 1846; 2 Cox C. C. 273. *Supra*, §§ 147, 163.

² Whart. on Neg. §§ 31-46. Compare *R. v. Huggins*, 2 Stra. 882, 1754; 2 Ld. Raym. 1574; 1 Hale P. C. 486.

³ *R. v. Murray*, 5 Cox C. C. 509, 1852; *R. v. Grout*, 6 C. & P. 629, 1834; *Pitts v. Gaines*, 1 Stra. 635, 1719; 2 Ld. Raym. 1402; *Hall v. Pickard*, 3 Camp. 184; *Barnes v. Hurd*, 11 Mass. 57, 1814. *Supra*, §§ 133 *et seq.* A foot-passenger in England is not excluded from the use of the carriage-way though there be a foot-path, and hence the killing of him by a carriage is manslaughter in the owner if reasonable care was not used. Thus, a tradesman was walking on a road, about two feet from the foot-path, after dark, but there were lamps at certain distances along the line of road, when the prisoner drove in a cart drawn by one horse, at the rate of from eight to ten miles an hour, according to some witnesses, and from

six to seven miles an hour, according to other witnesses; the prisoner sat on some sacks, laid on the bottom of the cart, and he was near-sighted. Other persons, who were walking along the same road, had with considerable difficulty got out of the way of the prisoner's cart. Bolland, B., told the jury that the question was whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of his majesty's subjects. If they thought he had conducted himself properly, they would say he was not guilty; but if they thought that he acted carelessly and negligently, they would pronounce him guilty of manslaughter. *R. v. Grout*, 6 C. & P. 629, 1834.

⁴ *R. v. Swindall*, *ut supra*; *Com. v. Metrop. R. R.*, 107 Mass. 236, 1871; Whart. on Hom. § 111, where the authorities are given at large.

A. was driving a cart with four horses in the highway at Whitechapel, and he being in the cart, and the horses upon a trot, they threw down

§ 356. When two drivers were negligently racing with their respective carts on a public road, and one of the carts killed a traveller on the road, both drivers were held responsible for manslaughter.¹ And this rule holds good in respect to all cases where an injury is produced to an innocent third person by a collision between two parties who are both negligent.²

§ 357. He who lets loose a dangerous animal is responsible for death caused by such animal, provided he either knew of the

a woman, who was going the same way, with a burden upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder, Lovel, held this to be only misadventure. But by Holt, C. J., if it had been in a street where people usually pass, it had been manslaughter. 1 East P. C. 263, 1704. But upon this case Mr. East remarked: "It must be taken for granted, from this note of the case, that the accident happened in a highway, *where people did not usually pass*; for otherwise the circumstance of the driver's being in the cart, and going so much faster than is usual for carriages of that construction, savored much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person who could not get out of the way in time. And, indeed, such conduct, in a driver of such heavy carriages might, under most circumstances, be thought to betoken a want of due care, if any, though but few, persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it required; but whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it which persons in similar situations are accustomed to do." 1 East P. C. 263.

Carter must stand at horse's head.—

A carter, if he does not have the means of controlling his horse when standing in the cart, is bound to keep at his horse's head or side, and if in consequence of his neglect in this respect death follows, he is guilty of manslaughter. Upon an indictment for manslaughter, the evidence was that the prisoner, being employed to drive a cart, sat in the inside instead of attending at the horse's head, and while he was sitting there the cart went over a child, who was gathering up flowers on the road. Bayley, B., held that the prisoner, by being in the cart instead of at the horse's head or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter. Knight's Case, 1 Lew. 168, 1828. Cf. Repsher v. Watson, 1 Phila. 24, 1850.

¹ R. v. Swindall, 2 C. & K. 230, 1846; 2 Cox C. C. 141. *Supra*, § 353.

² Colegrove v. N. Y. & N. H. R. R., 20 N. Y. 492, 1859; aff. s. c. 6 Duer, 382; Lockhardt v. Lichtenthaler, 46 Pa. 151, 1864; Barrett v. The Third Ave. R. R. Co., 45 N. Y. 628, 1870; Thoroughgood v. Bryan, 8 C. B. 115, 1849; Catlin v. Hills, Ibid. 123, 1849; R. v. Haines, 2 C. & K. 368, 1847. For further distinctions, see Whart. on Neg. (2d ed.) § 395; Armstrong v. R. R., L. R. 10 Exch. 477.

animal's dangerous tendencies,¹ or was in such a position that he should have known of such tendencies.² If the mischief was undesigned by the defendant, the offence is manslaughter; if designed, murder.³

Letting
loose
noxious
animals.

§ 358. The doing an act, or the imperfect performance of a duty toward a person who is helpless, which naturally and ordinarily leads to the death of such person, is murder, if death or grievous bodily harm is intended; and manslaughter, if the cause is negligence.⁴

Killing of
helpless
person by
negligent
act is man-
slaughter.

§ 359. So far as concerns the neglect of a mother to properly attend to a bastard child after birth, statutes exist in which the common law offence is absorbed. Independently of these statutes, it may be generally stated that for a parent, having special charge of an infant child, to so culpably neglect it that death ensues as a consequence of such neglect, is manslaughter if death or grievous bodily harm were not intended; and murder if there was an intent to inflict death or grievous bodily harm.⁵ To constitute murder there must be means to relieve, and wilfulness in withholding relief.⁶ If the parent has

Death of
child by
parent's
neglect is
man-
slaughter.

¹ R. v. Dant, L. & C. 567; 10 Cox C. C. 102, 1865.

² *Supra*, § 207; Whart. on Neg. § 904.

³ See, fully, Whart. on Hom. § 125.

⁴ R. v. Walters, C. & M. 164, 1841; R. v. Smith, L. & C. 607; 10 Cox C. C. 82, 1865. See *supra*, § 156; U. S. v. Knowles, 4 Sawy. 517, 1864. Sir J. F. Stephen (Dig. Crim. Law, 5th ed. art. 244) thus states the point in Walter's case: A., recently delivered of a child, lays it naked by the side of the road, and wholly conceals its birth. It dies of cold. This is murder or manslaughter, according as A. had or had not reasonable ground for believing that the child would be preserved. On this he comments as follows:

"This case appears to me to illustrate the true doctrine on the subject better than the old and often quoted case of the woman who left her child in a place where it was struck by a

kite and killed. The point of that case I take to be, that the striking by a kite was an occurrence sufficiently likely to impose upon the mother the duty of guarding against it. Kites having been almost exterminated in England, their habits are forgotten. But to lay a child on the ground in Calcutta would be to expose it to almost certain and speedy death from kites and other birds of prey. I have myself been struck by a kite which had just struck at one of my children."

⁵ *Supra*, §§ 156, 331; *infra*, §§ 1563-8; R. v. Chandler, Dears. C. C. 453, 1855; R. v. Mabbett, 5 Cox C. C. 339, 1851; R. v. Bubb, 4 Ibid. 455, 1850; R. v. Conde, 10 Ibid. 547, 1867; R. v. Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569, 1867. See, however, R. v. Knights, 2 F. & F. 46, 1860.

⁶ R. v. Saunders, 7 C. & P. 277, 1835.

not the means for the child's nurture, his duty is to apply to the public authorities for relief; and failure to do so is itself culpable neglect, wherever there are public authorities capable of affording such relief.¹ Hence, as we have seen, it is not necessary to aver in the indictment possession of means by the parent.²

When a child grows to sufficient age to be capable of applying for aid himself, and is at full liberty so to do, then the parent's neglect to supply his wants is not the subject of indictment.³ Nor can the parent's conscientious errors of judgment in matters of medical treatment be at common law punished.⁴

Much doubt exists as to the legal obligation of a father to support an illegitimate child, though as to the fact of the moral duty there can be no question.⁵ Pufendorf tells us⁶ that "maintenance is due not only to legitimate children, but even to incestuous issue." But be this as it may, it is clear that when a party assumes the guardianship of a child, whether as putative or step-parent, he becomes responsible for mismanagement or neglect.⁷

A married woman, however, cannot be convicted of the murder of her illegitimate child, three years old, by withholding from it proper food, unless it be shown that her husband supplied her with food to give the child, and she wilfully withheld it.⁸

To place a helpless infant child in such a position that it cannot live is murder if the intent be to kill; and manslaughter if the desertion be negligent.⁹

§ 360. The same general principles are applicable to prosecutions against masters for neglect of their servants and apprentices, resulting in death.¹⁰

¹ *Supra*, § 335; *R. v. Mabbett*, 5 *v. Murdock*, 7 Cal. 511, 1857; *Gillett Cox C. C.* 339, 1851; *R. v. Bubb*, 4 *v. Camp*, 27 Mo. 541, 1858; *Hussey v. Roundtree*, *Busbee Law*, (N. C.) 110, Ibid. 455, 1850.

² *R. v. Ryland*, L. R. 1 C. C. 99; 1852; *Lantz v. Frey*, 14 Pa. 201, 10 Cox C. C. 569. 1850; *Brush v. Blanchard*, 18 Ill. 46,

³ *Supra*, § 335; *infra*, § 1585; *R. v.* 1857; *Schouler Dom. Rel.* 378.

Shepherd, 9 Cox C. C. 123, 1862; L. ⁸ *R. v. Saunders*, 7 C. & P. 277, & C. 147. 1835.

⁴ *Supra*, § 336.

⁵ *Nichole v. Allen*, 3 C. & P. 36, 1827. ⁹ *R. v. Walters*, C. & M. 164, 1841; *R. v. Ridley*, 2 Camp. 640, 653; *R. v. Waters*, T. & M. 57; 1 Den. C. C. 356; 2 C. & K. 864, 1849; *R. v. Phil-*

⁶ Book 4, c. 11, s. 6.

⁷ *Stone v. Carr*, 3 Esp. 1; *Cooper v. Martin*, 4 East, 77, 1803; *Williams v. Hutchinson*, 3 Comst. 312, 1850; *Sharp* 358.

v. Cropsey, 11 Barb. 224, 1852; *Murdock* ¹⁰ *Self's Case*, 1 East P. C. 226,

§ 361. Whoever assumes the special charge of a helpless person is indictable for manslaughter if he cause the death of such person by withholding the necessities of life.¹ This rule undoubtedly applies to jailers and alms-house keepers, and persons undertaking the voluntary charge of lunatics.² So of jailers and other guardians. It has been correctly extended in England to a person who undertakes the special nursing and care of another who is sick or otherwise helpless.³

But it is necessary that the guardianship should be special.⁴ And, as has already been seen,⁵ a brother, omitting to supply his idiot brother with food, is not, in default of proof of such obligation, indictable for the omission.⁶ It is otherwise if the control be exclusive and absolute.⁷

§ 362. One who professes to be a physician, and is called in as such, is bound to apply to his patient the care and skill which good physicians of his particular school are accustomed to apply under similar circumstances.⁸ If he does not possess the skill or apply the care usual among good practitioners of his school under the circumstances, and his patient dies in consequence of his neglect, then he is chargeable with manslaughter.⁹ Physician liable for lack of ordinary diligence and skill.

1776; 1 Leach C. C. 137; R. v. Squire, 1 Russ. on Cr. (9th Am. ed.) 627, 1799; R. v. Ridley, 2 Camp. 650; Anon., 5 Cox C. C. 279, 1851; Sellan v. Norman, 4 C. & P. 80, 1829; R. v. Smith, 8 Ibid. 153, 1838. The master is legally liable for failure to furnish medical attendance. R. v. Smith, L. & C. 607, 1865; 10 Cox C. C. 82; R. v. Davies, 1 Russ. on Cr. (9th Am. ed.) 679, 1831; R. v. Crumpton, 1 C. & M. 597, 1842. See these cases detailed in Whart. on Hom. §§ 137-8. Comp. *supra*, § 335; *infra*, § 1585.

¹ *Supra*, § 333; *infra*, § 1585.

² R. v. Porter, L. & C. 394, 1864; 9 Cox C. C. 449, 1796; R. v. Treeve, 2 East P. C. 821; R. v. Warren, R. & R. C. C. 48 n., 1820; R. v. Booth, Ibid, 47 n., 1796, and other cases cited *supra*, § 333.

³ R. v. Marriott, 8 C. & P. 425, 1838.

⁴ R. v. Pelham, 8 Q. B. 959, 1846.

⁵ *Supra*, § 331; *infra*, §§ 1563 *et seq.*

⁶ R. v. Smith, 2 C. & P. 449, 1826.

⁷ R. v. Porter, L. & C. 394; 9 Cox C. C. 449, 1864; R. v. Edwards, 8 C. & P. 611, 1838. *Supra*, §§ 330-1.

⁸ Whart. on Neg. § 730. See as to question of causal relation, *supra*, § 157. This subject is discussed at large in 3 Whart. & St. Med. Jur. §§ 765 *et seq.* See Bost. Med. Jour., Dec. 4, 1884, 544. See State v. Reynolds, 42 Kans. 320, 1889.

⁹ R. v. Spiller, 5 Car. & P. 333, 1832; R. v. Senior, 1 Mood. C. C. 346, 1832; R. v. Williamson, 3 C. & P. 635, 1829; Webb's Case, 1 M. & R. 405, 1841; R. v. Long, 4 C. & P. 398, 1830; R. v. Whitehead, 3 C. & K. 202. See R. v. Chamberlain, 10 Cox C. C. 486, 1867; R. v. Spencer, 10 Ibid. 525, 1867; R. v. Markuss, 4 F. & F. 356, 1864; R. v. Macleod, 12 Cox C. C. 534, 1874; Mat-

The burden is on the prosecution to prove negligence.¹

§ 363. If the patient, by refusing to adopt the remedies of the physician, frustrates the latter's endeavors, or if he aggravates the case by his misconduct, he cannot charge to the physician the consequences due distinctively to himself.² The question of assent on the part of the patient is to be determined by all the circumstances in the case.³

Not responsible if patient was direct cause of injury.

§ 364. It was at one time held in England that persons not graduated and licensed as physicians are to be held to a severer accountability than persons who are so graduated and licensed.⁴ But the law now is, that the want of a degree (unless there be a special statute on the subject) adds nothing to the grade of the offence where there is no deceit, if there be a *bona fide* and honest attempt by the defendant to do his best, and if he possess skill and knowledge requisite for the position he claims.⁵ On the other hand, whoever undertakes to deal with a dangerous remedy ought to acquaint himself with its properties; and if, from ignorance of what he ought to know and professes to know, the death of the patient ensues, he is indictable

No difference between licensed and unlicensed practitioner.

theson's Case, 1 Swinton, 593; State v. Hildreth, 9 Ired. 440, 1849; State

v. Hardister, 38 Ark. 605, 1880; 3 Whart. & St. Med. Jur. § 765. For cases at large, see Whart. on Hom. §§ 143-4. See, also, Com. v. Green, 80 Ky. 178, 1882. See Territory v. Yee Dan, (N. M.) 37 Pac. Rep. 1101, 1894; State v. Gile, 8 Wash. 12, 1894.

¹ R. v. Bull, 2 F. & F. 201, 1860; R. v. Spencer, 10 Cox C. C. 525, 1867; State v. Schulz, 55 Iowa, 628, 1881, discussed in 3 Whart. & St. Med. Jur. § 765. See Brown v. State, 38 Tex. 482, 1873, that reasonable doubt must acquit.

² *Supra*, §§ 157, 162-3; McCandless v. McWha, 22 Pa. 261, 1853; s. c. 25 Ibid. 95. See the qualifications in Hibbard v. Thompson, 109 Mass. 286, 1872; Brown v. State, 38 Tex. 482, 1873.

³ *Supra*, § 144.

⁴ 4 Black. Com. 197; 1 Hale, 429; Brit. c. 5; 4 Inst. 251; R. v. Simpson,

Willcock's L. Med. Prof. Append. 227.

⁵ R. v. Van Butchell, 3 C. & P. 629, 1829; R. v. Williamson, Ibid. 635, 1829; R. v. Spiller, 5 Ibid. 333, 1832, coram Bolland, B., and Bossanquet, J. See, also, Lanphier v. Phipos, 8 Ibid. 475, 1838, where Tindal, C. J., said: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable, and competent degree of skill."

See R. v. Simpson, 1 Lew. C. C. 172; R. v. Ferguson, Ibid. 181, 1830; Com. v. Thompson, 6 Mass. 134, 1809.

for manslaughter.¹ It is true that a more lenient view has been taken by high authorities in this country;² it being held that it is a defence in such cases that the defendant's ignorance was honest. But this only holds good where such ignorance is excusable. A layman, for instance, advising a quack medicine on the faith of its general reputation, would not be responsible for the bad consequences. It would be otherwise with respect to ignorance of a matter with which it is the party's duty to be acquainted.³ A specialist, therefore, who ignorantly applies dangerous remedies which prove fatal, but with whose character he ought to have been acquainted, is indictable for manslaughter.⁴

§ 365. Hence, whatever may have been the views expressed in some of the earlier cases,⁵ a person practising medicine or surgery is bound to know the nature of the remedies he prescribes, and the treatment he adopts; and he is responsible criminally for any injuries resulting from his ignorance in this relation.⁶ *A fortiori*, where he is pursuing a plan of bold imposture, he is liable for injuries produced by his ignorance, and this whether he be with or without a degree.⁷

Culpable
ignorance
in any
view im-
poses lia-
bility.

§ 366. Proof of the use or administration of dangerous agencies by an incompetent person is evidence from which culpable negligence can be inferred.⁸

Careless or
ignorant
use of dan-
gerous
agent is
negli-
gence.

§ 367. It matters not whether the medical man is dealing with a patient as a fee physician or as a volunteer friend. Thus in a case tried before Denman, J., in 1874, the defendant, a physician, was charged with negligently killing his wife by an overdose of muriate of morphine. Judge Denman correctly charged the jury "that it made no difference whether a medical man was dealing with a patient, or, as a volunteer, dealing with a friend, or with his wife." . . . "If the drug was administered without

Gratui-
tousness
does not
affect
case.

¹ See 3 Whart. & St. Med. Jur. P. 398, 1831; R. v. Long, 4 Ibid. 428, § 765.

² Rice v. State, 8 Mo. 561, 1841; 534, 1874; see Ann v. State, 11 Humph. 159, 1850; Holmes v. State, 23 Ala. 17, 1852; State v. Hardister, 38 Ark. 605, 1881. See Com. v. Stratton, 114 Mass. 303, 1873.

³ Whart. on Neg. §§ 415 *et seq.*

⁴ Com. v. Pierce, Sup. Ct. Mass. 1884, 18 Rep. 757.

⁵ Com. v. Thompson, 6 Mass. 134, 1809.

⁶ See *supra*, §§ 343, 345.

⁷ *Supra*, § 362; R. v. Long, 4 C. &

⁸ R. v. Crick, 1 F. & F. 519, 1859; R. v. Crook, Ibid. 521, 1859; R. v. Markus, 4 Ibid. 356, 1864; R. v. Chamberlain, 10 Cox C. C. 486, 1867.

want of skill and intending to do for the best—doing nothing, in fact, that a skilful man might not do—then if the jury merely thought it was some error of judgment which anybody might have committed, the prisoner should be acquitted.”¹

§ 368. An apothecary’s apprentice who is guilty of negligence in delivering medicine, when death ensues in consequence, is guilty of manslaughter.² But if the mistake be made under such circumstances as would perplex an ordinarily prudent man, there should be, it seems, an acquittal.³

Apothecaries and chemists liable on same principles.

§ 369. It has been already stated that in the use of dangerous instruments care must be applied in proportion to danger.⁴ This principle applies both to manufacturers, by whom defective material is used or defective workmanship applied, and to workmen who are guilty of negligence in their application of such powers to practical use.⁵

By persons running machinery care must be exercised in proportion to danger.

The jury should be directed, however, to acquit, if the care usual with good workmen under similar circumstances

was shown.⁶

Where the prisoner, a person ignorant and rash, was charged with manslaughter upon an indictment which alleged that he undertook, as a man midwife, the care and charge of B. K., and to do everything needful for her during and after the time of her delivery, and that after B. K. was delivered he neglected to take proper care of and to render her proper assistance, by means whereof she died; Tindal, C. J., said to the jury: “You are to say whether, in the execution of that duty which the prisoner had undertaken to perform, he is proved to have shown such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of; and that the death of the person named in the indictment was caused thereby.” Ferguson’s Case, 1 Lew. 181, 1830. If this be the case stated in Long’s Case, the prisoner was a blacksmith, drunk, and wholly ignorant of the proper steps to be taken;

no evidence is stated in Lewin. See 1 Russ. on Cr. (9th Am. ed.) 693, 694; and see, also, R. v. Webb, 1 M. & R. 405, 1841; 2 Lew. 196; R. v. Spilling, 2 M. & R. 107, 1843.

¹ R. v. Macleod, 12 Cox C. C. 534, 1874. The question, how far the physician’s liability is affected by the patient’s misconduct, or by concurrent diseases, is discussed *supra*, §§ 158–169.

² Tessymond’s Case, 1 Lew. 169, 1828. *Supra*, § 346. For an indictment against a druggist for manslaughter, through negligently compounding a prescription, see State v. Smith, 66 Mo. 92, 1877.

³ R. v. Noakes, 4 F. & F. 920, 1866. *Supra*, § 346.

⁴ *Supra*, § 337.

⁵ R. v. Carr, 8 C. & P. 163, 1837, cited *supra*, §§ 154, 337.

⁶ Rigmaidon’s Case, 1 Lew. 180, 1833; Fenton’s Case, *Ibid.* 179, 1833.

An indictment charged that there was a scaffolding in a certain coal

§ 370. For a person charged specially with dangerous machinery to desert without notice, and leave an incompetent substitute in his place, makes him liable for death caused by the incompetency of such substitute.¹ But a person not leaving machinery in the public path is not liable for injuries caused by the interposition of an independent responsible agent.²

So when death is caused by negligent desertion of post.

IV. KILLING IN ATHLETIC SPORTS.

§ 371. On the same principle that parties engaged in a duel are guilty of murder if death ensue, persons engaged in prize-fighting

mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding; and that in consequence of the scaffolding being so broken, a corf, in which the deceased was descending the mine, struck against a beam, on which the scaffolding had been supported, and by such striking the corf was overturned, and the deceased precipitated into the mine and killed. It was proved that scaffolding was usually found in the mines in the neighborhood, for the purpose of supporting the corves, and enabling the workmen to get out and work the mines; that the stones were of a size and weight sufficient to knock away the scaffolding, and that if the beam only was left, the probable consequence would be that the corf striking against it would upset, and occasion death or injury. Tindal, C. J., said: "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill, or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance the act was one of mere wantonness and sport, but still the act was wrongful;

it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death." Fenton's Case, 1 Lew. 179, 1833.

The deceased was with others employed in walling the inside of a shaft. The defendant was engaged to put a stage over the mouth of the shaft, but from his omission to perform this duty the deceased was killed. The defendant was held on this evidence to be rightfully convicted of manslaughter. *R. v. Hughes*, D. & B. C. C. 248; 7 Cox C. C. 301, 1857. See *supra*, §§ 181 *a*, 337.

Homicide from negligent omission to ventilate a mine is in like manner manslaughter. *R. v. Haines*, 2 C. & K. 368, 1847.

¹ *R. v. Lowe*, 3 C. & K. 123; 4 Cox C. C. 449, 1850. See *supra*, § 180.

² *R. v. Hilton*, 2 Lew. C. C. 214, 1835. This case can only be sustained on the ground that the steam engine was not in the public path. The same distinction may be taken as to elevators in private houses, the proprietors of which are not responsible for the interference of meddlers.

with the same result are guilty of manslaughter. The difference between the cases is simply that of *intent*. In the first instance, there is an intent to take life; in the second, an intent merely to do an unlawful act not amounting to felony. But if, in prize-fighting, a party goes out with an original intent to do grievous bodily harm to his antagonist, and slays him, the offence is murder at common law, or murder in the second degree under the American statutes. And so if he goes with the intention to *kill*, no matter what may have been the *motive*, the offence is murder. If, however, the guilty intent arises in hot blood, in the excitement of the struggle, and without the intervention of cooling-time, the offence is but manslaughter; and under such circumstances all participants encouraging a prize-fight in which death ensues are also guilty of manslaughter.¹

§ 372. When death occurs as an incidental consequence of an unlawful sport, it is manslaughter in all concerned in promoting the act which immediately caused the death. This principle has been applied in England to all present encouraging not only boxing-matches, but other sports of a similar kind, which are exhibited for lucre, on the ground that they tend to encourage idleness by drawing together a number of disorderly people, and hence involve a criminal responsibility.² In such

¹ R. v. Murphy, 6 C. & P. 108, by an injury received during a sparring match does not amount to manslaughter. On the other hand, even in an innocent game, killing consequent on an attempt to seriously hurt, or on negligence in use of excessive strength, is manslaughter. R. v. Bradshaw, 14 Cox C. C. 83. See *infra*, § 636; *supra*, § 142. As to liability in such cases, see *infra*, § 636.

² Fost. 260. See *supra*, § 211 a. In R. v. Young, 10 Cox C. C. 371, 1866, it was held by Bramwell, B., at the Central Crim. Court, that there is nothing unlawful in a sparring exhibition unless the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. Therefore, except in the latter case, death caused

In R. v. Orton, 39 L. T. (N. S.) 293; 14 Cox C. C. 226, 1878, the evidence was that a number of persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as at prize-fights. The combatants fought for about forty minutes with great ferocity, and severely pun-

cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained; and meetings of this kind have also a strong tendency in their nature to a breach of the peace.¹ Nor does provocation operate to acquit. Thus in a case of old date, where the prisoner had killed his opponent in a boxing-match, it was held that he was guilty of manslaughter; though he had been challenged to fight by his adversary in public trial of skill in boxing, and was also urged to engage by taunts, and the occasion was sudden.² Hence the English custom of cock-throwing, at Shrovetide, has been considered unlawful and dangerous; and accordingly, where a person throwing at a cock, missed his aim, and killed a child who was looking on, Mr. J. Foster ruled it to be manslaughter; and, speaking of the custom, he says: "It is a barbarous, unmanly custom frequently productive of great disorders, dangerous to the bystanders, and ought to be discouraged."³ So throwing stones at another wantonly in play, being a dangerous sport, without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, and by such means killing a person, will be manslaughter.⁴

§ 373. Persons who take part in lawful athletic games, and fairly follow the rules belonging to such games, are not responsible for deaths accidentally resulting therefrom.⁵ But in such cases, if the weapons used are of a dangerous and unsuitable character, and are employed with recklessness which leads to death, the offender, in case of death, is guilty of manslaughter. Thus, in an early English case, the evidence

But not so
in lawful
athletic
sports.

ished each other. The police interfered and arrested the defendants, who were among the spectators. It was held that if this was a mere exhibition of skill in sparring, it was not illegal; but if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize-fight, whether the combatants fought in gloves or not. It was subsequently held, however, that mere voluntary presence at such a fight does not make the party so present guilty of aiding and abetting. *R. v. Coney*, L. R. 8

Q. B. D. 534; 15 Cox C. C. 46, 1881; 46 L. T. (N. S.) 307; *supra*, § 211. See comments in Law Times, Dec. 17, 1881, p. 111.

¹ 1 East P. C. c. 5, s. 42, p. 270.

² Ward's Case, 1 East P. C. 270, 1789.

³ Fost. 261.

⁴ 1 Hawk. P. C. c. 29, s. 5. See *infra*, § 636.

⁵ See *Pennsylvania v. Lewis*, Addis. 279, 1796; and see more fully, argument in Whart. on Hom. § 163; as to assaults, *infra*, § 636; *Fenton's Case*, 1 Lew. 179, 1833. *Infra*, § 636.

was that Sir John Chichester made a pass at his servant with a sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard; and the thrust not being effectually broken, the servant was killed by the point of the sword.¹ This was adjudged manslaughter; and Mr. J. Foster thinks, in conformity with Lord Hale, that it was rightly so adjudged, on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm.² But, notwithstanding these high authorities, it may now be questioned whether, in this case, the application of the principle is as correct as the principle itself. If the practising of this kind in fencing—which was the sport in which Sir John Chichester was engaged—is lawful, it would seem that the bursting of the sword through the chape of the scabbard was a mere misadventure. The design of the scabbard is to render the sword harmless, and a man who carries his sword about his person assuredly gives the best evidence in his power of his confidence in the sufficiency of the guard. If it is lawful to carry such a weapon, it assuredly is lawful to use it when properly guarded from mischief. The whole question, therefore, turns on the point whether the particular exercise in which Sir John Chichester was engaged was one likely to disengage the sword from the scabbard.

§ 373 a. But where the death occurs not as incident to a game whose risks all the participants know in advance, but as the result of a practical joke which was a surprise on the deceased, then, though there was no malice, the defendant is responsible for manslaughter, when the death is imputable to physical agencies put in motion by himself.³ In accordance with this view it has been held manslaughter to cause death by ducking another;⁴ by building a fire round a drunken man in order to frighten him, he afterward rolling into the fire, which was not placed so near as to endanger him if he had laid still;⁵ by shooting with a gun, though for the mere purpose of

¹ 1 Hale, 472.

² Ibid. 478; Fost. 260.

³ R. v. Sullivan, 7 C. & P. 641, 1836;
State v. Hardie, 47 Iowa, 647, 1877.

See article in 22 Alb. L. J. 184; and
see cases cited *supra*, § 344.

⁴ 1 East P. C. 286.

⁵ R. v. Errington, 2 Lew. 217, 1835.

alarming;¹ by throwing stones into a coal-pit in sport;² by upsetting a cart as a joke;³ by administering, as a joke, excessive quantities of intoxicating liquor.⁴ But when a piece of turf was thrown in sport by one of a party digging it at another, and death ensued, an acquittal was directed.⁵

V. CORRECTION BY PERSONS IN AUTHORITY.

§ 374. When death ensues in consequence of correction by parents, masters, and others having lawful authority, and such correction is considered only reasonable, the death will be treated as accidental.⁶ Where, however, the correction exceeds the bounds of due moderation, either in the measure of it, or in the instrument made use of for the purpose, it will be either murder or manslaughter, according to the circumstances.⁷ If done with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter;⁸ if with a dangerous weapon, likely to kill or maim, and with cruelty, it will be murder; due regard being had in both instances to the age and strength of the party.⁹ So, as was said

¹ *State v. Roane*, 2 Dev. 58, 1829. *Supra*, § 344. And so when the pistol was shot only as a frolic. *Smith v. Com.*, 100 Pa. 324, 1882; *State v. Hardie*, 47 Iowa, 647, 1877.

² *Fenton's Case*, 1 Lew. 179, 1833. *Infra*, § 631; *supra*, § 259. See *Hill v. State*, 63 Ga. 578, 1879.

³ *R. v. Sullivan*, 7 C. & P. 641, 1836. In this case a carman was in the front part of a cart, loading it with sacks of potatoes, and a boy pulled the trapstick out of the front of the cart, but not with intent to do the man any harm, as he had seen it done several times before by others; and in consequence of the trapstick having been taken out, the cart tilted up, and the deceased was thrown out on his back on the stones, and the potatoes were shot out of the sacks, and fell on and covered him over, and he died in consequence of the injuries then received. It was held that as the intent was to

commit a mere trespass, the boy was guilty of manslaughter.

⁴ *R. v. Martin*, 3 C. & P. 211, 1827; *R. v. Packard*, 1 C. & M. 246, 1841. *Supra*, § 347.

⁵ *R. v. Conrahy*, 2 Cr. & Dix, 86, 1844; *supra*, § 125.

⁶ 1 East P. C. 261. *Supra*, § 259.

⁷ *R. v. Griffin*, 11 Cox C. C. 402, 1869, where death from a blow given by a father to a child, two and a half years old, was held manslaughter; and see *R. v. Conner*, 7 C. & P. 438, 1836.

⁸ *Anon.*, 1 East P. C. 261.

⁹ *Fost.* 262; *Kel.* 28, 133; 1 *Hale*, 454, 457, 473, 474; *Hazel's Case*, 1 *Leach*, 368, 1785; *R. v. Conner*, 7 C. & P. 438, 1836; *R. v. Cheeseman*, 7 C. & P. 455, 1836; *State v. Harris*, 63 N. C. 1, 1871, a case of death by extremely cruel chastisement by one *in loco parentis*. For other cases see *infra*, §§ 631-4.

in a case already cited, if a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who notwithstanding compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast and is drowned thereby, and his death is occasioned by such misconduct in the master; under such circumstances it is murder in the master. If there be no malice in the master, the crime is reduced to manslaughter.¹ So if a father, without malice, beats his son for theft so severely with a rope that he dies, it is only manslaughter; if with malice, it is murder;² and so for a person *in loco parentis* to cruelly overwork or maltreat a child, producing its death.³

A schoolmaster who, on a boy's return to school, wrote to his parents, proposing to beat him severely, in order to subdue his alleged obstinacy, and on receiving his father's reply, assenting thereto, beat the boy for two hours and a half secretly in the night, and with a thick stick, until he died, was held guilty only of manslaughter, no malice being proved.⁴

VI. STATUTORY DISTINCTIONS.

§ 375. According to the older common law authorities, not only was it murder to kill another, though the intent was merely to severely hurt, but it was considered murder if homicide were unintentionally committed by a person when engaged in a collateral felony. It is true that so long as all killing incidental to a felonious purpose was punishable with death there was no practical call for a classification of such killings. But when under humaner auspices it was felt that death should only be assigned as a punishment to homicides specifically and maliciously intended, it was found necessary to distinguish between this class of murders and murders in which there was no such intent. It was for this purpose that legislative action was invoked. The statute, however, in which the distinc-

Old English law indifferent to gradations of guilt.

¹ U. S. v. Freeman, 4 Mason C. C. State v. Harris, 63 N. C. 1, 1871. 505, 1827. See U. S. v. Knowles, 4 *Supra*, § 360.

Sawy. 517, 1864, cited *supra*, § 337. ⁴ R. v. Hopley, 2 F. & F. 202, 1860.

² Anon., 1 East P. C. 261. *Infra*, *Infra*, §§ 630-2. See Com. v. Randall, § 631. 4 Gray, 36, 1855. And as to school-

³ R. v. Cheeseman, 7 C. & P. 455, master's right to chastise, see *infra*, 1836. See 2 Twiss's Lord Eldon, 36; § 632.

tion first found formal expression was not a law imposed by the legislature of the people, but a law which had grown into practical acceptance with the people, and had then been put into technical shape by the legislature. Juries for generations had refused to convict for murder unless a specific intent to take life had been shown; or, if they did convict, when there was no such proof, it was with a recommendation to mercy, which withdrew from the sentence at least the incident of punishment by death.¹

§ 376. By the following analysis the distinctive features of the statutes of several States can be seen at a glance:

General
analysis of
statutes.

¹ This process of evolution is thus stated: "Pennsylvania may be taken as a conspicuous illustration of the position that, at least in the earlier stages of a community, laws, moulded by the conditions of a people, are inspired by its conscience and needs, and not dictated by a sovereign. Pennsylvania was in part settled by English colonists, who, it has been repeatedly declared, brought with them the English common law. In Pennsylvania, down to the Revolution, the British Parliament was as absolute as in England. Yet not only did the judges of the Supreme Court, in answer to a request from the legislature, announce that numerous of the oldest British statutes had never been in force in the State, but they declared, as a rule, that British statutes, made even before the settlement of the province, were not in force in it unless 'convenient and adapted to the circumstances of the country.' The judges do not say, 'we decide that these statutes are not to be regarded as hereafter in force.' What they virtually say is: 'These statutes never were in force here.' But why? They had been enacted by the British Parliament, many of them before Pennsylvania had been settled; and a series of other statutes were declared to be in force because enacted by the British Parliament; this being held to be the case with the statute of limitations, 32 Hen. VIII.; the statute of additions, 1 Hen. V.; the statute of escapes, 13 Edw. I.; and, what is still more remarkable, the statutes of mortmain. Whart. Com. Am. Law, § 23. It was in this way that capital punishment fell into gradual disuse in Pennsylvania in all but murder cases; and even in murder the distinction of degrees, as now existing, was adopted in practice before it was formulated in legislation."

MURDER IN THE FIRST DEGREE.

| | ENUMERATED INSTANCES. | GENERAL DEFINITION. |
|------------------------|--|---|
| <i>Maine</i> | Murder "in perpetrating or attempting to perpetrate any crime punishable with death, or imprisonment in the State prison for life, or for an unlimited term of years." | Murder with "express malice aforethought." |
| <i>New Hampshire</i> | Murder by "poison, starving, torture," or "in the perpetration or attempt at the perpetration of arson, rape, robbery, or burglary." | Murder by "deliberate and premeditated killing." |
| <i>Massachusetts</i> . | Murder "in the commission of or in an attempt to commit any crime punishable with imprisonment for life, ¹ or committed with extreme atrocity or cruelty." ² | Murder "committed with deliberately premeditated malice aforethought." |
| <i>New York</i> . . . | Murder "when perpetrated without any design to effect death by a person engaged in the commission of any felony." ³ By § 183 of the Penal Code of 1882, this is extended so as to include attempt at felonies. | Murder "first, when perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. Second, when perpetrated by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, ⁴ although without any premeditated design to effect the death of any particular individual." "Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, shall be murder in the second degree when perpetrated intentionally, but without deliberation and premeditation." ⁵ |
| <i>Pennsylvania</i> . | Murder "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary." | Murder perpetrated "by any other kind of wilful, deliberate, and premeditated killing." |
| <i>Connecticut</i> . . | Ibid. | Ibid. |
| <i>New Jersey</i> . . | Ibid. | Ibid. |
| <i>Michigan</i> . . . | Ibid. | Ibid. |
| <i>Missouri</i> . . . | Murder "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or any other felony." | Ibid. |
| <i>Virginia</i> . . . | Murder "by poison, by lying in wait, imprisonment, starving, or by wilful, deliberate, and premeditated killing, or other cruel treatment or torture," or in "the commission of or attempt to commit any arson, rape, robbery, or burglary." | Ibid. |
| <i>Tennessee</i> . . . | Murder committed "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or larceny." | Murder perpetrated "by any (other) kind of wilful, deliberate, malicious, and premeditated killing." |

The earliest of these statutes was that of Pennsylvania, and was drafted by the first Mr. William Rawle and Mr. William Bradford, jurists as distinguished for their humanity as for their legal capacity. As the Pennsylvania statute has been reproduced in a majority of the States in the Union, it forms the basis of most of the adjudications which have been given under this head.

¹ This includes all crimes on which such punishment may be inflicted. *Com. v. Pemberton*, 118 Mass. 36, 1875.

² As to what constitutes "extreme atrocity or cruelty," see *Com. v. Desmarteau*, 16 Gray, 1, 1861; *Com. v. Devlin*, 126 Mass. 253, 1879.

³ See *infra*, §§ 380, 384.

⁴ A death unintentionally caused by cruel beating is not within this clause. *Darry v. People*, 2 Parker C. R. 606, 1855; 6 Seld. 120, 1855.

⁵ Act of May 29, 1873. As to this statute, see *Leighton v. People*, 88 N. Y. 117, 1882.

§ 377. The general definition of the Pennsylvania and cognate statutes does not affect the common law distinction between murder and manslaughter;¹ it simply divides murder into two classes: murder with a specific, deliberate intent to take life being murder in the first degree; murder without such an intent to take life being murder in the second degree. The statutes, it has been held, in requiring murder in the first degree to be deliberate, do not change the common law doctrine in that respect with regard to murder; the existence of deliberation being necessary to both degrees.² The distinctive peculiarity attached by the statutes to murder in the first degree, however, is that it must necessarily be accompanied with a premeditated intention to take life.

Pennsylvania and cognate statutes leave distinction between murder and manslaughter untouched, making specific intent to take life the peculiar feature of murder in the first degree.

The "*killing*" must be "*premeditated*." Wherever, then, in cases of deliberate homicide, there is a specific intention to take life, the offence, if consummated, is murder in the first degree;³ if there is *not* a specific intention to take life, it is murder in the second degree. Between murder (embracing under the terms both degrees) and manslaughter the distinction remains as at common law.⁴

¹ *Infra*, § 388.

² See *Jones v. State*, (Ohio,) 38 N. E. Rep. 79, 1894; *Marshall v. State*, 82 Fla. 462, 1893; *State v. Workman*, (S. C.) 17 S. E. Rep. 694, 1893; *Ex parte Sloane*, 95 Ala. 22, 1892. But see *Drum*, 58 Pa. 9, 1868; *Com. v. Dougherty*, 1 Browne App. 18, 1807; *Com. v. Crause*, 4 Clark, (Phil.) 500, 1846; *State v. Spencer*, 1 Zab. 196, 1848; *State v. Jones*, 1 Houst. C. C. 21, 1863; *Slaughter v. Com.*, 11 Leigh, 618, 1841; *Com. v. King*, 2 Va. Cas. 78, 1817, in *note*; *Whiteford v. Com.*, 6 Rand. 721, 1828; *Burgess's Case*, 2 Va. Cas. 483, 1825; *Com. v. Jones*, 1 Leigh, 598, 1829; *Dale v. State*, 10 Yerg. 551, 1837; *Mitchell v. State*, 5 Ibid. 340, 1833; *State v. Anderson*, 2 Tenn. R. 6, 1804; *Anthony v. State*, 1 Meigs, 265, 1838; *Bratton v. State*, 10 Humph. 108, 1849; *Warren v. State*, 4 Cold. 130, 1867; *Petty v. State*, 6 Baxt. 610, 1875; *State v. Shoultz*, 25 Miss. 128, 1853; *State v. Curtis*, 79 Mo. 594, 1829; *State v. Stoeckli*, 71 Ibid. 559, 1880; *Nye v. People*, 35 Mich. 16, 1875; *Baker v. People*, 40 Ibid. 411, 1879; *People v. Josephs*, 7 Cal. 129, 1857;

³ *People v. Rohl*, 138 N. Y. 616, 1893; *People v. Hamilton*, 137 N. Y. 531, 1893. Intention, premeditation, and the other ingredients to be inferred from the evidence. *Yates v. State*, 26 Fla. 484, 1890; *Fields v. State*, 31 Tex. Cr. 42, 1892; *State v. Brown*, 119 Mo. 527, 1893.

⁴ *Resp. v. Bob*, 4 Dallas, 145, 1795; *Pennsylvania v. Honeyman*, Addis. 147, 1793; *Pennsylvania v. Lewis*, Ibid. 279, 1796; *Com. v. Green*, 1 Ashm. 289, 1826; *Com. v. Murray*, 2 Ibid. 41, 1834; *Com. v. Daley*, App. Whart. on Hom.; *Com. v. Hare*, Ibid. 1844; *Com. v. Gable*, 7 S. & R. 422, 1821; *Kelly v. Com.*, 1 Grant, 484, 1858;

§ 378. The doubt which arises from the term "wilful" has already been noticed. Can an *unintended* act be said to be wilful,

People v. Haun, 44 Ibid. 96, 1872; People v. Doyell, 48 Ibid. 85, 1874; Milton v. State, 6 Nebr. 136, 1877; State v. Raymond, 11 Nev. 98, 1876; Savage v. State, 18 Fla. 909, 1882; Territory v. Romine, 2 New Mex. 114, 1881; Palmore v. State, 29 Ark. 248, 1869.

See, particularly, remarks of King, P. J., in Com. v. Daley, 1844. Whart. on Hom. App., afterward adopted by Rogers, J., in the Supreme Court, in Com. v. Sherry, Ibid. Appendix, 1845.

A criticism on the conclusion in the text may be found in Atkinson v. State, 20 Tex. 522, 1860, where, under a similar statute, it was held that to constitute murder in the first degree some degree of prior deliberation must be shown. This subject has been already discussed in its general bearings. *Supra*, §§ 106-122; *infra*, §§ 380 *et seq.*

As to Alabama, see Fields v. State, 52 Ala. 348, 1824; Simpson v. State, 59 Ibid. 1, 1829. The distinction between the Alabama and the Pennsylvania statutes is given in Mitchell v. State, 60 Ibid. 26, 1879.

In Delaware the statute, while preserving the common law distinction between murder and manslaughter, makes murder with express malice aforethought murder in the first degree, while murder in the second degree includes all other cases of common law murder. This is held to exclude from murder in the first degree murder incidental to felonies. State v. Jones, 1 Houst. C.C. 21, 1863; State v. Buchanan, Ibid. 79, 1864; State v. Green, Ibid. 217, 1867; State v. Boice, Ibid. 355, 1868.

In Texas the distinction is also that of malice express, and of malice im-

plied, though the grade is made to depend on the nature of the instrument used. Primus v. State, 2 Tex. App. 369, 1877; Jones v. State, 3 Ibid. 150, 1877; Tooney v. State, 5 Ibid. 163, 1878; Rye v. State, 8 Ibid. 163, 1878; Robins v. State, 9 Ibid. 666, 1880; Eanes v. State, 10 Ibid. 421, 1881; Hill v. State, 11 Ibid. 456, 1882. But see *supra*, § 113; *infra*, § 392.

Under the Texas statute, homicide with intent to do serious bodily harm which will probably end in death, may be murder in the first degree. Cox v. State, 5 Ibid. 493, 1879.

In Missouri, which follows in the main the Pennsylvania precedents, the rule given in the text is qualified by the insertion, after "arson, rape, robbery, or burglary," in the statute, of the words, "or any other felony." The infliction of great bodily harm on another, though such injury does not amount to mayhem, being regarded a felony in Missouri, it was at first held that a murder committed incidentally to the infliction of such injury is murder in the first degree, though in Pennsylvania, from the lack of a specific intent to take life, it would be murder in the second degree. Thus in State v. Jennings, 18 Mo. 438, 1853, the court below charged the jury that if they "believed from the evidence that it was not the intention of those concerned in lynching Willard to kill him, but that they did intend to do him great bodily harm, and that in so doing death ensued, such killing is murder in the first degree, by the statute of this State." The Supreme Court on this point say: "The sixth instruction is correct under the statute of this State. Homicide" ("murder" is the statutory term), "com-

and if so, can the homicide of one party when another was intended be such? It has been seen that on this point "Wilful" there exists some conflict of authority. Keeping in view ^{means specifically} the severity which the construction of a penal statute ^{willed.} requires, and recollecting that the term as used in this case was meant to be restrictive, the better view seems to be, that in order

mitted in the attempt to perpetrate any arson, rape, robbery, burglary, or *other* felony, shall be deemed murder in the first degree. The thirty-eighth section makes the person by whose act or procurement great bodily harm has been received by another guilty of what is by our law called a felony." To the same effect in *State v. Nueslin*, 25 Mo. 111, 1857. See *State v. Joeckel*, 44 Ibid. 234, 1869.

In *State v. Green*, 66 Ibid. 631, 1877, it was held that under the statute the intent to inflict great bodily harm upon the defendant, such act, if consummated, being a felony in Missouri, makes homicide murder in the first degree, although such homicide was not "wilful, deliberate or premeditated."

In *State v. Wieners*, 66 Ibid. 13, 1877; aff. in *State v. Green*, Ibid. 647, 1877, it is said that "such a killing," *i. e.*, one in the attempt to perpetrate any felony, "was murder, although not specifically intended, for the law attaches the intent to commit the other felony to the homicide."

These rulings have been reviewed in a series of thoughtful articles in the *Central Law Journal* for 1878. If the Missouri Supreme Court, as the words quoted in *State v. Jennings* may indicate, hold that a homicide in perpetration of a felony, or by poisoning or rape, would be murder under the statute, when it would not be murder at common law, this position cannot be reconciled with the words of the statute, or the rulings of other courts. *Infra*, §§ 382-84. If, on the other

hand, what is meant is that a *murder at common law*, perpetrated incidentally to another felony, need not, under the statute, be wilful or premeditated or deliberate in order to be murder in the first degree, the question is open to doubt. See *infra*, § 384, *Souther v. Com.*, 7 Gratt. 673, 1851. The question depends on the statute. "Other kind of wilful, deliberate, and premeditated killing" may seem to indicate that all killing, under the statute, in order to be murder in the first degree, must be "wilful, deliberate, and premeditated." But the statute, if closely read, does not sustain this view. The words are, "Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, or premeditated killing; or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be murder in the first degree." The terms "wilful," etc., do not qualify the enumerated cases with which the section closes.

In *Shock v. State*, 68 Mo. 352, 1878, it was said by the court: "We are of the opinion that the words 'other felony' used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offence distinct from homicide. Whart. on Hom. §§ 55, 56 *et seq.*"

to bring a homicide within the act, it must have been specifically *willed* by the perpetrator. It is difficult to see how, if an unintended homicide be within the terms of the act, any other kind of homicide with a collateral felonious intent can be excluded.¹

§ 379. That species of homicide which is the result of justly provoked passion falls at common law under the head of manslaughter, and of course is out of the question here. But there are many cases of murder at common law which are *indeliberate*. Putting aside homicides perpetrated in pursuance of a collateral felonious intent, which have already been considered, we have those cases where the intellect is so confused by drink or stimulants, or by undue and yet not homicidal passion, as to be incapable of deliberation.² These cases are all murder at common law, but it is plain that they want the essential features of deliberation to make them murder under the statutes before us. Under these statutes the deliberate intent must be "to take life."³

§ 380. To establish the predicate of "premeditated," which, under most of the statutes, is an essential incident of murder in the first degree,⁴ it has been said that a positive previous intent to take life must be shown;⁵ but this opinion has since been recalled by the court that delivered it,⁶ and is opposed to the weight of authority elsewhere. And it has also been said that when the fact of death alone is proved, the presumption is that it is murder in the second degree, it being incumbent on the prosecution to rebut this by something, however slight, from which premeditation can be inferred.⁷ But be this as it may—and

¹ See *Felton v. U. S.*, 96 U. S. 699, 1879; *State v. Lopez*, 15 Nev. 407, 1877.

² *Infra*, § 388. As to meaning of deliberation, see *supra*, § 117; *State v. Sharp*, 71 Mo. 218, 1880; *State v. Cooper*, *Ibid.* 436, 1880, and cases in next note. *Upstone v. People*, 109 Ill. 169, 1883.

³ *Mitchell v. State*, 5 Yerg. 340, 1833. ⁴ *Dale v. State*, 10 Yerg. 551, 1837. *Supra*, §§ 116–7, and see *Lewis v. State*, 96 Ala. 6, 1892.

⁵ *Hill v. Com.*, 2 Gratt. 594, 1845; *State v. Turner*, Wright, 20, 1831; *State v. Melton*, 67 *Ibid.* 594, 1876; *State v. Curtis*, 70 Mo. 594, 1879. See 1878; *Nye v. People*, 35 Mich. 16, 1877. As to New York statute, see *People v. Batting*, 49 How. Pr. 392, 1874, and *People v. Cassiano*, 30 Hun, (N. Y.) 388, 1883. ⁶ *Warner v. State*, (N. J.) 29 Atl. Rep. 505, 1894. *Contra* where presumption of malice arises from use of a deadly weapon; *Wilkins v. State*, 98 Ala. 1, 1893;

⁷ See *State v. Curtis*, 70 Mo. 594, 1879; *Young v. State*, 95 Ala. 4, 1892; *Gibson*

when analyzed the position varies very little from that of the crown writers on murder, who draw the presumption of malice aforethought, not from the fact of death, but from the nature of the wound, instrument, etc.—there is a substantial concurrence of authority on the general meaning of *premeditation*. It involves a prior intention to do the act in question.¹ It is not necessary, however, that this intention should have been conceived for any particular period of time.² It is as much premeditation, if it entered into

v. State, 89 Ala. 121, 1889; *State v. Deschamps*, 41 La. An. 1051, 1889; *People v. Downs*, 8 N. Y. Sup. 521, 1890.

Sir J. F. Stephen (Dig. Crim. Law, 5th ed. art. 244 *a*) says: "A man who wantonly, or on a slight cause, intentionally and violently kills another, shows by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred instantly conceived and executed, which is at least as bad, if not worse. This, in the strict sense of the words, is malice aforethought. As Hobbes well observes: 'It is malice forethought, though not long forethought.' Dialogue of the Common Laws, Works, vi. 85. And it is not by law necessary that it should be long. If a slight provocation does not reduce murder to manslaughter, *a fortiori* the total absence of all provocation, and the mere rapidity with which the execution of a cruel and wicked design follows on its conception, cannot have that effect." To this it may be added that we can be on the guard against malice which exhibits itself in prior overt acts, but not against that which is concealed

¹ *State v. Wieners*, 66 Mo. 13, 1877; *State v. Williams*, 69 Ibid. 110, 1879; *Binns v. State*, 66 Ind. 428, 1879; *Schlencker v. State*, 9 Nebr. 300, 1880; *State v. Coleman*, 20 S. C. 441, 1883; *Hanvey v. State*, 68 Ga. 612, 1882; *Moon v. State*, 68 Ga. 687, 1882.

² *Supra*, § 117; *infra*, § 388; *U. S. v. Neverson*, 1 Mack. (U. S.) 152, 1881;

Keenan v. Com., 44 Pa. 55, 1862; *Kilpatrick v. Com.*, 31 Ibid. 198, 1858; *Green v. Com.*, 83 Ibid. 75, 1876; *Com. v. Buccieri*, 153 Pa. 535, 1893. See *Reyons v. State*, 32 Tex. Cr. 151, 1893; *Jones v. State*, 31 Tex. Cr. 177, 1892; *State v. Henderson*, 24 Oreg. 100, 1893; *Haunstine v. State*, 31 Nebr. 112, 1890; *People v. Johnson*, 139 N. Y. 358, 1893; *Clifford v. State*, 58 Wis. 477, 1883; *People v. Cornetti*, 92 N. Y. 85, 1883; *Ernest v. State*, 20 Fla. 383, 1883; *Donnelly v. State*, 2 Dutch. (N. J.) 463, 1858; *Shoemaker v. State*, 12 Ohio, 43, 1843; *Clifford v. State* 58 Wis. 477, 1883; *Whiteford v. Com.*, 6 Rand. (Va.) 721, 1828; *Hill v. Com.*, 2 Gratt. 594, 1845; *Bailey v. State*, 70 Ga. 617, 1883; *Miller v. State*, 54 Ala. 155, 1875; *Swan v. State*, 4 Humph. 136, 1843; *McKenzie v. State*, 26 Ark. 334, 1870; *State v. Dunn*, 18 Mo. 419, 1853; *State v. Jennings*, Ibid. 435, 1853; *State v. Hayes*, 23 Ibid. 287, 1856; *State v. Holmes*, 54 Ibid. 153, 1873; *State v. Mitchell*, 64 Ibid. 191, 1876; *State v. Hill*, 69 Ibid. 451, 1878; *State v. Kilgore*, 70 Ibid. 391, 1879; *State v. Sharp*, 71 Ibid. 218, 1880; *People v. Cotta*, 49 Cal. 166, 1874; *Milton v. State*, 6 Nebr. 136, 1877; *Schlencker v. State*, 9 Ibid. 300, 1880; *State v. Ah Mook*, 12 Nev. 144, 1877. In Indiana, the statute is construed to require that an intention should be proved or be inferred to have been formed by the defendant prior to the act; *Fahnestock v. State*, 23 Ind. 231, 1864; but

the mind of the guilty agent a moment before the act, as if it entered ten years before.¹ And the reason of this is obvious. In the first place, if in order to make murder in the first degree it be necessary that the idea should be proved to have been conceived a week or a day ahead, there will be no murder in the first degree at all, for the guilty party will take care that the conception be concealed until the limitation is passed. In the second place, all psychological investigation shows that the process of mental conception lies beyond the scrutiny of exact observation.² Hence judges have generally united in holding that while there must be some sort of *premeditation*—*i. e.*, the blow must not be the incident of mania or a sudden paroxysm of passion, such as suspends the intellectual powers—whether there has been such premeditation is for the jury; and they are to be governed, in their determination of this question, under the instructions of the court, by a logical examination of all the facts in the case. The question, in other words, is one of fact, not of arbitrary technical law.³ But when premeditation is shown,

this does not differ from the view of Rep. 69, 1889. See *O'Connor v. State*, the text. See *Binns v. State*, 66 Ind. 28 Tex. App. 288, 1889.

428, 1879. In Texas the view of the text is combated. *Atkinson v. State*, 31 Tex. 440, 1868; *Ake v. State*, 30 Ibid. 466, 1867; s. c. 31 Ibid. 416, 1868. But see *Duebbe v. State*, 1 Tex. App. 159, 1876; *Craft v. State*, 3 Kans. 450, 1865. See, also, *Bivens v. State*, 6 Eng. 455, 1850. In Alabama, under the code, the killing must be "wilful, deliberate, malicious, and premeditated" which involves prior thought. *Smith v. State*, 68 Ala. 424, 1880; *State v. Ashley*, (La.) 13 So. Rep. 738, 1893; *Johnson v. State*, 88 Ga. 203, 1891; *State v. Cox*, 110 N. C. 503, 1892; *Lovett v. State*, 30 Fla. 142, 1892; *Combs v. Com.*, (Ky.) 21 S. W. Rep. 353, 1893.

¹ *People v. Clark*, 7 N. Y. 385, 1852; *Com. v. Daley*, 4 Pa. L. J. 150, 2 Clark, 361, 1844; *Wright v. Com.*, 33 Gratt. 880, 1880; *McDaniel v. Com.*, 77 Va. 281, 1883; *State v. Smith*, (Mo.) 21 S. W. Rep. 827, 1893; *State v. Brown*, (Mich.) 43 N. W. 145, 1794; *Green v. Com.*, 83 Pa. 75,

² "In this case we have to deal only with that kind of murder in the first degree described as wilful, deliberate, and premeditated. Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offence. Therefore, if an intention to kill exists, it is wilful. If this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated." *Agnew, C.*

J., Com. v. Drum, 58 Pa. 9, 1868. See, also, *McCue v. Com.*, 78 Ibid. 185, 1875; *State v. Holme*, 54 Mo. 162, 1873; *Gray v. State*, 4 Baxt. 331,

³ *Resp. v. Mulatto Bob*, 4 Dallas, 145, 1794; *Green v. Com.*, 83 Pa. 75,

an intermediate provocation, not involving bodily danger, does not reduce the degree.¹

§ 381. There are, however, certain facts which, when proved, justify, in cases where courts are at liberty to charge on matters of fact, instructions to the jury that from them, as a matter of logic, a deliberate intent to take life may be inferred.² Where a man intelligently and maliciously

Facts from which premeditation may be inferred.

1876; *Quigley v. Com.*, 84 *Ibid.* 18, “thought for any length of time, how-
1877; *Collier v. State*, 69 *Ala.* 247, over short,” is defective in omitting
1881; *State v. White*, 30 *La. An.* 364, “beforehand.” *State v. Harris*, 76
1878; *King v. State*, 4 *Tex. App.* 256, Mo. 361, 1882. See *State v. McGin-*
1878; *Jones v. State*, *Ibid.* 436, 1878; nis, *Ibid.* 326, 1882.

Irwin v. State, 19 *Fla.* 872, 1860. In Alabama an instruction that pre-
Whart. Crim. Ev. §§ 734 *et seq. Supra*, dicates murder pursuant to design pre-
§§ 116, 117; *People v. Neary*, (*Cal.*) viously formed regardless of whether
37 *Pac. Rep.* 943, 1894; *Madison it was the result of malice, passion,*
v. Com., (*Ky.*) 17 *S. W. Rep.* 164, self-defence, etc., is erroneous. *Do-*
1891; *Simmons v. Com.*, (*Ky.*) 18 *S.* mingus *v. State*, (*Ala.*) 11 *So. Rep.* 190,
W. Rep. 534, 1892; *Aszman v. State*, 1892; *Hornsby v. State*, 94 *Ala.* 55, 1892.

123 *Ind.* 347, 1889; *Westcott v. State*, The definition of premeditation as
31 *Flo.* 453, 1893; *State v. Welch*, 36 “thought beforehand, for any length
W. Va. 690, 1892; *Halliburton v.* of time, however short, has too often
State, 32 *Tex. Cr.* 51, 1893; *State v.* and too long had the sanction of this
Welsor, 117 *Mo.* 570, 1893; *State v.* court to be repudiated now.” *Henry*,
Carver, 22 *Oreg.* 602, 1892; *Territory J.*, *State v. Snell*, 78 *Ibid.* 243, 1883.

v. Bannigan, 1 *Dak.* 451, 1877; *State* ¹ *State v. Clifford*, 58 *Wis.* 477, 1883.
v. Lewis, 14 *Mo. App.* 191, 1883; ² See *Whart. on Crim. Ev.* §§ 734 *et*
State v. Anderson, 10 *Oreg.* 448, 1882. *seq.*; and see *supra*, §§ 313, 314;

Under the New York statute it has *Green v. Com.*, 83 *Pa.* 75, 1876; *Lan-*
been held that the “deliberate and ahan *v. Com.*, 84 *Ibid.* 80, 1877; *Nev-*
premeditated design” must precede ling *v. Com.*, 98 *Ibid.* 323, 1881; *Belt-*
the killing for an appreciable period ram *v. State*, 9 *Tex. App.* 280, 1880;
of time, no matter how brief, which Gaitan *v. State*, 11 *Ibid.* 544, 1882;
may suffice for reflection and consid- Com. *v. Bell*, (*Pa.*) 30 *Atl. Rep.* 511,
eration, and the formation of a defi- 1894; *Butler v. State*, 91 *Ga.* 161,
nite purpose. *People v. Majone*, 91 1893; *Tilley v. Com.*, 89 *Va.* 136,
N. Y. 211, 1883; *s. c.* 12 *Abb. (N. C.)* 1892; *Davis v. Com.*, 89 *Va.* 132,
187. But it is not necessary to show 1892; *Marable v. State*, 89 *Ga.* 425,
motive or prior ill feeling. *People v.* 1892; *Lashley v. Com.*, 88 *Va.* 400,
Cornetti, 92 *N. Y.* 85, 1883; *People v.* 1891; *Thomas v. State*, 67 *Ga.* 460,
Fish, 125 *N. Y.* 136, 1891. See *supra*, 1881; *Nelson v. Com.*, (*Ky.*) 23 *S. W.*
§ 117, for other cases. To the same *Rep.* 350, 1893; *State v. Avery*, 113
general effect, see *Simmerman v. State*, Mo. 475, 1893; *King v. State*, 91 *Tenn.*
14 *Nebr.* 568, 1883. 617, 1892; *State v. McCoy*, 111 *Mo.*
517, 1892; *State v. Bulling*, 105 *Mo.*
204, 1891; *State v. Hultz*, 106 *Mo.*
41, 1891; *Drake v. State*, 29 *Tex. App.*
265, 1890; *Weathersby v. State*, 29

See *Adams v. People*, 109 *Ill.* 444, 1884, as to intent.

In Missouri it has been held that a charge defining premeditation as

makes use of a weapon likely to take life,¹ the party assailed being unarmed;² where he declares his intentions to be deadly; where he makes preparations for the concealing of the body; where, before the death, he lays a train of circumstances which may be calculated to break the surprise, or baffle the curiosity which would probably be occasioned by it; where, in any way, evidence arises which shows a harbored design against the life of another;³ where the act is part of a conspiracy to destroy persons of a particular class;⁴ where the facts indicate peculiar cruelty;⁵ such evidence,

Tex. App. 278, 1890; *Lewis v. Com.*, (Ky.) 14 S. W. Rep. 966, 1890; *State v. Miller*, 100 Mo. 606, 1890; *Pace v. Com.*, (Ky.) 12 S. W. Rep. 271, 1889; *O'Brien v. Com.*, 89 Ky. 354, 1889; *Gallaher v. State*, 28 Tex. App. 247, 1889; *State v. Schieler*, (Idaho) 37 Pac. Rep. 272, 1894; *People v. Bruggy*, 93 Cal. 476, 1892; *Miller v. State*, 3 Wyo. 657, 1892; *State v. Davis*, 48 Kans. 1, 1892; *Com. v. Volkavitch*, (Pa.) 5 Lanc. Law Rev. 311, 1887.

¹ For definition of "deadly weapon," see *Sylvester v. State*, 72 Ala. 201, 1882; *Waite v. State*, 13 Tex. App. 169, 1882.

² *Kilpatrick v. Com.*, 31 Pa. 198, 1863; *Abernethy v. State*, 101 Ibid. 322, 1883; *Howell's Case*, 26 Gratt. 995, 1875; *Mitchell v. Com.*, 33 Ibid. 872, 1880; *Hornsby v. State*, 94 Ala. 55, 1891; *State v. Banks*, 118 Mo. 117, 1893; *McCarty v. Com.*, (Ky.) 20 S. W. Rep. 229, 1892, where drunkenness was no defence. See *Ward v. State*, 30 Tex. App. 687, 1892; *Hughes v. State*, 29 Tex. App. 565, 1891; *Williams v. State*, 29 Tex. App. 89, 1890; *Mitchell v. Com.*, (Ky.) 14 S. W. Rep. 489, 1890; *Murphy v. State*, 28 Tex. App. 350, 1890; *Walker v. State*, 28 Tex. App. 503, 1890; *State v. Carver*, 22 Oreg. 602, 1892; *People v. Wolf*, 95 Mich. 625, 1893; *People v. Wright*, 89 Mich. 70, 1891; *People v. Lynch*, 101 Cal. 229, 1894; *McDermott v. State*, 89 Ind. 187, 1883; *Mayes v. People*, 106 Ill. 306, 1883.

³ *Campbell v. Com.*, 84 Pa. 187, 1877; *Clem v. Com.*, (Ky.) 13 S. W. Rep. 102, 1890; *Barnards v. State*, 88 Tenn. 183, 1889; *Pullen v. State*, 28 Tex. App. 114, 1889; *Jordan v. People*, 19 Colo. 417, 1894; *Caldwell v. State*, 28 Tex. App. 566, 1890; *Lewis v. State*, 29 Tex. App. 201, 1890; *Tarvers v. State*, 90 Tenn. 485, 1891; *Stephens v. State*, 31 Tex. Cr. 365, 1892; *Thomas v. Com.*, (Ky.) 20 S. W. Rep. 226, 1892; *Hawes v. State*, 88 Ala. 37, 1890; *State v. Umble*, 115 Mo. 452, 1893; *State v. Howell*, 117 Mo. 307, 1893; *State v. Dettmer*, (Mo.) 27 S. W. Rep. 1117, 1894; *State v. Wilson*, 104 N. C. 868, 1889; *Muscoe v. Com.*, 87 Va. 460, 1891; *Taylor v. Com.*, (Va.) 17 S. E. Rep. 812, 1893; *People v. Slocum*, 125 N. Y. 716, 1891; *Garlitz v. State*, 71 Md. 293, 1889; *Snodgrass v. Com.*, 89 Va. 679, 1893; *Power v. People*, 17 Colo. 178, 1892; *State v. Cumberland*, (Iowa,) 58 N. W. Rep. 885, 1894; *Com. v. Crossmire*, 156 Pa. 304, 1893.

⁴ *Ibid.*; *Carroll v. Com.*, 84 Ibid. 107, 1877; *Kehoe v. Com.*, 85 Ibid. 127, 1877; *Smith v. State*, 7 Tex. App. 414, 1880; *Pharr v. State*, Ibid. 472, 1879; *Graves v. State*, 14 Ibid. 113, 1883; *Duran v. State*, Ibid. 195, 1883; *Stanley v. State*, Ibid. 315, 1883; *State v. Clifford*, 58 Wis. 477, 1883; *State v. Kearley*, 26 Kans. 77, 1881; *State v. Burke*, 71 Ala. 377, 1881.

⁵ *State v. Mahly*, 68 Mo. 315, 1878; *People v. Geoghan*, 138 N. Y. 677,

when standing by itself, entitles us to hold, as a presumption of fact, that the intention to take life was deliberate.¹ The same view was taken where the defendant loaded a pistol, took aim at, and shot the deceased;² where he deliberately procured a butcher's knife and sharpened it for the avowed purpose of killing the deceased;³ where he concealed a dirk in his breast, stating, shortly before the attack, that he knew where the seat of life was;⁴ where he thrust a handspike deeply into the forehead of the deceased.⁵ But it is not necessary, to warrant a conviction of murder in the first degree, that the instrument should be such as would necessarily produce death.⁶ Thus where the weapon of death was a club not so thick as an axe-handle, the jury, under the charge of the court, rendered a verdict of murder in the first degree, it appearing that the blow was induced by a deliberate intention to

1893; *Com. v. Holmes*, 157 Mass. 233, 1892; *Hormsba v. Com.*, (Ky.) 19 S. W. Rep. 845, 1892; *Blackwell v. State*, 29 Tex. App. 194, 1890; *Painter v. People*, 147 Ill. 444, 1893.

¹ *Resp. v. Mulatto Bob*, 4 Dallas, 145, 1794; *Com. v. Williams*, 2 Ashm. 69, 1839. See *State v. Spencer*, 1 Zab. 196, 1848.

² *Com. v. Smith*, 7 Smith's Laws, 696, 1816. See *Com. v. Werling*, (Pa.) 30 Atl. Rep. 406, 1894, as to deadly weapons; *Wilkins v. State*, 98 Ala. 1, 1893; *Territory v. Johnson*, 9 Mont. 21, 1889.

³ *Com. v. O'Hara*, 7 Smith's Laws App. 694, 1797. See *Green v. Com.*, 83 Pa. 75, 1876; *Lanahan v. Com.*, 84 Ibid. 80, 1877; *Com. v. Burgess*, 2 Va. Cas. 483, 1825; *People v. Rohl*, 138 N. Y. 616, 1893; *Sullivan v. State*, (Ala.) 15 So. Rep. 264, 1894; *Webb v. State*, (Ala.) 14 So. Rep. 865, 1894; *Whart. Crim. Ev.* §§ 734-764.

"Without adopting all the language of Chief Justice McKean in that case (*Com. v. O'Hara*), I may use that of Judge Strong in *Cathcart v. The Commonwealth*, 37 Pa. 108, 1860. 'If the killing was not accidental, then malice and a design to kill were to be pre-

sumed from the use of a deadly weapon; for the law adopts the common, rational belief that a man intends the usual, immediate, and natural consequences of his voluntary act. Human reason will not tolerate the denial that a man who intentionally, not accidentally, fires a musket ball through the body of his wife, and thus inflicts a mortal wound, has a heart fatally bent on mischief, and intends to kill.'" *Agnew, C. J.*, *McCue v. Com.*, 78 Pa. 185, 1875; S. P., *Quigley v. Com.*, 84 Ibid. 18, 1877. But see *Whart. Crim. Ev.* §§ 734-764.

⁴ *Bennett's Case*, 8 Leigh, 745, 1837; *Scales v. State*, 96 Ala. 69, 1892; *Clark v. State*, 29 Tex. App. 357, 1891.

⁵ *Swan v. State*, 4 Humph. 136, 1843, and see generally, *Whart. Crim. Ev.* §§ 764 *et seq.*; *U. S. v. Cornell*, 2 Mason, 94, 1821; *Com. v. Whiteford*, 6 Rand. 721, 1828; *Woodside v. State*, 2 Howard, (Miss.) 656, 1837; *Casat v. State*, 41 Ark. 511, 1882; *Moore v. State*, 15 Tex. App. 1, 1883; *Short v. State*, Ibid. 370, 1884; *Gomez v. State*, Ibid. 327, 1884.

⁶ See *McDaniel v. Com.*, 77 Va. 281, 1883.

take life,¹ though it was otherwise when the weapon was a crowbar, suddenly caught up.² The same inference of premeditation is drawn with still greater strength from the declared purpose of the defendant,³ as where the defendant said he intended "to lay for the deceased, if he froze, the next Saturday night," and where the homicide took place that night;⁴ where he said: "I am determined to kill the man who injured me;"⁵ where he declared the day before the murder, that he certainly would shoot the deceased;⁶ where, in another case, the language was: "I will split down any fellow that is saucy;"⁷ and where a grave had been prepared a short time before the homicide, though the deceased was not ultimately placed in it, the whole plan of action being changed.⁸ But inferences of this class are matters of reasoning, not of formal jurisprudence; and when the statute leaves the matter to the jury, a court is not justified in absolutely directing the jury to find for a particular degree.⁹

§ 382. Where A., with intent to kill B., shoots at B. and kills C., without particular intent to kill C., the offence has been held murder at common law.¹⁰ Is it murder in the first degree under our statutes? Supposing the case to be one in which we can legitimately infer deliberation and intent, the answer, at the first view, would be in the affirmative. It is objected, however, that in such case there

Killing B. when the intent was to kill C. is murder in the first degree.

¹ *Com. v. Murray*, 2 Ashm. 41, 696, 1816. See *People v. Foy*, 138 N. Y. 664, 1893.

² *Kelly v. Com.*, 1 Grant, 484, 1858. Or when weapon was a plank, see *Kelly v. State*, 68 Miss. 343, 1891; *Simpson v. State*, 56 Ark. 8, 1892. ⁷ *Resp. v. Mulatto Bob*, 4 Dallas, 145, 1795; *Lancaster v. State*, 91 Tenn. 267, 1892; *People v. Hull*, 86 Mich. 449, 1891.

³ *Stewart v. State*, 1 Ohio, 66, 1853; *Whart. Crim. Ev.* §§ 756 *et seq.* See *Nevling v. Com.*, 98 Pa. 322, 1881; *State v. Dickson*, 78 Mo. 439, 1883. ⁸ *Com. v. Zephon*, MS., Phil. 1844. See, also, *Parker v. State*, 135 Ind. 534, 1893.

⁴ *Jim v. State*, 5 Humph. 145, 1844. ⁹ *Hopt v. U. S.*, 110 U. S. 574, 1883; *People v. Raten*, 63 Cal. 421, 433, 1882; *Whart. Cr. Pl. & Pr.* § 812. "The jury must not be imperatively re-

⁵ *Com. v. Burgess*, 2 Va. Cas. 483, 1825; *Whart. Crim. Ev.* §§ 756 *et seq.*; *McDonald v. State*, 22 S. W. Rep. 403, 1893. See *Hodge v. State*, 26 Fla. 11, 1890; *State v. Scheele*, 57 Conn. 307, 1889; *Com. v. McManus*, 143 Pa. 64, 1891; *State v. Palmer*, 65 N. H. 216, 1889. ¹⁰ See *supra*, §§ 110-120, 317. *Calla-*

is no exclusive intent to take the life taken. But is this essential to murder in the first degree? If it be necessary to a conviction of murder in the first degree that such an intent should be exactly proved, could there be ever such a conviction? A., for instance, thinks that he is injured by B., and A., therefore, shoots B. under the impression that he shoots one by whom he has been injured. But is this impression ever coincident with the truth? Can we recall any case of malice in which the defendant's passions did not, more or less, create an ideal object of enmity? Would it be any defence to the shooting of B. that A. supposed B. to be a different character from what he really was, and that therefore his shooting B. was a mistake? If we negative these questions, we can only do so by assuming the position that the grade of a malicious homicide is not reduced by the fact that the defendant mistook his relations to the person whom he killed. And there are several collateral reasons, supposing that the person killed was the one whom the defendant aimed at, why we should not limit this principle by excluding from it cases where A. kills C. by mistaking him for B. *First*, in such a killing we have the constituents necessary to the guilt of murder in the first degree—deliberation, intent, malice, and killing. *Secondly*, the policy of society eminently requires that life should be protected by the application of this principle; for while I may elude the attack of one with whom I know myself to be at enmity; no prudence on my part can ward off from me an attack which mistakes me for another, and to prevent such attack I must rely exclusively on the protection of the law. *Thirdly*, the question of particular intent is one as to which it is difficult to apply an exact gauge; and if it is necessary to prove in each case an exact intent to kill the particular person, just prosecutions must often fail, because in most cases, from the inherent imperfection of evidence, no such proof can be supplied. At the same time we must remember, as we have already observed,¹ that were the question still open, the

han v. State, 21 Ohio, 306, 1871; State v. Raymond, 11 Nev. 98, 1876. To the same effect see Com. v. Dougherty, 7 Smith's Laws, 696, 1816; Com. v. Flavel, Phil. 1846, MSS.; State v. Renfrow, 111 Mo. 589, 1892; see Jennings v. Com., (Ky.) 16 S. W. Rep. 348, 1891. See Hoffman v. State, (Wis.) 59 N. W. Rep. 588, 1894, for murder in third degree. As differing from the above, see Bratton v. State, 10 Humph. 103, 1849. In McConnell v. State, 13 Tex. App. 390, 1883, the grade in such cases is held to be murder in the second degree. ¹ *Supra*, §§ 120, 319; and see Pliemling v. State, 46 Wis. 516, 1879. See Com. v. Breyessee, 160 Pa. 451, 1894.

true course, in cases where the intent was to kill B., and C. was negligently killed by the blow meant for B., C. not having been aimed at by A., is to indict for an attempt to kill B., and for the negligent manslaughter of C.¹

§ 383. Where A. maliciously aims at a body of men, intending to kill any one of them, and kills B., the offence is murder in the first degree; if he intends only to hurt seriously, it is murder in the second degree.² The first of these propositions is settled by the reasoning of the last section.³ If A., intending maliciously to kill B., kills C. instead of B., is guilty of murder in the first degree, *a fortiori* is this the case where A., when killing C., kills one of a group of persons, some one of whom he intended to kill. On the other hand, if his intent was only to do serious bodily harm, his offence, though murder at common law, is only murder in the second degree under the Pennsylvania and cognate statutes, it not containing the necessary constituent of an intent to kill.⁴

§ 384. It has sometimes been said that a homicide in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, is, under the Pennsylvania and cognate statutes, murder in the first degree. But it must be remembered that the statutes under criticism do not say that "*Homicide*," when so committed, shall be murder in the first degree, but that "*Murder*," when so committed, shall be murder in the first degree. Nothing, therefore, that is not murder at common law can be murder either in the first or second degree; and we have first to inquire, in determining the grade of any particular homicide under the statutes, whether it is murder at common law. If it is not, then such homicide cannot be murder either in the first or the second degree under the statutes, although it is a homicide committed in perpetration of one of the specified

¹ *Supra*, §§ 109-111, 120, 319. See which, however, is only declaratory of the common law; *Presley v. State*, 1886. *Infra*, § 388, n. 6. *Sims v. State*, 59 Ala. 98, 1879; *Washington v. State*, Com., (Ky.) 13 S. W. Rep. 1079, 1890. 60 *Ibid.* 10, 1879; *Smith v. State*, 88

² See *supra*, § 319; *State v. Edwards*, Ala. 73, 1889.

71 Mo. 312, 1880; *Aiken v. State*, 10 Tex. App. 610, 1881.

³ See *supra*, §§ 119, 319. In Alabama this is prescribed by statute, 10, 1879.

⁴ Under the Alabama code the offence would be murder in the first degree. *Washington v. State*, 60 Ala. 10, 1879.

felonies.¹ On the other hand, if the offence would have been murder at common law, then, although there was no intent to take life, the case, if the homicide were committed in the perpetration or attempt at perpetration of an enumerated felony, is murder in the first degree under the statutes.²

¹ *State v. Dowd*, 19 Conn. 388, 1849; *Com. v. Hanlon*, 3 Brewst. 461, 1870; s. c., 8 Phil. R. 401; *Ex parte Chauncy*, 2 Ashm. 227, 1838; *State v. Earnest*, 70 Mo. 520, 1879; *Pharr v. State*, 7 Tex. App. 472, 1879. See *Com. v. Jones*, 1 Leigh, 598, 1829, and comments in Whart. on Hom. § 184. In New York this view does not seem to be accepted. *People v. Van Steenburgh*, 1 Parker C. R. 39, 1854, though see *Buel v. People*, 18 Hun, 489; s. c., 78 N. Y. 492, 1879. In *Buel v. People*, the defendant, while attempting to ravish a girl, passed a strap around her neck, by which she was strangled. This was held murder in the first degree; a decision not inconsistent with the text, as the offence would have been murder at common law. See to same effect, *Cox v. People*, 19 Hun, 430; 80 N. Y. 500, 1880, where the murder was incidental to burglary. See *People v. Greenwall*, 115 N. Y. 520, 1889; *Williams v. State*, 21 Tex. App. 256, 1891; as to "robbery," *Williams v. State*, 30 Tex. App. 354, 1891; as to conspiracy for robbery, see *People v. Olsen*, 80 Cal. 122, 1889. See *State v. Brown*, 7 Oreg. 186, 1879. As to Missouri, see *Shock v. State*, 68 Mo. 352, 1878; *supra*, § 377.

In *People v. Vasquez*, 49 Cal. 560, 1875, it was held that where several are engaged in the commission of a robbery, and one of the associates does not intend to take life, and dissuades the others from taking life, yet he is guilty of murder in the first degree if one of them take life in furtherance of the plan to rob. See, also, *Singleton v. State*, 1 Tex. App. 501, 1877.

As to what is extreme atrocity and cruelty, under Massachusetts statute, see *Com. v. Devlin*, 126 Mass. 253, 1879.

In Virginia, where "wilful and excessive whipping" is among the enumerated instances, a verdict of murder in the first degree was sustained against a master for whipping a slave to death, though it was maintained that the intent was to do only bodily harm. It should be observed, however, that in the Virginia act the term "other" is omitted before the phrase "*kind of wilful, etc., killing*," so that to some degree the bearing of the latter definition on the enumerated instances is weakened. *Souther v. State*, 7 Gratt. 673, 1851.

That "other felony" in the Missouri statute must be some felony not necessarily incident to the assault, see *State v. Shock*, 68 Mo. 352, 1878; *supra*, § 377.

A homicide, to be murder in the first degree under this clause, must be *one emanating from the felony*; not one to which the felony was collateral. *Pliemling v. State*, 46 Wis. 516, 1879. Judge need not define these felonies; *Com. v. Manfredi*, 162 Pa. 144, 1894; *Com. v. Cleary*, 135 Pa. 64, 1890. See *State v. Tyler*, (La.) 15 So. Rep. 624, 1894. See *Smith v. State*, 31 Tex. Cr. 33, 1892; (robbery) *Leeper v. State*, 29 Tex. App. 63, 1890.

² *Ibid.*; *Com. v. Pemberton*, 118 Mass. 36, 1875; *Buel v. People*, 78 N. Y. 492, 1879; *Com. v. Hare*, Whart. Hom. App., 1844; *Com. v. Daley*, 4 Penn. L. J. 150; s. c., 2 Clark, 361, 1844; *Howell v. Com.*, 26 Gratt. 995, 1875; *Moynihan v. State*, 70 Ind. 126,

§ 385. The same observation applies to the agency of poison. A homicide by poison is not necessarily murder at common law.¹ If it is not, it is not murder in the first degree.² At the same time, where the evidence shows that the death was effected by intentional and malicious poisoning, the court, where this is not precluded by statute, may tell the jury that the offence is murder in the first degree.³

Homicide committed by means of poison or lying in wait, not necessarily murder in the first degree.

So also as to lying in wait. A man may lie in wait for another merely to commit a trespass; and if so, in case of an accidental killing, the offence being only manslaughter at common law, is only manslaughter under our

1880; *Riley v. State*, 9 Humph. 646, 1849; *Tooney v. State*, 5 Tex. App. 163, 1878; *Pharr v. State*, 7 Ibid. 472, 1879.

¹ *Supra*, § 346. See *Dresbech v. State*, 38 Ohio St. 365, 1882.

² *State v. Dowd*, 19 Conn. 388, 1848; *Com. v. Keeper*, 2 Ashm. 227, 391, 1838. See *Lane v. Com.*, 59 Pa. 371, 1868; *Com. v. Jones*, 1 Leigh, 598, 1829; *Souther v. Com.*, 7 Gratt. 673, 1851. When poison is administered in order to excite sexual passion, and death ensues, this is not death through intended poisoning so as to be murder in the first degree. *Infra*, § 610; *Bechtelheimer v. State*, 54 Ind. 128, 1876. As to distinction in Texas, see *Tooney v. State*, 5 Tex. App. 163, 1878.

In *State v. Wells*, 61 Iowa, 633, 1883, the evidence was that the defendant, a convict in the State's prison, administered to one of the guards, in order to effect an escape, chloroform in such quantities as to produce death. This was held to be murder in the first degree under a statute which provides that "all murder which is perpetrated by means of poison, of lying in wait, or by any kind of wilful, deliberate, and premeditated killing . . . is murder in the first degree." In the opinion of the court there are some expressions to the effect that the clause

above cited covers all cases of intentional poisoning. But the proper view is that only cases of murder at common law are, when effected by poison, under this clause, murder in the first degree. That this particular case was murder at common law may be maintained on two grounds: (1) that the chloroform was administered in such a way as to be a deadly poison; (2) that this offence was collateral to an indictable felony.

In *State v. Dowd*, 19 Conn. 388, 1848, the court said: "If any case can be supposed where murder may be committed by means of poison, and not be the result of such an act (deliberate), then a conviction of murder in the second degree may be legal."

In *State v. Wagner*, 78 Mo. 644, 1883, the poison was laudanum administered to the deceased for the purpose of fraudulently inducing him to part with his property. This, being murder at common law, was held murder in the first degree under the Missouri statute; the court at the same time saying, "a homicide by poison is not necessarily murder at common law, Whart. on Hom. § 92," recognizing, therefore, the distinction in the text.

³ *Shaffner v. Com.*, 72 Pa. 60, 1872; *People v. Hall*, 48 Mich. 482, 1882.

statutes. But if an intentional homicide by lying in wait be proved, then such homicide is ordinarily murder in the first degree.¹

§ 386. Where A., intending to commit a felony, the execution of which is not enumerated in the statutes as contributing to the definition of murder in the first degree, unintentionally kills B., the offence is manslaughter. A., for instance, shoots a tame fowl, and in so doing unintentionally and accidentally kills B. Is A. guilty in this of murder in the second degree under our statutes? No doubt we have several *obiter dicta* of our judges answering this question in the affirmative, though no case exists in which the point has been directly affirmed. But if we are to hold, as we may justly do, that such an offence is only manslaughter at common law, then it is only manslaughter under our statutes.²

Homicide incidental to unenumerated felony is manslaughter.

§ 387. An "attempt" to commit one of the enumerated felonies, under the statutes, must consist of a substantive indictable offence. The word "attempt," as thus used in the statutes must be construed strictly, as describing such an attempt as is indictable. Hence it is not sufficient, in order to bring the case under the statutes, that the homicide should have been committed while in preparing to commit the felony in question;³ nor is it enough that the offence consists in mere solicitation; or in purpose without distinctive overt act.⁴ "An attempt to commit a rape, in which killing occurs, is necessarily an overt act, indicating the intent and purpose of the assault, of which clear proof, sufficient to place the fact beyond a reasonable doubt should be given. A mere intention to commit the offence is nothing, unless accompanied by acts directed toward its accomplishment. The killing, to constitute the crime of murder, without the specific intent to take life, must be clearly shown by the prosecution to have occurred in the performance of such acts as should establish the independent substantive crime."⁵

Under the statutes, "attempt" must be a substantive offence.

See *supra*, § 392; *State v. Best*, 111 N. C. 638, 1892; *State v. Wells*, 61 Iowa, 629, 1883; *Zoldoske v. State*, 82 Wis. 580, 1892; *Johnson v. State*, 29 Tex. App. 150, 1890.

¹ See *People v. Miles*, 55 Cal. 207, 1880; *White v. State*, 30 Tex. App. 652, 1892.

² See this point examined *supra*, §§ 320 *et seq.*

³ See *supra*, § 180.

⁴ *Supra*, § 179. See *Bittle v. State*, (Md.) 28 Atl. Rep. 405, 1894.

⁵ *Thompson, C. J., Kelly v. Com.*, 1 Grant, 484, 1858. See *Com. v. Manfredi*, 162 Pa. 144, 1894.

§ 388. Murder in the second degree includes all cases of common law murder¹ where the intention was not to take life, of which murder, when the intent was only to do great bodily hurt, may be taken as a leading illustration.² There may, also, be cases where death ensues during a riotous affray, under circumstances which would constitute murder at common law, but which, in consequence of the want of a specific intent to take life being shown, amount but to murder in the second degree.³ And this is the case generally wherever the mind, from any form of disturbance, is incapable of framing a specific purpose.⁴ It has been also held that where the offence is

Murder in the second degree includes all common law murders in which the intention is not to take life, including cases in which the mind is in such a state as to be incap-

¹ That "malice aforethought" is essential, see *Daly v. People*, 39 Hun, 182, 1884; *State v. Curtis*, 70 Mo. 594, 1879; *State v. Stoeckli*, 71 *Ibid.* 559, 1880; *Brooks v. State*, 90 Ind. 428, 1882; *People v. Grigsby*, 62 Cal. 482, 1881; *Bohanan v. State*, 15 Nebr. 209, 1883.

² *Com. v. Dougherty*, 7 Smith's Laws, 695, 1828; *Whiteford v. Com.*, 6 Rand. (Va.) 721, 1828; *State v. Robinson*, 73 Mo. 306, 1881; *State v. Decklots*, 19 Iowa, 447, 1865. See

Washington v. State, 53 Ala. 29, 1875; *State v. Hill*, 69 Mo. 451, 1879; *Harris v. State*, 36 Ark. 127, 1880; *Caldwell v. State*, 41 Tex. 86, 1874; *Hill v. State*, 11 Tex. App. 456, 1881. As to Delaware statute, see *State v. Jones*, 1 Houst. C. C. 21, 1857; *State v. Hamilton*, *Ibid.* 101, 1860; *State v. Gardner*, *Ibid.* 146, 1864; *State v. Green*, *Ibid.* 217, 1866; *State v. Till*, *Ibid.* 233, 1867; *State v. Boice*, *Ibid.* 355, 1871; *State v. Rhodes*, *Ibid.* 476, 1877; *State v. Scott*, 41 Minn. 365, 1889; *State v. Baldwin*, 79 Iowa, 714, 1890. But see *Golding v. State*, 26 Fla. 530, 1890; *State v. Mitchell*, 98 Mo. 657, 1889; *State v. Baker*, 13 Mont. 160, 1893.

³ *Com. v. Hare*, 4 Penn. L. J. 257; s. c. 2 Clark, 467, 1844; and see *Com. v. Sherry*, App. Whart. on

Hom.; *Com. v. Neills*, 2 Brewst. 553, 1868. *Supra*, §§ 47, 118. It is said in Missouri, that mental excitement and disturbance produced by insults consisting only of words, may reduce the offence to murder in the second degree. *State v. Ellis*, 74 Mo. 207, 1881; *State v. Kotowsky*, *Ibid.* 247, 1881. See *State v. Crawford*, 115 Mo. 620, 1893; *State v. Estep*, 44 Kans. 572, 1890.

⁴ For murder in the second degree under statutes of Texas, see *Skaggs v. State*, 31 Tex. Cr. 563, 1893; *Crow v. State*, (Tex.) 21 S. W. Rep. 543, 1893; *Warren v. State*, 31 Tex. Cr. 573, 1893; *Coyle v. State*, 31 Tex. Cr. 604, 1893; *May v. State*, (Tex.) 20 S. W. Rep. 396, 1892; *Hardy v. State*, 31 Tex. Cr. 289, 1892; *Simmons v. State*, 31 Tex. Cr. 227, 1892; *Green v. State*, (Tex.) 20 S. W. Rep. 712, 1892; *Pace v. State*, (Tex.) 20 S. W. Rep. 762, 1892; *Knowles v. State*, 31 Tex. Cr. 383, 1892; *Gibbs v. State*, (Tex.) 20 S. W. Rep. 919, 1892; *Cochran v. State*, 28 Tex. App. 422, 1890; *Fisher v. State*, (Tex.) 13 S. W. Rep. 773, 1890; *Jacobs v. State*, 28 Tex. App. 79, 1889; *State v. O'Brien*, (Idaho,) 29 Pac. Rep. 38, 1892; *Kelly v. People*, 17 Colo. 130, 1891; *State v. Freidrich*, 4 Wash. 204, 1892; *State v. Peffers*, 80 Iowa, 580, 1890; *Childers v. State*,

murder, but there is no proof of intent, the grade is the second degree.¹ But premeditation is essential, as in other cases of murder.²

§ 389. When the defendant is in such a state of drunkenness as to be incapable of forming a specific intent to take life, then the offence, if murder at common law, is murder in the second degree under the statutes.³ “Implied malice is sufficient at common law to make the offence murder, and under our statute to make it murder in the second degree; but to constitute murder in the first degree, actual malice must be proved. Upon this question the state of the prisoner’s mind is material. In behalf of the defence, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, but as tending to show that the less and not the greater offence was in fact committed.”⁴ When, however, the defendant voluntarily

ble of specific intent.

Murder in drunkenness is murder in the second degree.

(Tex.) 13 S. W. Rep. 650, 1890; 86 Va. 746, 1890; State v. Punshon, Powell v. State, 28 Tex. App. 393, (Mo.) 27 S. W. Rep. 1111, 1894.

1890; State v. Moxley, 102 Mo. 374, 1890; *Ex parte* Jones, 31 Tex. Cr. 422, 1893; State v. McKinzie, 102 Mo. 620, 1890; Jones v. State, 29 Tex. App. 338, 1890; Surrell v. State, 29 Tex. App. 321, 1890; Turner v. State, (Tenn.) 15 S. W. Rep. 838, 1891; State v. Elkins, 101 Mo. 344, 1890; Baltrip v. State, 30 Tex. App. 545, 1891; State v. Nelson, 101 Mo. 464, 1890; State v. Howard, 102 Mo. 142, 1890; Jacobs v. Com., (Pa.) 22 W. N. C. 268, 1888; Bohanan v. State, 15 Nebr. 209, 1883; Johnson v. State, 24 Fla. 162, 1888. *Supra*, § 47.

³ See cases cited *supra*, §§ 47, 48, 51, 52; Willis v. Com., 32 Gratt. 929, 1879; State v. Trivas, 32 La. An. 1086, 1880.

⁴ Carpenter, J., State v. Johnson, 40 Conn. 136, 1873; see Com. v. Jones, 1 Leigh, 610, 1829; Com. v. Haggarty, Lewis C. L. 403, 1847; Pirtle v. State, 9 Humph. 664, 1848; People v. Young, 102 Cal. 411, 1894; see Upstone v. People, 109 Ill. 169, 1883.

“Except in the case of murder, which happens in consequence of actual or attempted arson, rape, robbery, or burglary,” says Judge Lewis, of the Supreme Court of Pennsylvania, “a deliberate intention to kill is the essential feature of murder in the first degree. When this ingredient is absent; where the mind, from intoxication or any other cause, is deprived of its power to form a design with deliberation and premeditation, the offence is stripped of the malignant features required by the statute to place it on the list of capital crimes; and

made himself drunk in anticipation of the crime, the offence is murder in the first degree.¹

§ 390. As has been already noticed, if a pregnant woman be killed in an attempt to produce abortion in her, and it appears that the design of the operator was not to take the life of the mother, the offence has been held murder in the second degree.² And on the principles already expressed, this may be defended in all cases where the intent was to do the mother serious bodily harm. Where there is no such intent, the proper course is to indict separately for the manslaughter of the mother, and for the perpetration of the abortion.

§ 391. Aside from murder in the commission of enumerated felonies, the rule is that where the deliberate intention is to take life, and death ensues, it is murder in the first degree; where it is to do serious bodily harm, and death ensues, it is murder in the second degree; while the common law definition of manslaughter remains unaltered.

This distinction, however, cannot always be preserved. In those jurisdictions where the juries are entitled to take control of the law, it of course gives way to other tests more agreeable to the prejudices of the particular case. And even where the court assumes its proper province, and where it lays down the law with precision and fulness, a jury is apt to seize upon murder in the second degree as a compromise, when they think murder has been

neither courts nor juries can lawfully dispense with what the act of assembly requires." Lewis C. L. 405. And see 1893; *State v. Zorn*, 22 Oreg. 591, 1892; *People v. Vincent*, 95 Cal. 425, 1892; *Bernhardt v. State*, 82 Wis. 23, 1892.

People v. Leonardi, (N. Y. App.) 38 N. E. Rep. 372, 1894; *Warner v. State*, (N. J.) 29 Atl. Rep. 505, 1894; *Aszman v. State*, 123 Ind. 347, 1889; *Com. v. Cleary*, 135 Pa. 64, 1890; *State v. Ashley*, (La.) 13 So. Rep. 738, 1893; *Hodges v. Com.*, 89 Va. 265, 1892; *King v. State*, 80 Ala. 612, 1891; *Hanvey v. State*, 68 Ga. 612, 1882; *Moon v. State*, 68 Ga. 687, 1882; *Evers v. State*, 31 Tex. Cr. 318, 1892. See *Hall v. Com.*, (Ky.) 13 S. W. Rep. 1082, 1890, for verdict of manslaughter. *State v. O'Neil*, 51 Kans. 651, 1893; *State v. Zorn*, 22 Oreg. 591, 1893; *People v. Vincent*, 95 Cal. 425, 1892; *Bernhardt v. State*, 82 Wis. 23, 1892.

¹ *Supra*, § 49; *Nevling v. Com.*, 98 Pa. 323, 1881; *State v. Robinson*, 20 W. Va. 713, 1883; *Garner v. State*, 28 Fla. 113, 1891; *Houston v. State*, (Tex.) 14 S. W. Rep. 352, 1883; *State v. O'Neil*, 51 Kans. 651, 1893; *Sanders v. State*, 94 Ind. 147, 1883.

² *Supra*, §§ 316, 325; *infra*, § 450; *Com. v. Jackson*, 15 Gray, 187, 1860; *Com. v. Keeper*, 2 Ashm. 227, 1838; *State v. Moore*, 25 Iowa, 128, 1867; *Yundt v. People*, 65 Ill. 372, 1872. See *State v. Bowker*, (Oreg.) 38 Pac. Rep. 124, 1894.

committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties. In such cases courts are not disposed to disturb verdicts, but permit them to stand, though technically incorrect.¹

§ 392. The character of the presumption to be drawn in cases of malicious killing is elsewhere independently discussed.² It is scarcely necessary here to repeat that such a presumption is an inference of fact to be drawn from all the circumstances of the particular case. Wherever the killing is with a deadly weapon, and there is evidence aliunde showing that this was intentionally, deliberately, and unjustifiably used, then the inference, as we have just seen, is that of an intent to take life, and the case is murder in the first degree. The burden, however, of proving this is on the prosecution.³ Stripping the case of these incidents, however, and supposing that simply a malicious killing be proved, then the inference is of murder in the second degree.⁴

In cases of doubt presumption is for murder in second degree.

¹ Whart. on Hom. § 193; Slaughter 54 Mo. 153, 1873; State v. Evans, 65 v. Com., 11 Leigh, 681, 1841; State v. Ibid. 574, 1877; State v. Winge, 66 Ostrander, 30 Mo. 18, 1852; State v. Ibid. 181, 1877; State v. Testerman, Cooper, 71 Ibid. 436, 1880; State v. 68 Ibid. 408, 1878; State v. Eaton, 75 Mewherter, 46 Iowa, 88, 1877. See, Ibid. 586, 1881; State v. Phelps, 76 however, Clem v. State, 42 Ind. 420, Ibid. 319, 1882; Hamby v. State, 36 1878; State v. Mahly, 68 Mo. 315, Tex. 523, 1871; Preuit v. People, 5 1878. See Blain v. State, (Tex.) 26 S. Nebr. 377, 1869; Milton v. State, 6 W. Rep. 63, 1894. Nebr. 136, 1877; Hodge v. State, 26

² See Whart. Crim. Ev. §§ 734, 764. Fla. 11, 1890.

³ Murray v. Com., 79 Pa. 311, 1875; In a Texas case it is said: "When Kehoe v. Com., 85 Ibid. 127, 1877. a homicide has been proven, that fact See, also, People v. Pallister, 138 N. alone authorizes the presumption of Y. 601, 1893; Smith v. People, 141 malice, and unexplained would war- Ill. 447, 1892; Lyons v. People, 137 rant a verdict for murder in the second Ill. 602, 1891; Warner v. State, (N. degree. But express and premeditated J.) 29 Atl. Rep. 505, 1894; People v. malice can never be presumed; it is Elliott, 80 Cal. 296, 1889. evidenced by former grudges, previous

⁴ *Supra*, § 118; Whart. on Crim. Ev. threats, lying in wait, or some concerted scheme to kill, or do some §§ 334, 721; Com. v. Drum, 58 Pa. 9, bodily harm, as poisoning, starving, 1858; O'Mara v. Com., 75 Ibid. 424, torturing, or the attempted perpetra- 1874; McCue v. Com., 78 Va. 185, tion of rape, robbery, or burglary, and 1875; State v. Walters, 45 Iowa, 389, these evidences of express malice, or 1877; Hill v. Com., 2 Gratt. 594, 1845; some one of them, must be proven as McDaniel v. Com., 77 Va. 281, 1883; directly as the homicide, before the Mitchell v. State, 5 Yerg. 340, 1833; jury are authorized in finding a verdict Witt v. State, 6 Cold. 5, 1868; Davis v. State, 10 Ga. 101, 1851; Green v. for murder in the first degree. State, 69 Ala. 6, 1881; State v. Holmes, "The distinction between murder

§ 393. Under the statutes a common law indictment for murder is sufficient to sustain a verdict of guilty of murder either in the first or the second degree. It being held, as has already been seen fully, that the line separating murder from manslaughter is in no way changed by our statutes; and it being further seen that murder in the second degree is simply murder at common law with certain aggravating features discharged, it follows that on a common law indictment for murder a verdict of murder either in the first or in the second degree can be sustained. So, indeed, have our courts, in many instances, ruled.¹ The same principle has been recognized

in the first and second degrees has been so often discussed by this court that we deem it necessary here only to refer to a few cases deciding this question: *McCoy v. The State*, 25 Tex. 33, 1860; *Maria v. The State*, 28 Ibid. 698, 1866; *Ake v. The State*, 30 Ibid. 466, 1867; *Lindsay v. The State*, and *Williams v. The State*, decided at this term." *Ogden. J., Hamby v. State*, 36 Ibid. 523, 1872; *supra*, § 377.

¹ *State v. Verril*, 54 Me. 408, 1866; *State v. Pike*, 49 N. H. 399, 1869; *Green v. Com.*, 12 Allen, 155, 1866; *Fitzgerald v. People*, 37 N. Y. 413, 1867; *Kennedy v. People*, 39 Ibid. 245, 1880; *Cox v. People*, 80 Ibid. 500, 1880; *Com. v. White*, 6 Binn. 179, 1813; *Com. v. Flannagan*, 7 Watts & S. 415, 1844; *Graves v. State*, 45 N. J. L. 347, 1881; *Com. v. Miller*, 1 Va. Cas. 310, 1812; *Com. v. Wicks*, Ibid. 387, 1824; *Livingston's Case*, 14 Gratt. 592, 1857; *Cargen v. People*, 39 Mich. 540, 1878; *State v. Lessing*, 16 Minn. 75, 1870; *Hines v. State*, 8 Humph. 597, 1848; *Mitchell v. State*, 5 Yerg. 340, 1833; *Poole v. State*, 2 Baxt. 288, 1872; *Taylor v. State*, 11 Lea, 708, 1883; *People v. Lloyd*, 9 Cal. 54, 1857; *People v. Bonilla*, 38 Ibid. 699, 1870; *State v. Millain*, 3 Nev. 409, 1866; *State v. Thompson*, 12 Ibid. 140, 1877; *State v. Hing*, 16 Ibid. 307, 1882; *People v. Ah Choy*, 1 Idaho, (N. S.) 317, 1874; *Gehrke v. State*, 13 Tex. 568, 1855; *Wall v. State*, 18 Ibid. 682, 1857; *Henrie v. State*, 41 Ibid. 573, 1875; *Bohanan v. State*, 14 Tex. App. 380, 1883; *McAdams v. State*, 25 Ark. 405, 1869; *Leschi v. Territory*, 1 Wash. Ter. 13, 1857; *Brannigan v. Territory*, 3 Utah, 488, 1869. See *Hogan v. State*, 30 Wis. 437, 1872; *Davis v. State*, 39 Md. 355; *People v. Osmond*, 138 N. Y. 80, 1893; *Garvey's Case*, 7 Colo. 384, 1884.

As to Florida, see *Bird v. State*, 18 Fla. 493, 1882.

In Missouri, however, it is held necessary to specify the murder to have been wilful and deliberate, and to state the circumstances making it such. *Bower v. State*, 5 Mo. 364, 1838; *State v. Jones*, 20 Ibid. 58, 1854. But see *State v. Kilgore*, *infra*.

As to California, see *People v. Wallace*, 9 Cal. 30, 1857; *People v. Stevenson*, Ibid. 273, 1857; *People v. Dolan*, Ibid. 576, 1857; *People v. Murray*, 10 Ibid. 309, 1858; *People v. Urias*, 12 Ibid. 325, 1859.

In Connecticut, under the Revised Statutes, providing that the "degree of the crime shall be alleged," it is sufficient, after stating the crime in the usual common law form, to add that the defendant did thereby commit murder in the first degree. *Smith v. State*, 50 Conn. 193, 1883. And

in cases where murder is committed in the attempt to commit arson, rape, robbery, etc., in which cases the specific intent need not be alleged.¹ These rulings were first made in Pennsylvania, a State which was the earliest to legislate on this subject; and it needs but a glance at the statutes and their history to see that the interpretation then given to them by the courts is correct. The object of the statutes in Pennsylvania, and in the States that adopted the same legislation, was to provide that when a defendant's mind is not capable of a specific design to take life, then he is not to be capitally punished.² In subsequent Pennsylvania statutes, it was provided that when the defendant's mind is disturbed to the further extent of being actually insane, then the jury is to acquit of the felony, but find the insanity, upon which the defendant is to be imprisoned as a dangerous lunatic. Analogous statutes have been adopted throughout the United States. Now it is no more reasonable to require "a specific intention to take life" to be specially averred to meet the first class of statutes, than it is to require "sanity" to be specially averred to meet the second class of statutes.³ The legal scope of murder, as a generic term, is unchanged, by either of the statutes. All that the statutes say is that when the jury find that the murder was committed in certain conditions of mind, then the punishment shall not be death, but imprisonment. We cannot reject this reasoning without holding that in all cases where a jury are, by statute or otherwise, authorized to find a diminished responsibility, the indictment must specially negative the facts implying such diminished responsibility. But this is absurd; and we must, therefore, fall back on the position established above, that an indictment for murder at common law is sufficient in cases of murder in the first degree. Hence, also, under an indictment in

see, also, *State v. Hamlin*, 47 Conn. 95, 1878.

As to Iowa, rejecting the views of *infra*.

the text, see *State v. McCormick*, 27 Iowa, 402, 1868; *State v. Watkins*,

Ibid. 415, 1868.

In Indiana, murder in first degree must be averred to have been done

"purposely." *Snyder v. State*, 59 Ind. 105, 1878. See *Powers v. State*, 87 Ind. 144, 1882.

As to Montana, see *Territory v. McAndrews*, 3 Mont. 158, 1878.

As to Kansas, see *State v. Fooks*, 29 Kan. 425, 1883; *State v. Brown*,

¹ *Com. v. Flannagan*, 7 Watts & Serg. 415, 1844.

² See *supra*, § 376; and particularly 1 Whart. & St. Med. Jur. §§ 181, 214, 227.

³ This has been even held when the statute makes a "sound mind" a constituent of murder. *Fahnestock v. State*, 23 Ind. 231, 1864. See *Dumas v. State*, 63 Ga. 600, 1879.

the common law form the prosecution may put in evidence killing by poison, or killing with the intent to commit arson, rape, robbery or burglary,¹ or killing by lying in wait.²

By the same reasoning, it has been held in Pennsylvania not necessary to aver "against the statute" in the conclusion, the *offence* being at common law, and only the punishment statutory.³

§ 394. Under an indictment for murder at common law, there may be, as has just been incidentally noticed, a conviction of either murder in the first or of murder in the second degree, as well as a conviction of manslaughter.⁴

Verdict
should
specify
degree.

Hence, under such an indictment, if there be a conviction for manslaughter, or of murder in the second degree, the more correct course is to find "not guilty of murder, but guilty of manslaughter," or "of murder in the second degree."⁵ In Maryland this has been held essential.⁶ But such a degree of particularity is

¹ Roach v. State, 8 Tex. App. 478, though the conviction was only for 1880. See, as to indictment in New York, Cox v. People, 80 N. Y. 500, 1880; Mendez v. State, 29 Tex. App. 608, 1891. State v. McNally, 32 Iowa, 581, 1868; State v. McCormick, 27 Ibid. 402, 1871. As to Missouri, see State v. Phillips, 24 Mo. 475, 1857.

² State v. Kilgore, 70 Mo. 546, 1879.

³ Com. v. White, 6 Binn. 179, 1813. In Kansas, the indictment to constitute murder in the first degree must charge that the assault and the killing were with the deliberate and premeditated intention of killing the deceased. State v. Brown, 21 Kans. 38, 1879. In Connecticut, as we have seen, a statute was passed in 1870 declaring that in all indictments of murder the degree shall be charged. State v. Hamlin, 47 Conn. 95, 1878, cited *supra*. This, however, does not touch indictments found prior to its passage, in which it is not necessary to allege the degree. State v. Smith, 38 Conn. 397, 1871.

In summing up the adjudications on this point, we may say that in Massachusetts, New York, Virginia, Indiana, Wisconsin, Arkansas, Texas, Nevada, Minnesota, California, and Washington Territory, as well as in Pennsylvania, Maine, and New Hampshire, which have been specially cited above, an indictment for murder at common law will sustain a verdict of murder in the first degree.

In Iowa, it has been held by the Supreme Court error to put the defendant on trial for murder in the first degree, on an indictment charging murder in the second degree, State v. Grant, 7 Oreg. 414, 1879.

⁴ See Com. v. Herty, 109 Mass. 348, 1872; Keefe v. People, 40 N. Y. 348, 1868; Davis v. State, 39 Md. 355, 1874; State v. Grant, 7 Oreg. 414, 1879.

⁵ See *infra*, § 541.

⁶ State v. Flannigan 6 Md. 167, 1854. See *infra*, § 541; Weighorst v. State, 7 Md. 442, 1855.

inconsistent with the practice which has been generally sustained.¹ And, in any view, an acquittal or conviction of the minor degree on an indictment good for the major is an acquittal of the major.² But the verdict must specify the degree.³ And defendants, whether joint principals, or principals and accessaries, may be convicted of different degrees.⁴

VII. RIOTOUS HOMICIDES.

§ 395. When an unlawful assemblage takes place for the redress of a supposed *public* wrong, and particularly where its object is the overturn of government, or the resistance of executive, legislative, or judicial authority as such, participation in it, to the extent of levying war against the government for these public purposes, becomes treason. Where, however, the intention is to redress a private or social grievance, and to incidentally resist process merely so far as may be necessary to effect the private or social end, the offence amounts not to the dignity of treason, and if during its commission life is lost, the offender may be tried for homicide. Two observations, however, may properly be made in this connection: (1) Even supposing treason exists, the felony of murder or manslaughter does not *merge* in it. Merger only exists where a misdemeanor and a felony form a constituent part of the same act, as where an attempt to commit a larceny and the larceny itself unite. In such cases it is the felony alone that can be prosecuted. But two felonies cannot thus coalesce, for being each of equal grade neither sinks into the other. (2) The domains of treason have become restricted within limits which exclude the great mass of those cases of general riot, which were formerly included within the term. It has already been noticed that during the necessities of civil war in England, each government for the time in power, acting on the principle that self-preservation is the duty of all governments, followed its predecessors in pushing the law of treason to

When war is levied against government for private purposes, and killing follows, indictment should be for homicide.

¹ Whart. Cr. Pl. & Pr. §§ 736 *et seq.* the defendant could successfully plead

² See authorities given more fully, the proceedings in this case in bar of *infra*, § 541; Whart. Cr. Pl. & Pr. §§ 465, 742. any subsequent prosecution against him for the same offence." *McMillan*, C. J., *State v. Lessing*, 16 Minn. 80, 1870.

A verdict of guilty of murder in the second degree "is equivalent to an express acquittal of the defendant for murder in the first degree, and

³ *Infra*, § 543.

⁴ *Supra*, § 236.

its extremest verge, both as regards principle and temper. But in more recent days, when the crown no longer feels it to be a contest for life between it and the state prisoner at the bar, the old policy has been relaxed, and "levying war," in the definition of treason, is shorn of the constructive element, and restricted, as the term suggests, to the actual making of war against the State. The same amelioration of judicial construction has taken place, also, in our own country. In the earlier treason cases in Pennsylvania, those of Roberts and Carlisle, which were tried in revolutionary times, the early English precedents were cited with approbation and applied with rigor. In Fries's trial, which took place during the administration of John Adams, when the government was scarcely settled, the same general views were expressed which obtained in England during the civil wars, and a local opposition to the execution of the window tax was construed to be a "levying war" against the government of the United States. But in Hanway's Case, the Circuit Court of the United States, sitting in Philadelphia in 1851, after noticing the fact that the better opinion in England now is that the term "levying war" should be confined to insurrections and rebellions for the purpose of "overturning the government by force and arms," went on to say that a combination on the part of certain citizens, in a particular neighborhood, to aid fugitive slaves in resisting their capture, even though such resistance results in murder and robbery, is not treason.¹

§ 396. Individuals who, though not specifically parties to the killing, are present and consenting to the assemblage by whom it is perpetrated, are principals when killing is in pursuance of common design. "When divers persons," says Hawkins, "resolve generally to resist all opposers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in so doing happen to kill a man, they are all guilty of murder, for they must at their peril abide the event of their actions who unlawfully engage in such bold disturbances of the public peace, in opposition to, and defiance of, the justice of the nation."² And the

¹ U. S. v. Hanway, 2 Wall. Jr. 139, F. & F. 351, 1858; R. v. McNaughton, 14 Cox C. C. 576, 1881; U. S. v. Ross, 1851.

² *Supra*, § 213; 1 Hawk. P. C. c. 1 Gallis. 624, 1814; *Ruloff v. People*, 13, s. 51; *Staundf.* 17; 1 Hale, 439 45 N. Y. 213, 1870; *Huling v. State, et seq.*; 4 Bl. Com. 200; 1 East P. 17 Ohio St. 583, 1867; *Washington v. C. c.* 55, s. 33, p. 257; *R. v. Archer*, 1 State, 36 Ga. 222, 1861; *Brennan v.*

principle applies to cases of unlawful assembly not amounting to riot.¹

§ 397. It should be observed, however, that while the parties are responsible for consequent acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals. Thus if one of the party, on his own hook, turn aside to commit a felony foreign to the original design, his companions do not participate in his guilt.² It must be remembered that to make out the *corpus delicti* in such cases it is essential to show that the party charged struck, either actually or constructively, the fatal blow, and consented to the common design. Thus it has been correctly held in England that when two or more, one of whom has received a provocation (as a blow) which would reduce homicide to manslaughter, are all charged with murder, and it cannot be proved which of them inflicted the fatal blow, neither of them can be convicted of murder, without a proof of a common design to inflict the homicidal act; nor of manslaughter, without proof of a common design to inflict unlawful violence.³

§ 398. Where a sudden popular movement is got up for the purpose of redressing some supposed grievance, the temper of those concerned is aroused by the outrage they believe themselves to have suffered, and in this view a homicide committed by one of the parties so affected would be but manslaughter. We must, however, remember that the common law treats at least as manslaughter all killing when in performance of an unlawful act, and the "unlawful act" in this case is the riotous assemblage, in which all voluntary participants, passive or active, are responsible.⁴ It should be added that a rioter is not responsible for an accidental homicide caused by an officer engaged in suppressing the riot;⁵ nor for a

But not in collateral crimes.

Presence without intent to kill involves manslaughter.

People, 15 Ill. 511, 1853; Lamb v. People, 96 Ibid. 73, 1880; State v. Simmons, 6 Jones Law, (N. C.) 21, 1858; People v. Brown, 59 Cal. 345, 1881.

¹ R. v. McNaughton, 14 Cox C. C. 576, 1881.

² *Supra*, §§ 214-220; R. v. Skeet, 4 F. & F. 931, 1866; R. v. Hawk, 3 C. & P. 392, 1828; R. v. Collison, 4 Ibid. 565, 1831; R. v. Warner, 5 Ibid. 525, 1833; R. v. Price, 8 Cox C. C. 96, 1858; U. S. v. Gilbert, 2 Sumn. 19, 1837.

³ R. v. Turner, 4 F. & F. 339, 1864.

⁴ See *supra*, §§ 213 *et seq.*; R. v. Murphy, 6 C. & P. 103, 1833; R. v. Collison, 4 Ibid. 565, 1831; R. v. Jackson, 7 Cox C. C. 357, 1857; R. v. Skeet, 4

F. & F. 931, 1866; Patten v. People, 18 Mich. 314, 1869; People v. Knapp, 26 Ibid. 112, 1872; Sloan v. State, 9 Ind. 565, 1857; Brennan v. People, 15 Ill. 511, 1853; State v. Jenkins, 14 Rich. (S. C.) 215, 1867.

⁵ Com. v. Campbell, 7 Allen, 541, 1863.

death caused by a stranger independently interfering for his own ends.¹

§ 399. When the object is to inflict capital punishment by what is called lynch-law, all who consent to the design are responsible for the overt act.² Under the statute above analyzed, this is murder in the first degree when not executed in hot blood. Of all species of homicide it is among those that most strikingly combine the two distinctive features of that type—namely, deliberation and a specific intent to take life.

§ 399 a. Even though the original assailants in a riotous homicide are guilty of murder, a person who, in hot blood, rushes in to aid them, is responsible only for manslaughter for a killing which takes place after he joins them.³ Whether a particular party in such a homicide is guilty of murder, supposing hot blood to have been proved, depends upon whether there has been cooling-time.⁴ A person who is secure from further personal aggressions has no right to return armed to the scene of conflict, and voluntarily engage in a new conflict with the aggressor. If he do, and slay his assailant, the offence will be murder or manslaughter, according to the particular circumstances.⁵ Where the whole proceeding is infected with a continuous public excitement, and where the return to the conflict is so immediate and so associated in sentiment as to form part of the same transaction with the original assault, the law applies the original provocation to the fatal blow. What interval of time is necessary to exclude the hypothesis of continuousness is, of course, dependent upon the circumstances of the case and the temperament of the individuals. But a good test is the interposition of other subject-matters in the mind, and its intermediate voluntary adoption of other topics. Thus it has been ruled that if, between the provocation received and the mortal blow given, the prisoner fall into other discourse or diversion, giving a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immedi-

¹ R. v. Murphy, 6 C. & P. 103, 1833. See *supra*, §§ 214, 220.

² State v. Wilson, 38 Conn. 126, 1871. *Infra*, §§ 461, 487.

³ *Supra*, §§ 115, 397. Thompson v. State, 25 Ala. 41, 1854; Frank v. State, 27 Ala. 38, 1855.

⁴ See *infra*, §§ 455 *et seq.*, where this point is discussed in its general relations.

⁵ *Infra*, §§ 478–482; and see *supra*,

ate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his attention was called off from the subject of the provocation, any subsequent killing of his adversary, especially where a deadly weapon is used, is murder.¹ It is obvious, therefore, that no measurement of time can be adopted in this respect. In periods of great public excitement, when men's minds have been so absorbed with a particular topic as to be incapable of considering anything else, a much greater period is required to cool after a supposed provocation than under ordinary circumstances. Care, however, should be taken in this as well as in all similar cases, lest the public excitement be used as a cloak for private cupidity or revenge.²

§ 400. The law, as we will hereafter observe,³ is that private citizens may, of their own authority, lawfully endeavor to suppress a riot, and for that purpose may even arm themselves, and that whatever is honestly done by them in the execution of that object will be supported and justified by the common law.⁴

Private persons may kill in suppression of riot.

VIII. HOMICIDE BY OFFICERS OF JUSTICE.

§ 401. Homicide committed by the sheriff in execution of a warrant to that effect is of course justifiable, entitling him to an acquittal.⁵ It is important to observe, however, that the judgment and sentence must be strictly followed, since if death is inflicted otherwise than directed, the officer will be guilty of manslaughter at least, if not of murder.⁶ If the judgment be hanging, and the officer behead the party, this is said to be murder;⁷ and if there be no jurisdiction in the court by whom the warrant is issued, the offence is murder, even though the officers charged honestly believed in the validity of the warrant, though it is otherwise when the warrant is irregular from some merely formal defect.⁸ A subaltern cannot defend himself by a warrant from an unauthorized superior.⁹

Killing in obedience to warrant justifiable.

¹ Com. v. Green, 1 Ashm. 289, 1826. 52, 211; 4 Bl. Com. 179. See *supra*,

² See *infra*, §§ 476-478.

§§ 94, 307; *infra*, § 508.

³ *Infra*, §§ 404-406.

⁷ 1 Hale, 483, 454, 466, 501; 2 Ibid.

⁴ *Infra*, § 404; State v. Roane, 2 411; 4 Bl. Com. 179.

Dev. 58, 1828. *Infra*, §§ 404, 405.

⁸ Sir J. F. Stephen (Dig. Crim. Law, 5th ed., art. 218) gives the following

⁵ *Infra*, § 508.

⁶ 1 Hale, 501; 2 Ibid. 411; 3 Inst. illustrations of the rule in the text:

⁹ *Supra*, §§ 94, 310; U. S. v. Carr, 1 Woods, 480, 1871.

§ 402. With the exceptions hereafter stated, officers of the law, when their authority to arrest or imprison is resisted, will be justified in opposing force to force, even if death should be the consequence;¹ yet they ought not to come to extremities upon every slight interruption, without a reasonable necessity.² If they should kill where no resistance is made, it will be murder; and the same rule will exist if they should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled.³

And so when necessary to effect an arrest.

The cases under this head may be classed as follows:

1. Civil.
2. Criminal.

1. Civil.

§ 403. In civil suits, if the party against whom the process has issued fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer, not being able to

Officer intentionally killing a per-

“(1) A. sits under a commission of dlesex, delivered by Lord (then Mr. jail delivery. The officer forgets to Justice) Blackburn, has been published or not. Much information on adjourn the court at the end of the the subject will be found in Forsyth’s Cases and Opinions on Constitutional Law, pp. 484–568. Mr. Forsyth prints, *inter alia*, an opinion given by the late Mr. Edward James, Q. C., and myself, in 1866; see pp. 551–563; and see Phillips v. Eyre, L. R. 6 Q. B. 11, 1870.” *Infra*, § 411. For C. J. Cockburn’s charge, see *supra*, § 8.

“(2) A., a lieutenant or other having commission of martial authority in time of peace, causes B. to be hanged by C., by color of martial law. This is murder in both A. and C. Coke, 3d Inst. 52; 1 Hale P. C. 499, 500. The whole subject of martial law underwent full discussion in connection with the execution of Mr. Gordon by a court martial in Jamaica, in 1865. An elaborate history of the case has been published by Mr. Finlason, and the charge to the grand jury, delivered at the Central Criminal Court by the Lord Chief Justice of England, has been published in a separate form. I know not whether the charge to the grand jury of Mid-

¹ Compare *infra*, § 411; R. v. Dadson, 2 Den. C. C. 35, 1850; U.S. v. Rice, 1 Hughes, 560, 1875; Wolff v. State, 18 Ohio St. 298, 1868; State v. Garrett, Winston, (N. C.) 144, 1864; State v. Anderson, 1 Hill, (S. C.) 327, 1833; Clements v. State, 50 Ala. 117, 1873. See on this point § 204 of N. Y. Penal Code of 1882. Evidence to show that deceased was not guilty of the charge contained in the warrant is not admissible. Roten v. State, 31 Fla. 514, 1893.

² 1 East P. C. 297; Smith v. State, (Ark.) 26 S. W. Rep. 712, 1894.

³ 1 Hale, 481; Fost. 291.

overtake him, make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it has been said that this will amount to murder.¹ But this is an extreme case, for the same authorities inform us that if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence; and if there be resistance, and an affray ensue, during which the party sought to be arrested is slain, the offence will also be but manslaughter.² But if a party liable to a civil arrest put in jeopardy the lives of those seeking lawfully to arrest him, his homicide will be excusable.³

son flying
from civil
arrest
chargeable
with murder.

2: Criminal.

§ 404. Unless it be in cases of riots, it is not lawful for an officer to kill a party accused of misdemeanor if he fly from the arrest, though he cannot otherwise be overtaken. Under such circumstances (the deceased only being charged with a misdemeanor) killing him intentionally is murder;⁴ but the offence will amount only to manslaughter if it appear that death was not intended.⁵

And so in
pursuit of
criminal
charged
with misdemeanor.

Where resistance is made, yet if the officer kill the party after the resistance is over, and the necessity has ceased, the crime will at least be manslaughter.⁶ And it is manslaughter for an officer to kill a prisoner in prevention of an escape when the escape could be prevented by less violent means.⁷

§ 405. An honest and non-negligent belief that a felony is about to be perpetrated will extenuate, so it has been declared, a homicide committed in prevention of it, though the person interposing be but a private citizen,⁸ but not a

Otherwise
in respect
to felonies.

¹ 1 Hale, 481; Fost. 291. *Infra*, Bl. Com. 201, note. See *State v. Oliver*, 2 Houst. (Del.) 585, 1855.

² Fost. 293, 294. See *Doherty v. State*, 84 Wis. 152, 1893. *Infra*, § 429. See *Bowman v. Com.*, (Ky.) 27 S. W. Rep. 870, 1894.

³ *State v. Anderson*, 1 Hill, (S. C.) 327, 1833. ⁴ 1 East P. C. 525. See *Clements v. State*, 50 Ala. 117, 1873.

⁵ *State v. O'Neil*, 1 Houst. C. C. 468, 1867; cited *supra*, § 317; *Handley v. State*, 96 Ala. 48, 1892. ⁶ *Reneau v. State*, 2 Lea, 239, 1878.

⁷ *Infra*, §§ 426-429, 440, 488, 497, 537; *Pond v. People*, 8 Mich. 150, 1860; *Oliver v. State*, 17 Ala. 487,

homicide committed in pursuit, unless special authority be given, or the pursuit be conducted according to law.¹ So far as concerns officers armed with a warrant, where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit if he cannot otherwise be overtaken. But the slayer in such cases, especially if he be a mere pursuer, must not only show that he had adequate grounds to believe that a felony was actually committed, but that he avowed his object, and that the felon refused to submit, and that the killing was necessary to make the arrest.² Such is the old law; but in States where the distinction between felonies and misdemeanors is done away with, the cases resting on this distinction are no longer authoritative. The reasonable rule is that where a man flies from arrest, the charge being a mere trespass or an offence equivalent to a trespass, to kill him in prevention of an escape is at least manslaughter. It is otherwise, supposing the arrest be duly authorized and notice duly given, where the offence is of high grade, assailing life or public safety.

§ 406. When a felony, or offence of high grade in States where the distinction as to felonies is abolished, has been committed and the offender is in duress, the officer is bound to make every exertion to prevent an escape; and if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable.³ This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it; for if, in these cases, fresh pursuit be made, and *a fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. The same rule holds if a felon, after arrest, break away as he is carried to jail, and his pursuers cannot retake without killing him. But if he may be taken, in any case, without such severity, it is at least manslaughter in him

Killing by
officer jus-
tifiable in
prevention
of escape
in felonies.

1849; Dill v. State, 25 Ibid. 15, 1854; 1 510, 1823; 1 Brunf. (U. S.) 467; State East P. C. 259. See Whart. Cr. Pl. & v. Roane, 2 Dev. 58, 1828; People v. Pr. § 8. Burt, 51 Mich. 199, 1882; Reneau v.

¹ State v. Rutherford, 1 Hawks, 457, State, 2 Lea, 720, 1879; Whart. Cr. 1822; Selfridge's Trial, 160; R. v. Pl. & Pr. §§ 8, 9, 13. See People v. Haworth, 1 Mood. C. C. 207, 1828; R. Adams, 85 Cal. 231, 1890.

v. Williams, Ibid. 387, 1833; Carr v. ³ Fost. 321. See Whart. Cr. Pl. & State, 43 Ark. 99, 1884. Pr. §§ 1-17. See People v. Kilving-

² U. S. v. Travers, 2 Wheel. C. C. ton, (Cal.) 37 Pac. Rep. 799, 1894.

who kills him ; and the jury ought to inquire whether it were done of necessity or not.¹

§ 407. As has been already observed, if officers of the law, when engaged in the preservation of the peace, find it necessary to take life, such homicide is justifiable. The rule is not confined to the instant the officer is on the spot, and at the scene of action, engaged in the business which brought him thither, for he is under the same protection, going to, remaining at, or returning from the same ; and, therefore if he come to do his office, and meeting great opposition, retire, and in the retreat is killed, this will amount to murder. He went in obedience to the law, and in the execution of his office, and his retreat was necessary to avoid the danger which threatened him. And upon the same principle, if he meet with opposition by the way, and is killed before he come to the place, such opposition being intended to prevent his doing his duty, which is a fact to be collected from the circumstances appearing in evidence, this will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him. It follows from this that if such an officer successfully resists those who seek to obstruct and hinder him from proceeding to the lawful execution of his duty in such respect, he is justified, even should the lives of the assailants, their aiders and abettors, be taken, from the necessary extent of the resistance so made.²

Killing justifiable when necessary to preserve peace.

§ 408. An arrest, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party who, while performing it, in the prosecution of his purpose causes the death of another person, guilty of murder,³ though if the officer act without malice, and the irregularity be trivial, the offence may be only manslaughter. In all cases, the officer should proceed with due caution ; and although it is not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor unless upon a reasonable necessity, in order to execute his duty.⁴

Lawful arrest unlawful if executed imposes responsibility.

¹ Ibid. As to escape, see *infra*, § 1672; *supra*, § 361.

² See *supra*, § 139.

³ *Infra*, § 1555; *In re Riots of 1844*, 488, 494; 2 Ibid. 84; Caffé's Case, 1 per King, P. J.—4 Penn. Law Jour. Ventr. 216; *State v. Roberts*, 52 N. 29; s. c. 2 Clark, 275, 1844. See *Whart. Cr. Pl. & Pr.* § 16.

⁴ 1 East P. C. 297; 1 Hale, 481, 182, 1866. See *Cockrell v. Com.*, (Ky.)

§ 409. An officer who makes an arrest out of his proper district, or without any warrant or authority, and purposely kills the party for not submitting to such illegal arrest, will, generally speaking, be guilty of murder in all cases where an indifferent person, acting in the like manner, without any such pretence, would be guilty to that extent.¹ The offence is manslaughter if the arrest is *bonâ fide* and without malice.²

§ 410. Private persons who, without warrant, undertake to bring felons to justice, are indictable for manslaughter if they unnecessarily take life to prevent an escape;³ and if they act even under apparent necessity, they are indictable for manslaughter if their belief that a felony was committed was in any way negligent.⁴ And if the object is to prevent the commission of a felony, the person so interfering is indictable for manslaughter, unless his action in killing was necessary to prevent enormous wrong.⁵

§ 411. The distinctions just announced apply to military and naval officers killing without authority. Unless there be such authority, killing by a military or naval officer is at least manslaughter.⁶ And a subaltern cannot defend himself, if he act maliciously, by his superior's commands.⁷

§ 412. Although an officer must not kill for an escape where the party is in custody for a misdemeanor, yet if the party assault the officer with such violence that he has reasonable ground for believing his life to be in peril, he may justify killing the party.⁸ The case is then one of homicide in self-defence.

23 S. W. Rep. 659, 1893; Johnson v. & S. 329; Roscoe's Cr. Ev. (7th ed.) State, 58 Ark. 57, 1893; Carter v. 767; Warder v. Bailey, 4 Taunt. 77, State, 30 Tex. App. 551, 1891. *Supra*, 1812; R. v. Thomas, 1 Russ. on Cr. § 139. 614 (9th Am. ed.) 823. See, as to the

¹ 1 East P. C. 312. *Infra*, § 432; Whart. Cr. Pl. & Pr. §§ 1-17. killing of Midshipman Spencer for mutiny, letters by Mr. Sumner in the

² R. v. Carey, 14 Cox C. C. 214, 1879. See O'Connor v. State, 64 Ga. 125, 1880; Georgia v. O'Grady, 3 Woods, 496, 1878; State v. Port, 3 Fed. Rep. 124, 1879. second volume of Sumner's Life, and notices in Thurlow Weed's life. As

to Eyre's case, see *supra*, § 401, note.

³ *Infra*, § 497; *supra*, § 406. ⁷ Ibid. See U. S. v. Jones, 3 Wash. C. C. 209, 1821; Com. v. Blodgett, 12 Metc. 57, 1847. *Supra*, §§ 401 et seq.

⁴ *Infra*, § 432. ⁸ State v. Anderson, 1 Hill, (S. C.)

⁵ Fost. 318. *Infra*, § 497. 327, 1833. *Infra*, § 454; and see For-

⁶ *Infra*, § 431; Clode's Military Law, 167. See R. v. Vaughan, 9 B. Whart. on Hom. § 220. ster's Case, 1 Lew. 187, 1825; cited

IX. HOMICIDE OF OFFICERS OF JUSTICE AND OTHERS AIDING THEM.

§ 413. When a party who having authority to arrest or imprison uses the proper means on a proper occasion for such a purpose, and in so doing is assaulted and killed, it will be murder in all concerned if the intent be to kill or inflict grievous bodily hurt.¹ And it has been decided that if in any quarrel, sudden or premeditated, a justice of the peace, constable or watchman, or even a private person, be slain in endeavoring to keep the peace and suppress the affray, he who kills him will be guilty of murder.² But to sustain a charge of murder it must appear that the person slain had given notice of the purpose for which he came, by officially commanding the parties to keep the peace, or by otherwise showing that it was not his intention to take part in the quarrel, but to appease it;³ unless, indeed, he were an officer within his proper district, and known, or generally acknowledged, to bear the office he had assumed.⁴ Thus if A., B., and C. be in a tumult together, and D., the constable, come to appease the affray, and A. knowing him to be the constable, kill him, and B. and C., not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C.⁵

Inten-
tional kill-
ing of ar-
resting
officer is
murder.

§ 414. If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him; if the party attempting the arrest were a constable who has authority in such cases to arrest, and such authority is an-

But man-
slaughter
when ar-
rest is
illegal.

¹ Whart. on Hom. § 225; Fost. 270-271; 1 Hale, 494; 2 Ibid. 117-8; U. v. State, 31 Tex. Cr. 609, 1893; State v. Renfrow, 111 Mo. 589, 1892; State v. Travers, 2 Wheeler's C. C. 495, 1823; 1 Brunf. (U. S.) 467; Phillips v. State, 66 Ga. 755, 1881; Fleetwood v. Com., 80 Ky. 1, 1881; State v. Green, 66 Mo. 631, 1877; Angell v. State, 36 Tex. 542, 1872. See Com. v. Drew, 4 Mass. 391, 1810; State v. Underwood, 75 Mo. 230, 1881; Cahill v. People, 106 Ill. 621, 1883; People v. Wilson, 141 N. Y. 185, 1894; Snelling v. State, 87 Ga. 50, 1891; Croom v. State, 85 Ga. 718, 1890; Evans v. State, 58 Ark. 47, 1893; Weatherford v. State, 31 Tex. Cr. 530, 1893; State v. Duncan, 116 Mo. 288, 1893; Miller v. State, 31 Tex. Cr. 609, 1893; State v. Renfrow, 111 Mo. 589, 1892; State v. Turlington, 102 Mo. 642, 1890; Porez v. State, 29 Tex. App. 618, 1891; Jacobs v. State, 28 Tex. App. 79, 1889. *Supra*, § 407.

² 1 Hawk. P. C. c. 13, ss. 48, 54.

³ Fost. 272. *Infra*, § 418; Mockabee v. Com., 78 Ky. 380, 1880. But see Glover v. State, (Tex.) 26 S. W. Rep. 204, 1894, as to killing of officer by third person; Fleetwood v. Com., 80 Ky. 1, 1882.

⁴ 1 Hawk. P. C. c. 13, ss. 49, 50; State v. Grant, 79 Mo. 113, 1883.

⁵ 1 Hale, 438. See Ibid. 446; 1 Russ. on Cr. 535. *Supra*, §§ 219, 236.

nounced, the killing has been held to be murder;¹ but if the arresting party is a private person, manslaughter;² the reason given being that the constable has authority, by law, to arrest in such case, but a private person has not.³ The same rule is applied in all the cases where a person is arrested, or attempted to be arrested, upon a reasonable suspicion of felony.⁴ But if an arrest, under color of legal authority, be illegally attempted or enforced, the better opinion now is that the killing of the person arresting, not in malice, but in resisting the arrest, is but manslaughter.⁵ And where A. unlawfully attempt to arrest B., B. is justified in resisting; and if A. so presses B. as to make it necessary for him to choose between submission and killing A., then the killing A. is not even manslaughter.⁶ So if A.'s assault on B. has mixed in it a felonious intent, then B., if necessary to avert the danger, may take A.'s life.⁷ In other cases, where the intent of B. was not to kill or inflict serious bodily harm, then the offence is but manslaughter, though the arrest was legal,⁸ while under a statute such case may be murder.⁹ But a malicious and delib-

¹ 2 Hale, 84, 87, 91; and see *R. v. Mich.* 199, 1882; *State v. Belk*, 76 N. Porter, 12 Cox C. C. 444, 1873; *R. v. C.* 10, 1877. See *Tiner v. State*, 44 Ford, R. & R. 329, 1818; *Drennan v. Tex.* 128, 1875; *Ross v. State*, 10 Tex. People, 10 Mich. 169, 1861; *People v. App.* 455, 1881. See *Muscoe v. Com.*, Pool, 27 Cal. 572, 1865. 86 Va. 443, 1890. But see *Ex parte*

² See 2 Hale, 83, 92. See *Robinson Sherwood*, (Tex.) 29 Tex. App. 334, *v. State*, (Ga.) 18 S. E. Rep. 1018, 1893. 1890; *Hamlin v. Com.*, (Ky.) 12 S.

³ See, as to arrest, *Whart. Cr. Pl. & W. Rep.* 146, 1889; *People v. Gosch*, Pr. §§ 1-17. 82 Mich. 22, 1890; *People v. Burt*, 51

⁴ See *Samuel v. Payne*, 1 Doug. Mich. 199, 1883. In *State v. List*, 1 359. See *Croom v. State*, 85 Ga. 718, 1890. 133, 1865, it was held

⁵ *Tooley's Case*, 2 Ld. Raym. 1296, being fired at by A., pursued, armed 1710; *R. v. Phelps*, 1 C. & M. 180, with a pistol, A. into A.'s house, and 1841; s. c. 2 Mood. C. C. 240; *R. v.* there was killed by A.

Patience, 7 C. & P. 775, 1837; *R. v.* ⁶ *Infra*, §§ 465-8; *State v. Oliver*, Davis, *Ibid.* 785, 1837; *R. v. Thomp-* 2 Houston, 585, 1855; *Drake v. State*, son, 1 Mood. C. C. 80, 1825; *R. v.* (Nebr.) 18 Rep. 790, 1883; *State v.* Carey, 14 Cox C. C. 214, 1879; *Com.* Anderson, 1 Hill, (S. C.) 327, 1833; *v. Carey*, 12 Cush. 246, 1853; *Com. v.* *State v. Tiner*, 44 Tex. 128, 1875; Drew, 4 Mass. 391, 1810; *Galvin v.* Alford *v. State*, 8 Tex. App. 545, State, 6 Cold. 283, 1869; *Poteete v.* 1880. See *Whart. Cr. Pl. & Pr.* §§ 5 State, 9 Baxt. 261, 1878; *Noles v.* *et seq.*; *infra*, § 417.

State, 26 Ala. 31, 1870; *Roberts v.* ⁷ *Supra*, § 412.

State, 14 Mo. 146, 1851; *State v.* ⁸ *R. v. Porter*, 12 Cox C. C. 444, Oliver, 2 Houst. 585, 1855; *Rafferty* 1873. See *State v. Gainor*, 84 Iowa, *v. People*, 69 Ill. 111, 1873; s. c. 72 209, 1892.

Ibid. 37, 1874; *People v. Burt*, 51 ⁹ *State v. Green*, 66 Mo. 631, 1877.

erate killing of an officer is murder, to which it is no defence that the officer was at the time endeavoring to arrest, on defective or void procedure, the defendant or his friends.¹

§ 415. As has already been incidentally noticed, constables, policemen, and other peace officers, as stated by Sir W. Russell, while in the execution of their offices, are under the peculiar protection of the law—a protection founded in wisdom and equity, and in every principle of political policy; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of public justice.² This protection, as has been already observed, is not confined to the period when the peace officer is at the scene of action; for he is under the same protection of the law *eundo, morando, et redeundo*.³ If known to be a peace officer, about to repair to a scene of public disorder in the exercise of his duties, it is murder to kill him in order to prevent him from discharging his duties; and it is also murder to kill him after

Constable and policeman have authority to arrest when public order is threatened.

¹ *Rafferty v. People*, 72 Ill. 73, 1873; *Roberts v. State*, 14 Mo. 138, 1851.

We have an elaborate discussion of the topic in the text in the argument of counsel and the opinion of Blackburn and Mellor, JJ., in *R. v. Allen*, reported in the Appendix to Steph. Dig. Crim. Law. From the opinion of Blackburn, J., which is concurred in by Mellor, J., and as to which he consulted the other judges, we take the following:

“When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently if he is killed in the execution of his duty, it is, in general, murder, even though there be such circumstances of hot blood and want of premeditation as would, in an ordinary case, reduce the crime to

manslaughter. But where the warrant, under which the officer is acting, is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and, consequently, the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances according to reasonable provocation.” If, however, the crime was committed maliciously, during deliberate attempt to rescue, the irregularity of the warrant does not constitute any defence. See, also, *People v. Carlton*, 115 N. Y. 618; 1889; *Miller v. State*, 32 Tex. Cr. 319, 1893; *Haunstine v. State*, 31 Nebr. 112, 1891.

² Russ. on. Cr. 535 *et seq.*; *R. v. Gardner*, 1 Mood. C. C. 390; *R. v. Hagan*, 8 C. & P. 167, 1837.

³ *Supra*, § 407; *infra*, § 430.

he leaves the spot in retreat or otherwise;¹ if his authority is not known, the killing in hot blood is manslaughter.²

A policeman or other officer appointed by the municipal authority for the preservation of order and the prevention of crime is entitled to the same protection which we have just stated to belong to a constable.³

§ 416. As a general rule, in civil cases, though an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity in cases of reasonable necessity; yet, if the party against whom the process has issued fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means.⁴

Bailiff's
powers
limited to
arrest.

§ 417. As is stated by Sir William Russell,⁵ the party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant; and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law; and therefore if a struggle ensue with the party injured, and such officer be killed, this will be only manslaughter.⁶

Officer ex-
ecuting
process
must be
within jur-
isdiction.

§ 418. Where a party is apprehended in the commission of a felony, or on fresh pursuit, notice of the crime is not necessary, because he must know the reason why he is apprehended.⁷ So far as concerns riots and affrays it is ordinarily considered enough for an officer of justice who

Notice
may be in-
ferred
from facts.

¹ Ibid. As will hereafter be seen, illegal action of officers may be forcibly resisted. *Infra*, §§ 646 *et seq.*

² Fleetwood *v.* Com., 80 Ky. 1, 1881. See State *v.* Johnson, 76 Mo. 121, 1882.

³ R. *v.* Hems, 7 C. & P. 312, 1836—Williams, J.; R. *v.* Hagan, 8 Ibid. 167, 1837—Bolland, B., and Coltman, J. See R. *v.* Porter, 12 Cox C. C. 444, 1873.

⁴ 1 Hale, 481; Fost. 271; State *v.* Moore, 39 Conn. 244, 1872. *Supra*, § 402.

⁵ 1 Russ. on Cr. (9th Am. ed.) 198—748; 1 Hale, 457—9; 1 East P. C. c. 5, s. 80, pp. 312, 314.

⁶ 1 Russ. on Cr. (9th Am. ed.) 823—4; R. *v.* Chapman, 12 Cox C. C. 4, 1871; R. *v.* Lockley, 4 F. & F. 155, 1864; R. *v.* Mead, 2 Stark. 205; Rafferty *v.* People, 69 Ill. 111, 1873; s. c. 72 Ibid. 73, 1874. See Whart. Pl. & Pr. §§ 5 *et seq.*; *infra*, § 648; Bates *v.* Com., (Ky.) 19 S. W. Rep. 928, 1892.

⁷ Whart. Cr. Pl. & Pr. § 8; R. *v.* Payne, 1 Mood. C. C. 378, 1833. See R. *v.* Fraser, R. & M. C. C. 419; R.

is present at a riot or affray within his district, in order to keep the peace, to produce his staff of office, or any other known ensign of authority, in the daytime, when it can be seen ; and if resistance be made after this notification, and he or any of his assistants be killed, this has been held to be murder in every one who joined in such resistance.¹

§ 419. If the defendant, being placed in a position in which his life is imperilled, slay an officer of whose official character he has no notice, this is homicide in self-defence, if the killing was apparently necessary to save the defendant's life ; nor does it matter that the officer was legally seeking to arrest the defendant, the defendant having no notice of the fact.² Nor should it be supposed that this exemption from distinctive liability, in cases where the officer's official character is not known, is founded on technical reasoning. Not only is it essential to the rights of the citizen that he shall be required to submit to arrest only when the official character of the demand is made known to him, but it is essential to the dignity of the State that its servants should be sheltered by these official prerogatives only when they are acting legally, and give notice that they so act. And it has been held, as we have seen, only manslaughter when a person arresting for a breach of the peace, having authority so to arrest, but not giving notice of such authority, is killed in hot blood by the person arrested.³ On the other hand, if the killing be malicious, and not in self-defence, the offence is murder.⁴

If there be no notice, killing in self-protection is not murder.

It should, however, be remembered that if the defendant knows the person apprehending to be an officer, he cannot set up as a defence his erroneous belief that the proceedings are irregular.⁵

v. Davis, 7 C. & P. 785—Parke, B., 1837 ; *R. v. Taylor*, Ibid. 266—*v. Johnson*, 76 Ibid. 121, 1882. See *Vaughan, J.*, 1835 ; *R. v. Howarth*, 1 Com. *v. Kirby*, 2 Cush. 577, 1849 ; *Mood. C. C.* 207, 1828 ; 1 Russ. on Cr. *People v. Muldoon*, 2 Parker C. R. (9th Am. ed.) 813 ; *R. v. Woolmer*, 1 13, 1854 ; *Johnson v. State*, 26 Tex. *Mood. C. C.* 334 ; 1 Russ. on Cr. (9th 117, 1861. Compare *supra*, § 87 ; *Plummer v. State*, 135 Ind. 308, 1893. As to right to resist illegal acts of officers, see generally *infra*, §§ 646–8.

¹ Fost. 311 ; 1 Hale, 315, 583. *Infra*, § 1555 ; Whart. Cr. Pl. & Pr. § 16.

³ Fleetwood *v. Com.*, 80 Ky. 1, 1882.

² *R. v. Ricketts*, 3 Camp. 68, 1812 ; *Yates v. People*, 32 N. Y. 509, 1865 ; *Logue v. Com.*, 38 Pa. 265, 1861 ; *State*

⁴ *Supra*, § 414.

⁵ *R. v. Bentley*, 4 Cox C. C. 406, 1850.

Warrant must be executed by party named or his assistant.

§ 420. The English rule is, that the warrant must be executed by the party named or described in it, or by some one assisting such party, either actually or constructively.¹

Warrant continues in force until executed.

§ 421. There is no time at common law at which an unexecuted warrant ceases to have effect; even after a party is brought before a magistrate, it is of force until judgment.²

Warrant in wrong name or with no offence, inoperative.

§ 422. If a constable, having a warrant to apprehend A. B., arrest C. B. under the warrant, such arrest is illegal, although C. B. were the person against whom the magistrate intended to issue the warrant, and although the person who made the charge before the magistrate pointed out C. B. as the man against whom the warrant was issued.³

It has also been held that a warrant omitting to state an offence is illegal.⁴

§ 423. As has already been noticed, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer, for every man is bound to submit himself to the regular course of justice;⁵ and, therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as the matters suggested in it.⁶

Falsity of charge no alleviation.

Warrant without seal void.

§ 424. At common law, if a warrant commanding the arrest of an individual in the name of the State have no seal, it is void. If an officer attempt to arrest the party named upon such authority, he proceeds at his peril, and is a wrong-doer; and if he be killed in the attempt by the party, the slayer is guilty of manslaughter and not of murder.⁷

¹ *R. v. Whalley*, 7 C. & P. 245, 1835; known, is held void. See Whart. Cr. Pl. & Pr. § 1; *R. v. Patience*, 7 C. & P. 775. Pl. & Pr. § 5. *R. v. Hood*, 1 Mood. C. C. 281, 1830.

² *Dickenson v. Brown*, Peake N. P. 307; *R. v. Williams*, R. & M. 387. ⁴ *Money v. Leach*, 1 W. Bl. 555; *Ex parte Nisbett*, 8 Jurist, 1071, 1862;

³ *Hoye v. Bush*, 1 Man. & Gr. 775, 1840; so, also, *Com. v. Crotty*, 10 Allen, 403, 1865, where a warrant Caudle v. Seymour, 1 Q. B. 889, 1841.

⁵ 1 East P. C. c. 5, s. 8, p. 310.

⁶ *Curtis's Case*, Fost. 135, 1756; and see *Ibid.* 312.

⁷ *Stockley's Case*, 1 East P. C. c. 5, s. 310, 1772. See *Housin v. Barrow*,

§ 425. Where, however, a warrant is merely informal, but not illegal or insensible, its informality will be no palliation for the killing of the officer intrusted with its execution.¹ Informality not amounting to illegality.

§ 426. It is not necessary that a warrant be shown to the party to be arrested, provided its substance be mentioned.² Indeed, as is elsewhere stated,³ if reading the warrant to the defendant is a prerequisite to an arrest, the defendant might never be arrested, for he might decline to wait to hear the warrant read.⁴ Warrant need not be shown.

§ 427. As is elsewhere seen,⁵ not only officers of justice but private persons are employed to make arrest in cases where felonies can in no other way be prevented. Independently of this principle, which is not now under discussion, an officer, though without a warrant, has a right to arrest on Arrest on charge of felony lawful without warrant.

6 T. R. 122, and cases there cited; murder, even though there be such Stevenson's Case, 19 St. Tr. 846, 1759; circumstances of hot blood and want R. v. Harris, 1 Russ. on Cr. (9th Am. ed.) 833. of premeditation as would in an ordinary case reduce the crime to manslaughter.

¹ R. v. Ford, R. & R. 329, 1817; R. v. Allen, 17 L. T. (N. S.) 222, 1867. And see Sandford v. Nichols, 13 Mass. 210, 1816; Com. v. Martin, 98 Mass. 4, 1867; Boyd v. State, 17 Ga. 194, 1854. Under English statute, see R. v. Roberts, 4 Cox C. C. 145, 1849. Omission to state in assault that an assault had been committed is fatal. Caudle v. Seymour, 1 Q. B. 889, 1841. See, as to other informalities, Jones v. Johnson, 5 Exch. 862; s. c. 7 Ibid. 452; R. v. Downey, 7 Q. B. 281, 1845, for not directing that the party should be brought before some judge or justice to be bound; State v. Oliver, 2 Houst. 585, 1855. In R. v. Allen, *ut supra*, Lord Blackburn wrote the following letter in reply to an application of counsel for the granting of a reserved case: But when the warrant under which the officer is acting is not sufficient to justify in arresting or detaining the prisoner, or there is no warrant at all, he is not entitled to this peculiar protection, and, consequently, the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation." (Lond. Law Times, May 20, 1882.)

² 2 Hawk. P. C. c. 13, s. 28; though see State v. Garrett, 1 Wins. (N. C.) 144, 1864; Gen. Stat. Mass. c. 158. § 1. ³ Whart. Cr. Pl. & Pr. § 7.

⁴ See R. v. Allen, 17 L. T. (N. S.) 222, 1867; Com. v. Cooley, 6 Gray, 350, 1856; Arnold v. Steeves, 10 Wend. 514, 1833; Wolf v. State, 19 Ohio St. 248, 1869; Drennan v. People, 10 Mich. 169, 1862. See, however, under English statute, R. v. Davis, L. & C. 64, 1862. ⁵ Whart. Cr. Pl. & Pr. §§ 8-16. *Supra*, § 405; *infra*, § 495; Tolbert v. State, (Miss.) 14 So. Rep. 462, 1893.

"When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently, if he is killed in the execution of his duty, it is in general

charge of felony; and if the fact of his being an officer be known to the party attempted to be arrested, killing by the latter of the former will be murder, though no felony was in fact committed.¹

§ 428. A class of statutes exist both in England and in this country which give authority not only to constables but also to private persons to apprehend parties *found committing* certain offences specified in such statutes. In these cases it is requisite that the authority to apprehend should be strictly pursued, and the party supposed to be guilty must be apprehended either committing the offence or upon immediate and fresh pursuit.² Independently of such statutes, it is held that an officer can arrest for all offences committed in his presence;³ though it is said in New York that this right is limited to felonies and breaches of the peace.⁴

§ 429. But however it may be with offences committed in the presence of the officer, it is clear that in other cases the officer's right to arrest without warrant is limited to felonies which the defendant is reasonably suspected to have committed, and to breaches of the peace of which a renewal may be expected.⁵ But where a serious assault is threatened, and there is a probability of its execution, then the officer may arrest without warrant.⁶

§ 430. Where there is a reasonable suspicion that a felony has been committed, and a charge has been made against a particular defendant connecting him with it, killing in cool blood the officer who arrests the defendant will be murder, though he has no

¹ R. v. Woolmer, 1 Mood. C. C. Light, 7 Cox C. C. 389, 1857; D. & B. 334, 1832; Boyd v. State, 17 Ga. 194, 332.

1856; White v. State, 70 Miss. 253, 1892. ⁴ Butolph v. Blust, 5 Lans. 84, 1871; Boylston v. Kerr, 2 Daly, 220, 1867.

² R. v. Curran, 3 C. & P. 397, 1828; Hanway v. Boulton, 1 Mood. & Rob. 14, 1841; R. v. Fraser, R. & M. C. C. B. & S. 363, 1862. See R. v. Walker, 419; R. v. Phelps, C. & M. 180, 1841; Dears. C. C. 358, 1855. Roscoe's Cr. Wolf v. State, 19 Ohio St. 248, 1869. Ev. (ed. of 1874) declares this the See People v. Burt, 51 Mich. 199, 1888. "better opinion." See, to same effect, See Plummer v. State, 135 Ind. 308, 1893; Porez v. State, 29 Tex. App. 618, 1891. ⁵ *Supra*, §§ 404-5; Whart. Cr. Pl. & Pr. §§ 1-10; Galliard v. Laxton, 2

³ *Supra*, §§ 391-2; Derecourt v. Corbishley, 5 E. & B. 188, 1855; R. v. 1868; R. v. Chapman, 12 Cox C. C. 4, 1871; State v. Oliver, 2 Houst. 585, 1833; Tiner v. State, 44 Tex. 128, 1875.

Mabel, 9 C. & P. 474, 1840; Com. v. ⁶ R. v. Light, D. & B. C. C. 332, Deacon, 8 S. & R. 47, 1822. See R. v. 1857.

warrant, and though the charge does not in terms express all the particulars necessary to constitute the felony.¹

Killing of officer arresting on reasonable suspicion is murder.

Whatever would amount to probable cause in an action for malicious prosecution is reasonable suspicion to justify an arrest.²

§ 431. Military and naval officers, when acting without authority, are to be treated as private citizens, and are responsible as such.³ Hence, where an officer of a British ship of war, in the year 1769, attempted without a special warrant to impress several seamen in a Massachusetts merchant vessel, and was killed in the attempt, it was held but manslaughter, the deceased acting without authority.⁴

Military and naval officers governed by the same rules.

§ 432. As has already been generally observed, every one coming to the aid of the officers of justice, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself.⁵ One aiding a policeman in conveying a person suspected of felony to the station-house is entitled to the same protection *eundo, morando, et redeundo* as the policeman. The deceased having been required by a policeman to aid him in taking a man, whom he had apprehended on suspicion of stealing potatoes, to the station-house, did so for some time, and then was going away, when he was attacked and beaten to death, and it was objected that he was not at the time aiding the policeman; Coltman, J., said, "He is entitled to protection *eundo, morando, et redeundo*."⁶

Persons aiding officers entitled to protection as officers.

§ 433. The same sanction is, with certain restrictions hereinafter stated, extended to the cases of private persons interposing to prevent mischief from an affray, or using their endeavors to apprehend felons, or those who have given a dangerous wound, and to bring them to justice; such persons being likewise in the discharge of a duty re-

So as to private persons lawfully arresting independently of officer.

¹ *Supra*, § 427; *R. v. Ford*, R. & R. 829, 1817.

² *Supra*, § 411. See Whart. Cr. Pl. & Pr. §§ 1-10.

³ *Supra*, § 411.

⁴ Case of the crew of the Pitt Packet, 4 Bost. Law Rep. 369. See *supra*, § 411, as to Spencer's Case.

⁵ 1 Hale, 462, 468; Fost. 809; Brooks v. Com., 61 Pa. 352, 1869. In such case the private persons so as-

sisting are under the officer's commands. *People v. Moore*, 2 Doug. (Mich.) 1, 1844. And the officer may have special private assistants. *Coyles v. Hurin*, 10 Johns. 85, 1813. See *State v. Alford*, 80 N. C. 445, 1879; Whart. Cr. Pl. & Pr. §§ 8, 10 *et seq.* *Supra*, § 410.

⁶ *R. v. Phelps*, 1 C. & M. 180, 1841; *R. v. Porter*, 12 Cox C. C. 444, 1873; *State v. Oliver*, 2 Houst. 585, 1838.

quired of them by the law. The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice.¹ And it is murder for the defendant to kill one whom he knows to be pursuing him for a felony of which he is the perpetrator.²

§ 434. But while it is clear that a private person is not only justified but obliged to do his best to bring felons to justice, as well as to prevent felony,³ a party interfering on this principle should be clear, first, that a felony has already been committed, or that an apparent attempt to commit a felony is being made by the party arrested.⁴ In the former case it must appear that the felony was apparently committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, unless apparently well founded, will not bring the person endeavoring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter if he should kill; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter: the one not having used due diligence to be apprised of the truth of the fact; the other not having submitted and rendered himself to justice.⁵

§ 435. Where a felony is in the process of commission a private

¹ Fost. 309; Jackson's Case, 1 East State, 25 Ala. 15, 1854. *Infra*, §§ 1542-P. C. 298, 1676; Brooks v. Com., 61 1555.

Pa. 352, 1869. See, however, *supra*, ⁴ 2 Inst. 52, 172; Fost. 318; Samuel v. Payne, Doug. 359; and in Coxe v. Winan, Cro. Jac. 150, 1686, it was holden that, without a fact, suspicion is no cause of arrest; and 8 Ed. IV. 3, 5 Hen. VII. 5, 7 Hen. IV. 35, are cited. To same effect, see Burns v. Erben, 40 N. Y. 463, 1869; Hawley v. Butler, 54 Barb. 490, 1866. See *supra*, § 410; *infra*, § 497; Whart. Cr. Pl. & Pr. § 13.

² Ibid.; Holly v. Mix, 3 Wend. 350, 1829; Reuck v. McGregor, 3 Vroom, (N. J.) 70, 1867; State v. Roane, 2 Dev. 58, 1830. See Galvin v. State, 6 Cold. (Tenn.) 283, 1869; People v. Raten, 63 Cal. 421, 1882.

³ *Ex parte* Krans, 1 B. & C. 258, 1823; 1 Russ. on Cr. (9th Am. ed.) 734-5. See, more fully, Com. v. Daily, 1844, Com. v. Hare, 1844, Appendix Whart. on Hom.; Dill v. v. Rutherford, 1 Hawks, 457, 1822.

⁵ 1 Hale, 490; Fost. 318. See State v. Rutherford, 1 Hawks, 457, 1822.

person is authorized to interfere and arrest without a warrant.¹ But such felony must, in order to authorize the killing of the felon, be one of violence, involving serious consequences;² and a stranger who interferes in a fight not in itself likely to be fatal, and kills one of the combatants, is chargeable at least with manslaughter.³

Private person may interfere to prevent crime.

§ 436. An indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon; but it is said that if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out; otherwise they will be guilty of manslaughter.⁴

Indictment found, good cause of arrest by private persons.

§ 437. A railway officer has a right to put out of the cars, in a careful way, so as not unnecessarily to hurt, a person who is disorderly in the cars, or who refuses to obey the rules of the company.⁵ But if the railway officer exact conditions which are unjust or illegal, then he is liable for any injury he or his assistants may inflict. And so if his mode of arrest or detention be unnecessarily severe.⁶ The same principles govern the rights of the assailed party in resisting the assault.

Railway officers may arrest passengers guilty of misconduct.

§ 438. To sustain an arrest for a breach of the peace an actual breach of the peace at the time of the arrest must be proved.⁷

Arrest for breach of peace illegal without *corpus delicti*.

§ 439. Questions not unfrequently arise, says Sir William Russell,⁸ as to the authority of constables and other officers to interfere with persons in inns or beer-houses. It is no part of a policeman's duty to turn a person out of an inn, although he may be

¹ *Infra*, § 495; *R. v. Hunt*, R. & M. 93; *R. v. Price*, 8 C. & P. 282, 1838.

² *Infra*, § 495.

³ *Com. v. Johnston*, 5 Gratt. 660, 1848. See *infra*, §§ 495 *et seq.*; *R. v. Caton*, 12 Cox C. C. 624, 1874; *supra*, § 220.

⁴ *Dalt. c. 170, s. 5*; 1 East P. C. c. 5, s. 68, 301.

"There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must

prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." Lord Tenterden, in *Beckworth v. Philby*, 6 B. & C. 635, 1827.

⁵ *Infra*, § 623. See Whart. on Neg. § 646, and cases there cited.

⁶ *R. v. Mann*, 6 Cox C. C. 461, 1854.

⁷ *R. v. Bright*, 4 C. & P. 387, 1830.

⁸ 1 Russ. on Cr. (9th Am. ed.) 810.

conducting himself improperly there, unless his conduct tends to a breach of the peace.¹ Neither is it the duty of a policeman to prevent a person from going into a room in a public house, unless a breach of the peace was likely to be committed by such person in that room.² But if a person make such a noise and disturbance in a public house as would create alarm and disquiet the neighborhood, this would be such a breach of the peace as would justify a policeman in taking the party into custody, provided it took place in the presence of the policeman, or the policeman was attracted by the uproar in the house, or was called in by the landlord.³ And unless the peace of the neighborhood be disturbed, or there be danger of the perpetration of a felony, the officer interferes at his own risk.⁴

An officer may also interfere in cases of flagrant breaches of the peace and attempted felonies in private houses, in which cases, if the danger be apparently urgent and extreme, he may enter, notifying his office, without a warrant,⁵ and when he is armed with a warrant he may break open the doors to arrest, if he previously notify his business and be refused admittance.⁶ He may also, after demand, break into a house, without warrant, to re-arrest an escaped prisoner.⁷ But, as to civil suits, the defendant in his own house is privileged from arrest.⁸

¹ *Wheeler v. Whiting*, 9 C. & P. (N. Y.) 597, 599, 1844; *Curtis v. Hubbard*, 1 Ibid. 331, 1841; *People v.* 262, 1840.

² *R. v. Mabel*, Ibid. 474—*Parke*, Hubbard, 24 Wend. 369, 1840; *Kneas v. Fidler*, 2 S. & R. 263, 1816; *State v.* B., 1840.

³ *Howell v. Jackson*, 6 Ibid. 723—*Oliver*, 2 Houst. 585, 1833. *Parke*, B., 1834.

⁴ *R. v. Prebble*, 1 F. & F. 325, 1858. Specifications of notice, however, may be waived by the house-owner

⁵ *Whart. Cr. Pl. & Pr.* §§ 18 *et seq.*; *Com. v. Reynolds*, 120 Mass. 190, 1876. *not asking for them.* *2 Hawk. P. C. c. 14, s. 7; Shaw v. Charitie*, 3 C. & K. 21.

⁶ *Fost.* 320; 1 *Russ. on Cr.* (9th Am. ed.) 841; *Elsee v. Smith*, 1 D. & B. 97; and see, also, the excellent notes of Messrs. Hare and Wallace to *Semayne's Case*, 1 *Smith's Leading Cases*, 164. *It is held that in such cases the officer, even without notice, may break the outer door, if the pursuit be immediate, and the defendant's conduct such as to imply a waiver of notice.* *Allen v. Martin*, 10 Wend. 300, 1833; *Com. v. McGahey*, 11 Gray, 194, 1858.

Compare *Lannock v. Brown*, 2 B. & Ald. 952; *State v. Hooker*, 17 Vt. 659, 1845; *Glover v. Whittenhall*, 6 Hill, 194, 1858. Where a felony has been com-

⁸ See *infra*, § 503.

§ 440. Private persons interfering in riots for the furtherance of public justice should expressly avow their intention, or their killing will be but manslaughter.¹ If there be a malicious intention to kill, however, the case is murder.²

Private persons interfering to quell riots should give notice of their purpose.

§ 441. To justify the arrest of street-walkers and vagrants, there must be reasonable ground of suspicion. The present and more humane opinion in this respect is, that the taking up of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer.³

Must be reasonable grounds to justify arrest of vagrants.

§ 442. The officer must also be careful not to make an arrest on a *Sunday*, except in cases of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority. But process may be executed in the night-time as well as by day.⁴

Time of execution of arrest.

mitted, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced after the notification, demand, and refusal, which have been mentioned. Fost. 320; 1 Hale, 459. And see 2 Hawk. P. C. c. 14, s. 7, where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person.

¹ Fost. 310, 311; U. S. v. Travers, 2 Wheeler C. C. 510, 1823; 1 Brunf. (U. S.) 467; 1 East P. C. c. 5, s. 58, p. 289. See *supra*, §§ 418 *et seq.*; *infra*, § 494.

² State v. Ferguson, 2 Hill, (S. C.) 619, 1835. See R. v. Bourns, 5 C. & P. 120, 1831.

³ Tooley's Case, 2 Ld. Raym. 1296, 1810. It is said that watchmen and beadles have authority, at common law, to arrest and detain in prison for examination persons walking in the streets at night, whom there is ground to suspect of felony, although there is no proof of felony having been committed. Lawrence v. Hedger, 3 Taunt. 14, 1811. And it has been said by Hawkins and others that every private person may, by the common law, arrest any suspicious night-walker, and detain him till he give a good account of himself. 2 Hawk. P. C. c. 13, s. 6; c. 12, s. 20. And it has been held that a person may be indicted for being a common night-walker, as for a misdemeanor. Ibid. c. 12, s. 20; Poph. 208; State v. Maxcy, 1 McMul. 503, 1841. But this prerogative is liable to great abuse, and should be kept within strict bounds. See article in 20 Alb. L. J. p. 215; Roberts v. State, 14 Mo. 138, 1851; Whart. Cr. Pl. & Pr. § 80. That statutes authorizing summary arrest of vagrants are

⁴ 9 Co. 66 a; 1 Hale, 457; 1 Hawk. P. C. c. 13, s. 62. See Whart. on Hom. § 281.

§ 443. Where officers accidentally, and without malice, take opposite parts in an affray, and one of them is killed, this, says Lord Hale, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other;¹ but upon this it has been remarked, that perhaps it had been better expressed to have said, that inasmuch as they acted not so much with a view to keep the peace as in the nature of partisans to the different parties, they acted altogether out of the scope of their characters as peace officers, and without any authority whatever.² If the sheriff, says the same authority, have a writ of possession against the house and lands of A., and A., pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ.³

§ 444. Whoever joins with a defendant in resisting process is in the same position, if he have notice, as the defendant himself.⁴ But malice in such case is imputable only to those who knew the officer was acting in an official capacity.⁵

Persons interfering to release prisoners cannot take advantage of the informality of the warrant.⁶

constitutional, see *People v. Forbes*, 4 Park. C. R. 611, 1858; *State v. Maxcy*, 1 McM. 501, 1841; *Roberts v. State*, 14 Mo. 138, 1851, and cases cited in Whart. Cr. Pl. & Pr. § 80. As to vagrants, see more fully Whart. Cr. Pl. & Pr. § 80. As to night-walkers, see *infra*, § 1446.

¹ 1 Hale, 460.

² 1 East P. C. c. 5, s. 71, p. 304.

³ 1 Hale, 460; Anon. Exeter Sum. Ass. 1793; 1 East P. C. c. 5, s. 71, p. 305; 1 Russ. on Cr. (9th Am. ed.) 666, 841.

⁴ *Hugget's Case*, Kel. 59. See 1 Hale, 456; Cro. Car. 378; Fost. 312 *et seq.*; *R. v. Warner*, R. & M. C. C. R. 385, 1833. See remarks of Pollock, C. B., in *R. v. Davis*, L. & C. 64, 1862.

And see, also, *R. v. Hunt*, 1 Mood. C. C. 93; *R. v. Curran*, 3 C. & P. 397; *R. v. Price*, 8 Ibid. 282, 1838; *R. v. Wier*, 1 B. & C. 261, 1823; Kel. 87; *R. v. Whithorne*, 3 C. & P. 394, 1828; *Jackson's Case*, 1 Hale, 464, 465, 1675; 1 Hawk. c. 13; 4 Co. 40 b.; *R. v. Luck*, 3 F. & F. 483, 1862; *R. v. Dadson*, 2 Den. C. C. 35, 1849; *State v. Murray*, 15 Me. 100, 1837; *Wolf v. State*, 19 Ohio St. 248, 1869; *State v. Garrett*, Wins. (N. C.) 144, 1864; *Boyd v. State*, 17 Ga. 194, 1856; *State v. Hilton*, 26 Mo. 199, 1858. *Supra*, § 418.

⁵ *State v. Zeibart*, 40 Iowa, 169, 1874.

⁶ *R. v. Allen*, 17 L. T. (N. S.) 222, 1867. See *infra*, §§ 1672 *et seq.*

X. INFANTICIDE.

§ 445. To kill a child in its mother's womb is no murder ; but if the child be born alive, and die after birth through the potion or bruises received in the womb, it is murder in the person who administered or gave them.¹ Where, also, a blow is maliciously given to a child while in the act of being born, as, for instance, upon the head as soon as the head appears, and before the child has breathed, it will be murder if the child is afterward born alive, and dies thereof.² If the child has been killed by the mother wilfully and of malice aforethought while it is alive, and has an independent circulation of its own, this is murder, although the child be still attached to its mother by the umbilical cord,³ supposing it does not derive its power of existence from its connection with its mother.⁴ But it must be proved that the child has actually been born into the world in a living state ;⁵ and the fact of its having breathed, so it has been decided, is not a conclusive proof thereof.⁶ It has also

When death occurs before child has independent circulation, offence not homicide; otherwise, when the child is born alive and dies after birth from injuries prior to birth.

¹ 3 Inst. 50 ; 1 Hawk. 13, § 16 ; R. v. Senior, 1 Mood. C. C. 346, 1832 ; R. v. West, 2 Cox C. C. 500 ; 2 C. & K. 784, 1848 ; R. v. Poulton, 5 C. & P. 329, 1832 ; R. v. Wright, 9 Ibid. 754, 1841 ; Evans v. People, 49 N. Y. 86, 1872. See discussion of this question in Dietrich v. Northampton, (Mass.) 30 Alb. L. J. 388, 1884. For life sentence, see Warren v. State, (Tex.) 26 S. W. Rep. 403, 1894. See Johnson v. State, 32 Tex. Cr. 504, 1893, as to accomplice.

² R. v. Senior, 1 Mood. C. C. 346, 1848 ; 3 Inst. 50 ; 1 Hawk. P. C. c. 13, s. 16 ; 4 Bl. Com. 198 ; *supra*, § 331 ; 1 East P. C. c. 5, s. 14, p. 228 ; *contra*, 1 Hale, 433, and Staundf. 21. But the reason on which the opinions of the last two writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be assumed that such fact never can be clearly established.

³ R. v. Trilloe, 1 C. & M. 650, 1842 ; 2 Mood. C. C. 260 ; Evans v. People, 49 N. Y. 86, 1871. See *infra*, § 446.

⁴ R. v. Handley, 13 Cox C. C. 79, 1874.

⁵ Wallace v. State, 7 Tex. App. 570, 1880 ; 10 Ibid. 255, 1881 ; *supra*, § 309.

⁶ R. v. Sellis, 7 C. & P. 850, 1837 ; Com. v. Donohue, 8 Phila. 623, 1871. *Infra*, § 446. See cases cited *supra*, § 309.

It is ruled, however, if a child be actually wholly produced alive, it is not necessary that it should have breathed to make it the subject of murder. Upon an indictment for the murder of a child, where it appeared that the dead body of the child was found in a river, and it was proved by two surgeons that it had never breathed, Park, J. A. J., said: "A child must be actually wholly in the world in a living state to be the subject of a charge of murder ; but if it has been wholly born, and is alive, it

been held that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterward dies in consequence of its exposure to the external air, the person who, by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder if the misconduct was meant to kill; and the mere existence of a possibility that something might have been done to prevent the death would not render it the less murder.¹ If the misconduct was merely reckless, without an intent to kill, the offence is manslaughter.²

§ 446. Whether the child was born alive is a question of fact to be determined by all the circumstances of the case. Thus Birth is a question of fact. where the evidence went to prove that the child was dropped from the mother when she was at a privy, and was smothered in the soil, it was held a question to be determined in the first place by the jury whether the child was alive at the birth.³ The question of killing is in like manner to be determined by inference from all the facts.⁴

§ 447. A principle of much importance bearing on this question, and one that has been more fully discussed in a previous chapter in its general relations, is, that if a person do or omit any act toward another who is helpless, which act or omission in usual natural sequence leads to the death of that other, the crime amounts to murder if the act or omission be intentional; but if the circumstances are such that the person would not or could not have been aware that the result would be death, this would reduce the crime to manslaughter, provided the death was occasioned by an unlawful act, but not such an act as showed a malicious mind.⁵ Killing of child by negligent exposure is manslaughter.

is not essential that it should have 1832, cited at large in Whart. on Hom. breathed at the time it was killed, as § 446.

many children are born alive, and yet do not breathe for some time after their birth." R. v. Brain, 6 C. & P.

349, 1834. See, also, R. v. West, 2 C. & K. 784, 1848. Compare R. v. Crutchley, 7 C. & P. 814, 1837; R. v. Reeves,

9 Ibid. 25, 1839; R. v. Enoch, 5 Ibid. 539, 1833; R. v. Wright, 9 Ibid. 754, 1841; R. v. Poulton, 5 Ibid. 329,

¹ R. v. West, 2 C. & K. 784, 1848.

² R. v. Handley, 18 Cox C. C. 79, 1874.

³ R. v. Middleship, 5 Cox C. C. 275, 1850; State v. Winthrop, 43 Iowa, 519, 1876; *supra*, § 309.

⁴ Peters v. State, 67 Ga. 29, 1881; *supra*, § 309.

⁵ R. v. Walters, C. & M. 164, 1841;

XI. SUICIDE.

§ 448. Whoever is present, actually or constructively, encouraging the violent and illegal death of another, is responsible for such death, even though it was voluntarily submitted to by the deceased.¹ Thus, if two persons encourage each other to commit suicide jointly, and one succeeds and the other fails in the attempt upon himself, he is a principal in the murder of the other.² Nor is it necessary to prove that the deceased would not have killed himself without the defendant's co-operation; nor does it make any difference that the deceased was at the time under sentence of death.³

Surviving principal in suicide indictable for murder.

§ 449. As at common law the principal must be convicted before a conviction of the accessory, there can be at common law no conviction of an accessory before the fact to suicide, because the suicide is beyond the process of the courts.⁴ But by statutes in England and several of the United States, the advising another to commit suicide is made a substantive indictable offence.⁵

At common law there can be no conviction of accessories before the fact to suicide.

§ 450. A woman desires to miscarry of a child with which she is pregnant, and assents to an operation for this purpose; and dies from the operation. Whether, in such case, the offence is murder or manslaughter, depends largely on the intent as appearing on the whole case.⁶ If the intent were to kill or grievously injure her, the offence is

Killing may be murder when incident to producing an abortion.

2 Lew. 220; *R. v. Middleship*, 5 Cox Com. v. Dennis, 105 Mass. 162, 1870; C. C. 275, 1850. See, fully, *supra*, Com. v. Mink, 128 Mass. 422, 1877; §§ 56, 331, 359; *infra*, §§ 1563 *et seq.* and see *supra*, §§ 216, 326.

Griffith v. State, 80 Ala. 583, 1891; By statute in Missouri the offence is *Warren v. State*, (Tex.) 16 S. W. Rep. manslaughter, *State v. Ludwig*, 70 Mo. 412, 1879.

¹ *R. v. Sawyer*, 1 Russ. Cr. & M. 670; *R. v. Dyson*, R. 1839; *R. v. Russell*, 1 Mood. C. C. 356, & R. C. C. 528, 1819; *State v. Avery*, 113 Mo. 475, 1893.

⁴ *R. v. Leddington*, 9 C. & P. 79, 1839; *R. v. Russell*, 1 Mood. C. C. 356, & R. C. C. 528, 1819; *State v. Avery*, 113 Mo. 475, 1893.

² *Supra*, § 216; *R. v. Dyson*, R. & R. C. C. 528, 1819; *R. v. Allison*, 8 C. & P. 418, 1838; *R. v. Sawyer*, 1 Russ. Cr. & M. (9th Am. ed.) 670, 1893; *Blackburn v. State*, 23 Ohio, 165, 1872.

⁵ See *supra*, § 142; *infra*, § 451. As to Ohio, see *Blackburn v. State*, 23 Ohio, 165, 1872.

By § 175 of the New York Penal Code of 1882, whoever "wilfully in any manner encourages, advises, assists, or abets another person in attempting to take the latter's life," is guilty of a felony.

³ *Com. v. Bowen*, 13 Mass. 359, 1814; 2 Wheel. C. C. 321, 1823; Pamph. Tr. 1816. See comments in

⁶ See *supra*, §§ 325, 390.

murder; it is manslaughter if the intent were only to produce the miscarriage, the agency not being one from which death or great injury would be likely to result.¹ But suppose the operation be one which is essential to the preservation of the mother's life? In this case the fact of such necessity is, as will be presently shown in fuller detail, a defence, should the operation terminate fatally.²

§ 451. That consent in such cases is no bar is an axiom acknowledged by all schools of jurisprudence, and rests on the maxim, *Jus publicum privatorum voluntate mutari nequit*.³ Of this we may recur to an illustration given in Pennsylvania in 1826, in which it was held that an agreement not to bring a writ of error in a criminal case of high degree does not preclude the defendant from bringing such writ. "What consideration," said Chief Justice Tilghman, in words that may be here repeated as touching the immediate point before us, "can a man have received, adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement, yet the principle is, in both cases, the same."⁴

§ 452. It has just been seen that the consent of the deceased is no defence to an indictment for murder; for no one can by consent validate the taking of his own life. But suppose A. is assailed by a fatal disease from which the only escape is a dangerous surgical operation; and that this operation is skilfully performed by B. at A.'s request, but that A. dies under the knife?⁵ On this point, Lord Macaulay, in his Report on the Indian Penal Code, says: "It is often the wisest thing a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labor under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment

¹ R. v. Gaylor, D. & B. C. C. 288; ⁴ Smith v. Com., 14 S. & R. 69, 7 Cox C. C. 253, 1857. *Supra*, §§ 325, 1826. 390.

² See, as to Illinois statute making it murder to kill incidental to an abortion unless the abortion was necessary, *Beasley v. People*, 89 Ill. 571, 1878. *Infra*, § 591. ⁵ Sir J. F. Stephen, Dig. Crim. Law, (5th ed.) art. 225, takes the view given in the text, saying, "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery assumes their truth."

³ See *supra*, §§ 142, 372.

to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigor. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause the death, not intending to cause death, but knowing himself likely to cause it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death." The same rule applies, as has been argued by Bar, an able German jurist, in cases where consent, on account of mental incapacity, cannot be given. Suppose a dangerous operation is required as the last hope of resuscitating an unconscious person. If the operation is performed with the skill usual to surgeons under such circumstances, this is a good defence if death ensue.¹

§ 453. Killing another, unintentionally and negligently, such other being desirous of committing suicide, is manslaughter.² Man-slaughter, etc.

§ 454. At common law, as we have already seen, an attempt to commit suicide has been held to be a misdemeanor.³ Attempts, etc.

XII. PROVOCATION AND HOT BLOOD.⁴

§ 455. To sustain provocation as a defence it must be shown that the defendant, at the time of the fatal blow, was "deprived of the power of self-control by the provocation which he had received; and, in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to

Loss of self-control essential to this defence.

¹ See *infra*, §§ 509, 510.

² See *Com. v. Mink*, 123 Mass. 422, *supra*, § 175. By § 178 of the New York 1878, cited *supra*, § 328. And see *infra*, § 428.

³ *R. v. Doody*, 6 Cox C. C. 463, 1854; *R. v. Burgess*, L. & C. 258; 9 Cox C. C. 247, 1862; cited with ap-

proval in *Com. v. Mink*, *supra*. Comp. *supra*, § 175. By § 178 of the New York Penal Code of 1882, an attempt to commit suicide is made a felony.

⁴ As to burden of proof as to provocation, see Whart. Cr. Ev. § 334.

the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind."¹

§ 455 a. Where the evidence shows an intent on the part of the defendant to kill, no words of reproach, no matter how grievous, are provocation sufficient to free the party killing from the guilt of murder;² nor are indecent provoking actions or gestures expressive of contempt or reproach without an assault upon the person.³

¹ Steph. Dig. Crim. Law, (5th ed.) 100, 1893; *People v. Hull*, 86 Mich. art. 246. See *Patterson v. State*, 66

Ind. 428, 1879; *Silver v. People*, 107

Ill. 563, 1883; *Thomas v. People*, 61

Miss. 60, 1881; *People v. Kennedy*, 22

N. Y. Sup. 267, 1893; *State v. Adams*,

78 Iowa, 292, 1889; *State v. Sterrett*,

80 Iowa, 609, 1890; *People v. Palmer*,

96 Mich. 580, 1893; *Lienpo v. State*,

28 Tex. App. 179, 1889; *Hays v. Com.*,

(Ky.) 14 S. W. Rep. 833, 1890; *Com.*

v. Ware, 187 Pa. 465, 1890; *McDuffie v.*

State, 90 Ga. 786, 1892; *State v. Way*,

38 S. C. 333, 1892; *Thorpe v. State*, 92

Ga. 470, 1893; *State v. Workman*, 39

S. C. 151, 1892; *Battle v. State*, 92 Ga.

465, 1893; *State v. Ashley*, (La.) 13 So.

Rep. 738, 1893; *Springfield v. State*,

96 Ala. 81, 1892; *Jones v. State*, 87

Ga. 525, 1891; *Roberson v. State*, 87

Ga. 209, 1891; *Smith v. State*, 83 Ala.

26, 1888; *Reese v. State*, 90 Ala. 624,

1891; *State v. Alfray*, (Mo.) 27 S. W.

Rep. 1097, 1894; *Handly v. Com.*,

(Ky.) 24 S. W. Rep. 609, 1894; *Caskey*

v. Com., (Ky.) 23 S. W. Rep. 368,

1893; *Holmes v. State*, 88 Ala. 26,

1890; *Scroggins v. State*, 32 Tex. Cr.

71, 1893; *Fowler v. State*, (Tex.) 22 S.

W. 587, 1893; *State v. Crabtree*, 111

Mo. 136, 1892; *West v. Com.*, (Ky.)

20 S. W. Rep. 219, 1892; *State v.*

Berkley, 109 Mo. 665, 1892; *Wolf-*

forth v. State, 31 Tex. Cr. 387, 1892.

See statutory provisions of Texas.

Pitts v. State, 29 Tex. App. 374, 1891;

Cotrell v. Com., (Ky.) 17 S. W. Rep.

149, 1891; *State v. Baker*, 13 Mont. 160,

1893; *State v. Henderson*, 24 Oreg.

100, 1893; *People v. Hull*, 86 Mich. 449, 1891.

² *State v. Berkeley*, 109 Mo. 665,

1892; *Turner v. State*, 89 Tenn. 547,

1891; *State v. Bryant*, 102 Mo. 24,

1890; *People v. Murback*, 64 Cal. 369,

1883. The words must be spoken by

the victim. *Missouri v. Lewis*, 14 Mo.

App. 191, 1883; *People v. Murback*,

64 Cal. 369, 1883.

³ 1 Hale P. C. 456; Fost. 290; U.

S. *v. Wiltberger*, 3 Wash. C. C. 515,

1822; U. S. *v. Travers*, per Story,

J., 2 Wheeler C. C. 504; 1 Brunf.

(U. S.) 467; *Com. v. York*, 9 Metc.

93, 1844; *Yates v. People*, 32 N. Y.

509, 1865; *Green v. Com.*, 83 Pa. 75,

1876; *Abernethy v. State*, 101 Ibid.

322, 1882; *State v. O'Neil*, 1 Houst.

C. C. 58, 1863; *State v. Tackett*, 1

Hawks, 210, 1822; *State v. Merrill*, 2

Dev. 269, 1830; *State v. Carter*, 76 N.

C. 20, 1877; *Ray v. State*, 15 Ga. 223,

1855; *Jackson v. State*, 45 Ibid. 198,

1872; *Bird v. State*, 55 Ibid. 17, 1875;

Ross v. State, 59 Ibid. 248, 1877;

Handy v. State, 68 Ibid. 612, 1881

Wortham v. State, 70 Ibid. 336, 1882;

Taylor v. State, 48 Ala. 180, 1872;

Judge v. State, 58 Ibid. 406, 1878;

Roberts v. State, 68 Ibid. 515, 1881;

Rapp v. State, 14 B. Mon. 614, 1854;

State v. Starr, 38 Mo. 270, 1867; *State*

v. Evans, 65 Ibid. 574, 1877; *State v.*

King, 78 Ibid. 555, 1883; *Preston v.*

State, 25 Miss. 383, 1853; *Evans v.*

State, 44 Ibid. 762, 1871; *Edwards v.*

State, 47 Ibid. 581, 1872; *Williams v.*

State, 3 Heisk. 376, 1872; *People v.*

At the same time it must be remembered that an assault, too slight in itself to be a sufficient provocation, may become such by being coupled with and explained by insulting words.¹

By statute in some jurisdictions "insulting words and conduct to a female relative" are regarded as sufficient provocation to reduce homicide under their immediate influence to manslaughter.²

§ 456. The moment, however, the person of the defendant is touched with apparent insolence, then the provocation is one which, ordinarily speaking, reduces the offence to manslaughter.³ Thus it has been held that if A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall) take the wall of him, and thereupon A. kill B., this is murder;⁴ but if B. had jostled A., this jostling, if made with such apparent insolence as to provoke a quarrel, and if hastily resented by A., in hot blood, reduces the grade to manslaughter.⁵

When the person is touched, then provocation reduces degree.

A fortiori, where an assault is made with violence or circum-

- Freeland, 6 Cal. 96, 1856; *People v. Butler*, 8 Ibid. 435, 1857; *People v. Turley*, 50 Ibid. 469, 1875; *State v. Shippey*, 10 Minn. 223, 1865; *Martin v. State*, 30 Wis. 216, 1872; *Johnson v. State*, 27 Tex. 758, 1865; *Myers v. State*, 33 Ibid. 525, 1870; *State v. Anderson*, 4 Nev. 265, 1867; *State v. Crozier*, 12 Ibid. 300, 1877. See qualifications stated in *R. v. Rothwell*, 12 Cox C. C. 145, 1871. A mere going to house of deceased to demand explanation, etc., not sufficient. *State v. Williams*, (La.) 15 So. Rep. 82, 1894; *Johnson v. State*, (Ala.) 16 So. Rep. 99, 1894; *State v. McIntosh*, 39 S. C. 97, 1892. Killing under passion aroused by insult, see *Ex parte Sloane*, 95 Ala. 22, 1892; *State v. Levelle*, 34 S. C. 120, 1891; *State v. Pankey*, 104 N. C. 840, 1889; *State v. McNeill*, 92 N. C. 812, 1885; *State v. Martin*, (Mo.) 28 S. W. Rep. 12, 1894. Insult must be to "female relative." *Moore v. State*, 31 Tex. Cr. 234, 1892; *Halliburton v. State*, 32 Tex. Cr. 51, 1893. See, also, *Ex parte Jones*, 31 Tex. Cr. 422, 1893.
- ¹ *R. v. Sherwood*, 1 C. & K. 556, 1844; *R. v. Rothwell*, *ut supra*; *R. v. Smith*, 4 F. & F. 1066, 1866; *Hurd v. People*, 25 Mich. 405, 1872; *Nye v. People*, 35 Ibid. 16, 1877; *Mitchell v. State*, 41 Ga. 527, 1870; *State v. Keene*, 50 Mo. 357, 1873; and see cases cited *infra*, §§ 468 *et seq.*
- ² *Williams v. State*, 3 Heisk. 376, 1872; *People v. Turley*, 50 Cal. 469, 1875; *Hill v. State*, 5 Tex. App. 2, 1878; *Hudson v. State*, 6 Ibid. 565, 1879; *Richardson v. State*, 9 Ibid. 612, 1880; *Eanes v. State*, 10 Ibid. 421, 1881. See *Jones v. State*, (Tex.) 26 S. W. Rep. 1082, 1894; *Lane v. State*, 29 Tex. App. 310, 1890; *Levy v. State*, 28 Tex. App. 203, 1889; *Richardson v. State*, 28 Tex. App. 216, 1889.
- ³ See *Erwin v. State*, 29 Ohio St. 186, 1876; *State v. Burt*, 51 Mich. 260, 1883.
- ⁴ See *State v. Smith*, 77 N. C. 488, 1877.
- ⁵ 1 Hale, 455. *Infra*, § 472; *Felix v. State*, 18 Ala. 720, 1849.

stances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation. And so it was considered that where A. was riding on the road and B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only manslaughter.¹

§ 457. Though words of slighting, disdain, or contumely will not of themselves make such a provocation as to lessen the crime to manslaughter; yet if A. use insulting language to B., and B. thereupon strike A., but not mortally, and then A. strike B. back, and then B. kill A., this is but manslaughter. The stroke by A. is deemed a new provocation, and the conflict a sudden falling out; and the killing is therefore considered only manslaughter.² And in a sudden fight thus arising it is immaterial who struck the first blow.³

§ 458. A large class of cases occur in practice where slight provocations, as has been already incidentally noticed, have been considered as extenuating the guilt of homicide, upon the ground that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But, in cases of this kind, it must appear that the punishment was not urged with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life.⁴ Thus where

¹ Kel. 135; 1 Hale, 455.

² R. v. Snow, 1 East P. C. 244, 1776;

³ Ibid.; R. v. Ayes, R. & R. 166, R. v. Rankin, R. & R. 43, 1810; Com. 1814; U. S. v. Mingo, 2 Curtis C. C. v. Biron, 4 Dall. 125, 1793; State v. 1, 1851; Com. v. Biron, 4 Dall. 125, Mass. 65 N. C. 480.

1793; State v. Davis, 1 Houst. C. C. 13, 1863; State v. Mass. 65 N. C. 480, 1871; State v. Abarr, 39 Iowa, 185, 1874; Petty v. State, 6 Baxt. 610, 1875. *Infra*, § 471; Jackson v. State, 82 Tex. Cr. 192, 1893. See Evers v. State, 31 Tex. Cr. 318, 1892, for "insulting words" under Penal Code of Texas; Polk v. State, 30 Tex. App. 657, 1892; Schlect v. State, 75 Wis. 486, 1890.

⁴ Fost. 291; 4 Bl. Com. 200; Com. v. Green, 1 Ashm. 289, 1826; State v. Tackett, 1 Hawks, 210, 1822; State v. Roberts, Ibid. 349, 1822; Thompson v. State, 55 Ga. 87, 1875; R. v. Freeman, 1 Russ. on Cr. 518; R. v. Howlett, 7 C. & P. 274, 1836; Wigg's Case, 1 Leach, 378, 1784.

it appeared that the prisoner, having employed her step-daughter, a child ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and it was also shown that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered of great difficulty, and no opinion was ever delivered by the judges. The doubt appears to have been principally upon the question whether the instrument was such as would probably, at the given distance, have occasioned death or great bodily harm.¹

¹ Hazel's Case, Ibid. 368, 1785; 1 East P. C. 236.

Where a man, who was sitting drinking in an alehouse, being called by a woman "a son of a whore," took up a broomstaff and threw it at her from a distance, and killed her, after conviction of murder a pardon was advised; and the doubt appears to have arisen upon the ground that the instrument was not such as could probably, at the given distance, have occasioned death or great bodily harm. 1 Hale, 455, 456. See *Felix v. State*, 18 Ala. 720, 1851.

A master having struck his servant, who was a lad, with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the size of the instrument he had made use of, have had any intention to take away the boy's life. *Turner's Case*, Comb. 407; 1 Ld. Raym. 143; 2 Sid. 1498.

The keeper of a park, finding a boy stealing wood in his master's ground, tied him to a horse's tail and beat him, upon which the horse running away, the boy was killed. It was said that if the chastisement had been more moderate, it had been but manslaughter; *Halloway's Case*, Cro. Car. 131; 1 Hale, 434; 1 East P. C. c. 5, s. 22,

p. 239; but, on the evidence, the offence was murder, since death, through a process so cruel and dangerous, was ground from which malice could be inferred. See *infra*, § 477.

Where A., finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him, it was held to be manslaughter; but it must be understood that he beat him, not with mischievous intention, but merely to chastise for the trespass, and to deter him from committing it again. *Fost.* 291; 1 Hale, 473.

The prisoner's son having fought with another boy and been beaten, ran home to his father all bloody, and the father presently took a cudgel, ran three-quarters of a mile, and struck the other boy upon the head, upon which he died. The case was held to be manslaughter, on the ostensible ground of hot blood; but the authority is only supportable on the ground that the accident happened by a single stroke given in heat of blood, with a cudgel, not likely to destroy, and that death did not immediately ensue. *Rowley's Case*, Ibid. 453; *Fost.* 294, 295, 1685. Yet such a palliation would not be allowed if the punishment was deliberately cruel. *Infra*, § 475. And hence in Virginia, where a man who

§ 459. Whether a homicide committed by a man smarting under a sense of dishonor is murder or manslaughter depends upon the question whether the killing was in the first transport of passion or not. Where there has been time for cooling, which is to be determined by the temper and conditions of the defendant,¹ the offence is murder; if otherwise, manslaughter. Thus, where a man finds another in the act of adultery with his wife, and kills him or her² in the first transport of passion, he is only guilty of manslaughter, and that of a nature entitled to the lowest degree of punishment,³ for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But, as has been already shown, the killing of an adulterer deliberately, and upon revenge, is murder.⁴ And evidence of the adultery is only admissible when the time of the husband's discovery of it is brought so near to the homicide as not to allow space for cooling.⁵ The same reason makes it murder for a man deliberately, after time for cooling, to kill his wife whom he has found in adultery, if the

Husband
in hot
blood kill-
ing adul-
terer,
guilty of
man-
slaughter.

had whipped a boy very severely was the next day killed by the boy's father, who fell on him and beat him violently, cruelly, and continuously with his fists, the killing was held murder. *Com. v. McWhirt*, 3 Gratt. 594, 1846.

¹ *Infra*, § 480; *Franklin v. State*, 30 Tex. App. 628, 1892. See *State v. Raven*, 115 Mo. 419, 1893; *Watson v. Com.*, 87 Va. 608, 1891; *Bone v. State*, 86 Ga. 108, 1890; *State v. McNeill*, 92 N. C. 812, 1885; *Scott v. Com.*, (Ky.) 23 S. W. Rep. 219, 1893.

² *Pearson's Case*, 2 Lew. 216; *Hooks v. State*, (Ala.) 13 So. Rep. 767, 1893; *Mays v. State*, 88 Ga. 399, 1891.

³ *Manning's Case*, 1 Ventr. 212; *Raym.* 212; *R. v. Kelly*, 2 C. & K. 814, 1848; *People v. Horton*, 4 Mich. 67, 1856; *Com. v. Whitler*, 2 Brewst. 388, 1868; *Maher v. People*, 10 Mich. 212, 1862; *State v. John*, 8 Ired. 330, 1848; *State v. Samuel*, 3 Jones Law, (N. C.) 74, 1855; *State v. Neville*, 6 Ibid. 423, 1859; *State v. Holme*, 54 Mo. 153, 1873. See *People v. Cole*, Cent. Law Jour. July 30, 1874. As to cooling-time, see *infra*, §§ 480, 1496; *McNeill v. State*, (Ala.) 15 So. Rep. 352, 1894.

⁴ 1 Russ. on Cr. 525; *State v. Pratt*, 1 Houst. C. C. 249, 1867; *State v. Samuel*, 3 Jones Law, (N. C.) 74, 1855; *State v. Avery*, 64 N. C. 608, 1870; *State v. Neville*, 6 Jones, (N. C.) 423, 1859; *State v. Harman*, 78 N. C. 515, 1878; *Sawyer v. State*, 35 Ind. 80, 1871; *State v. Holme*, 54 Mo. 153, 1873; *State v. France*, 76 Mo. 681, 1882; *People v. Hurtado*, 63 Cal. 288, 1883. See *Turner v. State*, 70 Ga. 767, 1883; *McNeill v. State*, (Ala.) 15 So. Rep. 352, 1894. See *Farmer v. State*, 91 Ga. 720, 1893; *Jackson v. State*, 91 Ga. 271, 1892; *Wilkerson v. State*, 91 Ga. 729, 1893; *Pickens v. State*, 81 Tex. Cr. 554, 1893.

⁵ See *Biggs v. State*, 29 Ga. 723, 1860. Comp. *infra*, § 496; *Wood v. State*, 31 Tex. Cr. 571, 1893; *Traverse v. State*, 61 Wis. 144, 1884.

intent to take life be shown.¹ The same distinctions are applicable to the killing by a father of one attempting indecent liberties with his son.²

¹ *Shufflen v. People*, 62 N. Y. 229, 1875.

It was therefore rightly held by the Supreme Court of Indiana, in 1871, that it is incompetent for the defendant to prove that for a long time he had been cognizant of the adulterous intercourse of his wife with the deceased. *Sawyer v. State*, 35 Ind. 80, 1871. "If," said the court, "he had been thus for a long time apprised of her guilt in that respect, there had been an abundance of time for the ebullition of passion which might be supposed to arise on being first apprised of the fact, to subside . . . It is sufficient to say that if the facts offered to be proven were established, they would in no way excuse or mitigate the offence." See, also, *State v. Samuel*, 3 Jones, (N. C.) 74, 1855; *State v. John*, 8 Ired. 330, 1848. It is, however, admissible for the defendant to prove a conspiracy of late date to carry off his wife, which had only come to defendant's notice immediately before the homicide, the deceased being in the conspiracy. *Cheek v. State*, 35 Ind. 492, 1871. See *R. v. Kelly*, 2 Car. & K. 814, 1848; *State v. Holme*, 54 Mo. 153, 1873.

In a famous case tried in Philadelphia, in 1816, the facts were that the deceased, after being married for some years, left the country; and A., his wife, not hearing from him for two years, married the defendant, acting under a Pennsylvania statute, which provided that persons so marrying should not be indictable for adultery, although, as it was afterward held, the second marriage was not in other respects valid. The deceased returned, after a lapse of a year from the second marriage, and

found A. living with the defendant, upon which a quarrel arose, which was partially composed, but which ended in the defendant deliberately shooting the deceased at the house of A. This was held murder in the first degree. *Com. v. Smith*, 7 Smith's Law, App.; 2 Wheeler C. C. 79, 1816.

But the propriety of this ruling has since been gravely questioned, on the ground that Judge Rush, who presided, charged that no time is too short in which to form the intention to kill which is necessary to murder in the first degree. See comments of Chief J. Agnew, in *Jones v. Com.*, 75 Pa. 403, 1874. Another ground for exception is, that as the defendant acted under legal advice (mistaken though it were) that his marriage was valid, and that as he therefore, according to his own view, was at the time of the conflict maintaining his own rights in his own house, the malice necessary to constitute murder in the first degree was not imputable to him.

A husband suspecting his wife of an adulterous intercourse with A., employed B. to watch them. While so employed B. killed A. It was held, that testimony that A. had committed adultery with the wife was not relevant in the trial of B. for the murder of A., whatever might have been the law if the husband had killed him. *People v. Horton*, 4 Mich. 67, 1856.

That cooling-time is a question of temperament, see *infra*, §§ 480, 496.

² In *R. v. Fisher*, 8 C. & P. 182, 1837, the verdict was manslaughter, though the court charged that, if there was deliberation, the offence was murder. See, also, *Jones v. State*, (Ohio) 38 N. E. Rep. 79, 1894.

§ 460. A man cannot, indeed, thus avenge the adultery of his paramour,¹ for the connection is not merely unauthorized by law, but in defiance of law. But where there are a legal right and a natural duty to protect, there an assault on the chastity of a ward (using this term in its largest sense) will be a sufficient provocation to make hot blood thus caused an element which will reduce the grade to manslaughter. That this is the law when a father is incensed at an unnatural offence attempted on his son, and acts in hot blood, we have already incidentally seen.² There is no sound reason why a similar allowance should not be made for a father's or a brother's indignation at a sexual outrage attempted on a daughter or a sister. To impose a severer rule would be a departure from the analogies of the law, and would bring the court in conflict, not only with the jury, who under such circumstances never would convict of murder, but with the common sense of the community. Supposing the injury to female chastity to be avenged in hot blood by a brother, a father, or other person having a right to protect the person injured, the offence is but manslaughter. But a brother cannot, after his sister has been apprehended in adultery, set up the provocation as a defence to an indictment against him for killing her paramour.³

§ 461. Persons laboring under a sense of wrong, public or private, real or imaginary, must apply to the law for redress. If there is opportunity to apply for such redress, he who supposes himself aggrieved is guilty of a criminal offence if he undertake to inflict violent punishment; and he is guilty of murder if he deliberately and coolly kill the person by whom he supposes himself aggrieved.⁴ In the highest of all injuries, that of adultery, this, as we have just seen, is the law; and *a fortiori* must this rule be applied in cases of injuries less crushing. That such grievances exist constitutes a defence that will not, as a bar to the indictment, be received by the court. Thus, on an indictment against a convict for the homicide of his keeper, evidence was properly held, by the Supreme Court of Connecticut, in 1870, to be inadmissible for the purpose of showing

¹ Parker v. State, 31 Tex. 132, 1868. ² R. v. Fisher, 8 C. & P. 182, 1837.
 No provocation less than detection of parties in actual sexual intercourse is sufficient as *matter of law*. Hooks v. State, (Ala.) 13 So. Rep. 767, 1893. ³ Lynch v. Com., 77 Pa. 205, 1874.
⁴ See *supra*, § 399. Rockmore v. State, (Ga.) 19 S. E. Rep. 32, 1894.

that the food supplied by the deceased to the defendant was tainted and unwholesome.¹

So a supposed public grievance will not excuse a riot undertaken for its removal;² though, as has been seen, the excitement and tumult produced by a movement of this class may be put in evidence for the purpose of showing such a confusion of mind as prevented the participants from entertaining a deliberate design to take life.³

§ 462. A bare trespass on the land or other property of another, not his dwelling-house, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence; and if he do, and with it kill the trespasser, it will be murder, unless killing were actually necessary to prevent the trespass, and unless the trespass was a serious invasion of the owner's rights.⁴ On the other hand, if the object of the violence be to drive off the trespasser, or even to chastise him, and no blows likely to produce grievous bodily harm be inflicted, the offence, if death ensue, is but manslaughter.⁵ So far as concerns trespassers on personal property, it has been undoubtedly held that such trespass does not lower the degree of homicide in case the trespasser is killed by the owner in an attempt by the latter to recover possession of the property. But this cannot be the law when the owner, his right to reclaim his goods being resisted,

A bare trespass on property not an adequate provocation in cases of intentional killing.

¹ *State v. Wilson*, 38 Conn. 126, 1871. See, also, *Territory v. Drennan*, 1 Mont. 41, 1868.

² *Supra*, §§ 397-399.

³ See *supra*, § 388.

⁴ *R. v. Scully*, 1 C. & P. 319, 1824; *Com. v. Drew*, 4 Mass. 391, 1808; *State v. Buchanan*, 1 Houst. C. C. 79, 1859; *State v. Woodward*, Ibid. 455, 1874; *Davison v. People*, 90 Ill. 221, 1878; *State v. Morgan*, 3 Ired. 186, 1842; *McDaniel v. State*, 8 S. & M. 401, 1847; *Hayes v. State*, 58 Ga. 35, 1877; *Oliver v. State*, 17 Ala. 588, 1850; *Simpson v. State*, 59 Ala. 1, 1874; *State v. Shippey*, 10 Minn. 223, 1865. See *Smith v. Com.*, (Ky.) 26 S. W. Rep. 583, 1894; *Herald v. Com.*, (Ky.) 14 S. W. Rep. 491, 1890. *Supra*, § 98; *infra*, §§ 473, 500.

⁵ *Fost.* 291; 1 *Hale*, 473; *Hawk. c.* 13, s. 34; *Kel.* (3d ed.) 180; *Halloway's Case*, Cro. Car. 131; 1 *Hawk. c.* 13, s. 42. See 1 *Hawk. P. C.* by Curw. §§ 33-6; *Com. v. Drew*, 4 Mass. 391, 1808; *Kendall v. Com.*, (Ky.) 19 S. W. Rep. 173, 1892.

The defendant, having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died; being indicted for murder, the defendant was found guilty and executed. *R. v. Moir*, cited in *R. v. Price*, 7 C. & P. 178, 1835.

kills in hot blood, or in honest belief that this is necessary to defend his rights. In such case the offence cannot, on principle, be more than manslaughter.¹ And he is justified in using all necessary force to prevent valuables, either his own or under his charge, from being taken from him by robbery.²

Exercise
of a legal
right no
just provo-
cation.

§ 463. It should be remembered that the mere exercise of a legal right, no matter how offensive, is no such provocation as lowers the grade of homicide.³

Spring-
guns il-
legal when
placed on
spots
where
innocent
trespassers
may
wander.

§ 464. A land-owner has no right to plant spring-guns by which ordinary trespassers may be wounded; and if he does so, and death ensues, he is responsible for the consequences.⁴ If such weapons be erected inconsiderately, the killing of a mere heedless trespasser on an open country is manslaughter; if the weapons be erected maliciously, the offence is murder.⁵ But if the weapons be erected at the door of a place where valuables are kept, and to which

in the ordinary course of things none but a burglar would penetrate, then the killing is excusable.⁶ The distinction is this: the agency is one which a house-owner is entitled to use in such a way as to keep off burglars and other felons. But the fact that he is so entitled does not protect him from an indictment for nuisance in case the right be abused by placing the trap where travellers or even trespassers would be exposed to injury, nor from an indictment for homicide in case any such traveller or trespasser be killed.

§ 465. The law as to defence of dwelling-house is discussed in future sections.⁷ In the present connection we may state the following propositions:

¹ *Supra*, §§ 98 *et seq.* *Infra*, §§ 500, 1859; *Gray v. Coombs*, 7 J. J. Marsh. 501. See *Callicoatte v. State*, (Tex.) 22 478, 1882; *Simpson v. State*, 59 Ala. 1, S. W. Rep. 1041, 1893; *State v. Donahoe*, 78 Iowa, 486, 1889. 1874; *Lynch v. Nurdin*, 1 G. D. 37; *Jordin v. Crump*, 8 M. & W. 782, 1841.

² *Infra*, §§ 500, 501. See *R. v. Wesley*, 1 F. & F. 528, 1859; *State v. Burwell*, 63 N. C. 661, 1869. See *State v. Levigne*, 17 Nev. 435, 1883. With *Barnes v. Ward*, *supra*, compare *Stone v. Jackson*, 16 C. B. 199; *Holmes v. North Eastern R. C.*, L. R. 4 Exch. 254, 1869; *Indermaur v. Dames*, L. R. 1 C. P. 274, 1866; *R. R. v. Stout*, 17 Wall. 657, 1873; *Bird v. Holbrook*, 4 Bing. 628, cited 1 Q. B. 37; *Wooton v. Dawkins*, 2 C. B. (N. S.) 412, 1857.

³ See *State v. Craton*, 6 Ired. 164, 1845; *State v. Lawry*, 4 Nev. 161, 1868; *R. v. Longden*, R. & R. C. C. 228. 4 Bing. 628, cited 1 Q. B. 37; *Wooton v. Dawkins*, 2 C. B. (N. S.) 412, 1857.

⁴ *Infra*, § 507; *State v. Moore*, 31 Conn. 479, 1863; *Barnes v. Ward*, 9 C. B. 392, 421, 1850; *Hardcastle v. South Yorkshire R. C.*, 4 H. & N. 67,

⁵ *Simpson v. State*, 59 Ala. 1.

⁶ See *infra*, § 507.

⁷ See *infra*, §§ 506, 507.

1. For the master of a house to kill, in cool blood, a person seeking entrance into the house, is murder, unless the person killing, according to his own lights, honestly, and without negligence, believes that the person entering the house is attempting to perpetrate a felony, and that killing is the only way to prevent the felony; in which case there should be an acquittal.

For master of house knowingly to kill visitor is murder.

§ 466. 2. For the master of a house to kill, in hot blood, a person forcing his way into the house, is manslaughter, unless the person killing, according to his own lights, honestly, and without negligence, believes that the person entering the house is seeking to perpetrate a felony, and that killing is the only way to prevent the felony; in which case there should be an acquittal.¹

When such killing is in hot blood it is manslaughter.

467. 3. When a person in danger of his life takes refuge in his own house, then, the attack being unlawful, he is excused for taking his assailant's life; and he may assemble his friends for the same purpose, who stand, as to this defence, in the same position as himself.²

When such killing is in self-defence it is excusable.

§ 468. As a man has a right to order another to leave his house, but has no right to put him out by force until gentler means fail, if he attempts to use violence at the outset and is slain, it will be manslaughter in the slayer, if there be no previous malice.³ If the owner of the house in expelling kill in hot blood without necessity an intruder, this is manslaughter.⁴

Manslaughter to kill master of house expelling defendant with unnecessary violence.

§ 469. If A. stands with a weapon in a doorway of a room, wrongfully to prevent B. from leaving it and others from entering, and C., who has a right to the room,

Killing a person having a

¹ *Infra*, § 500.

² As authority for these points, see *infra*, §§ 506-7, and *Levett's Case*, Cro. Car. 438; 1 Hale P. C. 43, 474, cited *supra*, § 38; *State v. Patterson*, 45 Vt. 308, 1873; *Com. v. Clark*, 2 Metc. 23, 1840; *State v. Ross*, 2 Dutch. 224, 1857; *People v. Caryl*, 3 Parker C. R. 326, 1857; *Greschia v. People*, 53 Ill. 295, 1870; *Pond v. People*, 8 Mich. 150, 1860; *Patten v. People*, 18 Ibid. 314, 1869; *State v. Martin*, 30 Wis. 216, 1872; *State v. Lazarus*, 1 Const. C. R. 34, 1817; *Lyon v. State*, 22 Ga. 399, 1857; *Carroll v. State*, 23 Ala. 28, 1877; *McCoy v. State*, 3 Eng. (Ark.) 451, 1848; *Hinton v. State*, 24 Tex. 454, 1859; *Territory v. Drennan*, 1 Mont. 41, 1868. See, also, an article in Alb. Law Journ. for October 14, 1874.

³ *McCoy v. State*, 3 Eng. (Ark.) 451, 1848; *Hinton v. State*, 24 Tex. 454, 1859; *Lyon v. State*, 22 Ga. 399, 1857.

⁴ *State v. Murphy*, 61 Me. 56, 1870; *infra*, § 500. See *Brinkley v. State*, 89 Ala. 34, 1890.

legal right to the use of a room is murder.

struggles with A. to get his weapon from him, upon which D., a comrade of A., stabs C., this is murder in D. if C. dies.¹

Where the parties are equal, a blow is sufficient provocation.

§ 470. Any assault, in general, made with violence or circumstances of indignity upon a man's person, by one not greatly his inferior in strength, if it be resented immediately by the death of the aggressor, and it appear that the party acted in the heat of blood upon that provocation, will reduce the crime to manslaughter.²

In sudden quarrels, immaterial who struck the first blow.

§ 471. In a sudden and equal quarrel, when both parties strike in the heat of blood, it is immaterial by whom the first blow is struck.³ Thus, if A. uses provoking language or behavior toward B., and B. strikes him, upon which a combat ensues, in which A. is killed, this is held to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow.⁴

But the assault must have been calculated to arouse the passions.

§ 472. An unintentional and trivial assault is no palliation.⁵ Thus in a case in South Carolina, where it was argued by the defendant's counsel that the passions of the defendant were excited by an unintended jostle of the prisoner or his wife by the deceased, the position was said to be equally unsupported by proof, and unavailing if true. "In a city like Charleston, where many persons are constantly passing until a late hour of the night, the accidental impinging of one upon another in the dark would not authorize such a murderous attack upon him. Such an act of itself would be a sure indication of a depraved and wicked heart void of all social duty, and fatally bent on mischief."⁶ The assault must be of a character from which hot blood might be expected to ensue.⁷

§ 473. Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by

¹ R. v. Longden, R. & R. C. C. 228, 1818.

² *Supra*, § 457.

³ R. v. Thomas, 7 C. & P. 817, 1837; R. & R. 166, 1880. See Petty v. Com., R. v. Taylor, 2 Lew. C. C. 217; R. v. (Ky.) 15 S. W. Rep. 1059, 1891.

Snow, 1 Leach C. C. 151, 1776; R. v. Rankin, R. & R. C. C. 43, 1802; Hill v. State, 8 Tex. App. 142, 1880. *Supra*, § 455, and cases hereafter cited.

⁴ *Ibid*.

⁵ State v. Tooky, 2 Rice Dig. 104.

⁷ Nichols v. Com., 11 Bush, 575, 1876.

the latter acting in the heat of blood upon that provocation, he killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow.¹ Violent acts of resentment, bearing no proportion to the provocation or insult, particularly where there is a decided preponderance of strength on the part of the party killing, and where the punishment is deliberate and cruel, constitute murder, if death ensue from the attack.²

Deliberate
and cruel
use of
superior
strength
implies
malice.

¹ R. v. Lynch, 5 C. & P. 324, 1832.

² Keates's Case, Comb. 408; R. v. Snow, 1 Leach, 151, 1776; 2 Ld. Raym. 1498; Royley's Case, 12 Rep. 87; s. c. 1 Hale, 453; R. v. Lynch, 5 C. & P. 324, 1832; R. v. Shaw, 6 Ibid. 372, 1834; R. v. Thomas, 7 Ibid. 817, 1837. See, also, Fost. 294; Cro. Jac. 296; Godb. 182; R. v. Willoughby, 1 East P. C. 288, 1791; McWhirt's Case, 3 Gratt. 594, 1846; McDermott v. State, 80 Ind. 87, 1881; State v. Craton, 6 Ired. 164, 1845; State v. Hildreth, 9 Ibid. 429, 1849; State v. Hargett, 65 N. C. 669, 1871; State v. Chavis, 80 Ibid. 353, 1879; State v. Boon, 82 Ibid. 637, 1880; *Ex parte* Nettles, 58 Ala. 268, 1877; State v. Christian, 66 Mo. 138, 1877; Holland v. State, 12 Fla. 117, 1868; People v. Perdue, 49 Cal. 425, 1874; Guffee v. State, 8 Ibid. 187, 1880, and authorities hereafter cited. See Colley v. Com., (Ky.) 12 S. W. Rep. 132, 1889.

This distinction applies to the case already cited, where the keeper of a park, finding a boy stealing wood in his master's ground, tied him to a horse's tail and beat him, upon which the horse running away, the boy was killed; the case being held murder. *Supra*, § 462.

There being an affray in the street, one Stedman, a foot soldier, ran hastily toward the combatants. A woman seeing him run in that manner, cried

out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled; and Stedman, pursuing her, stabbed her in the back. It seemed to Holt, C. J., that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially; but it afterward appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was ruled clearly to be no more than manslaughter. The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the attack. Stedman's Case, Fost. 292, 1704.

But even on this evidence, as it thus stands, the case has been very much doubted. Thus, in Pennsylvania, Gibson, C. J., said: "If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on a husband would bring the killing of her below murder. Under

§ 474. If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatch up a deadly weapon and kill the other party with it, such killing will be only manslaughter.¹ But if a party, under color of fighting upon equal terms, used from the beginning of the contest a deadly weapon without the knowledge of the other party, and kill the other party with such weapon; or if at the beginning of the contest he prepare a deadly weapon, so as to have the power of using it in some part of the contest, and use it accordingly in the course of the combat, and kill the other party with the weapon; the killing in both these cases will be murder.²

§ 475. Where a party, after he has got the better of the other, holds him prostrate and defenceless, the reception of a prior blow will not reduce the grade to manslaughter. This proposition, in fact, is a corollary of that which makes a blow no mitigating provocation when there is a manifest disparity of strength between the parties. For even where no such disparity at first exists, the principle holds good when by the result of the conflict one party is disarmed, or becomes otherwise helpless.³

§ 476. The plea of provocation will not avail where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretence for wreaking his malice; and even where there may have been previous struggling or blows, such defence will not

this view of the law I have always 1877. See *Territory v. Bannigan*, 1 doubted *Stedman's Case*." *Com. v. Dak.* 451, 1877.

Mosler, 4 Barr, 264, 1846; *Fitzgerald v. State*, 15 Lea, (Tenn.) 99, 1885. ² *R. v. Anderson*, 1 Russ. on Cr. (9th Am. ed.) 731, 1816; *R. v. Taylor*, 5 Burr. 2793; *R. v. Smith*, 8 C. & P. 160, 1837; *Macklin's Case*, 2 Lew. 225; *Scales v. State*, 96 Ala. 69, 1892; *Habel v. State*, 28 Tex. App. 588, 1890.

That an assault with a cane may be a provocation which may lower the degree, see *R. v. Tranter*, 1 Stra. 499, 1768; *supra*, § 403.

Cf. definition in § 203 of New York Penal Code of 1882.

¹ *R. v. Anderson*, 1 Russ. on Cr. 731, 1816; *R. v. Kessal*, 1 C. & P. 437, 1824; *Davis v. People*, 88 Ill. 350, 1888; *State v. Ramsay*, 5 Jones, (N.C.) 195, 1857; *Judge v. State*, 58 Ala. 408, 1878; *Preston v. State*, 25 Miss. 388, 1853; *State v. Christian*, 66 Mo. 138, 1877; *State v. Alexander*, *Ibid.* 148, 1877. As to burden of proof, see *Whart. Cr. Ev.* § 334.

² *R. v. Shaw*, 6 C. & P. 372, 1832. See *Territory v. Bannigan*, 1 Dak. 451, 1877. As to burden of proof, see *Whart. Cr. Ev.* § 334.

be sustained where there is evidence of prior malice.¹ And where a combatant enters into a contest dangerously armed and fights under an undue advantage, though mutual blows pass, it is not manslaughter, but murder, if he slay his adversary pursuant to a previously formed design, either general or special, to use his weapon in an emergency.² A party has in this way no right, even on the plea of self-defence, to execute private vengeance.³

§ 477. It has been said that when the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be presumed, unless there is evidence to repel it; and that there must be some evidence to show that the wicked purpose had been abandoned.⁴ If by this we are to understand that the defendant is in such case to prove by witnesses that he had abandoned his old grudge, the position cannot be sustained. It is otherwise, however, if we understand the conclusion to be that the presumption (which is exclusively one of fact) of the continuance of the old grudge may be met and overcome by the presumption of its abandonment, which may be drawn from the lapse of time, from the circumstances of the encounter, and from the character of the parties.⁵ Thus it has been properly held that if a person, upon

Question of continuance of old grudge one of fact.

¹ 1 Vent. 159; 1 Hale, 452; Oneby's 568, 1855; State v. Rogers, 18 Kans. Case, 2 Ld. Raym. 1490, 1725; R. v. 78, 1877; People v. Stonecifer, 6 Cal. Smith, 8 C. & P. 160, 1837; R. v. 405, 1856; McCoy v. State, 25 Tex. Mason, 1 East P. C. 239, 1756; 1 33, 1860; Murray v. State, 36 Ibid. Russ. on Cr. (9th Am. ed.) 719, 790; 642, 1871; King v. State, 13 Tex. App. Stewart v. State, 1 Ohio St. 66, 1853; 277, 1882; Jackson v. State, 28 Tex. State v. Stoffee, 15 Ibid. 47, 1864; App. 108, 1889. As to burden of Slaughter v. Com., 11 Leigh, 681, proof, see Whart. Cr. Ev. § 384. 1841; Vaidon v. Com., 12 Gratt. 717, ² R. v. Thomas, 7 C. & P. 817, 1837; 1855; Bristow v. Com., 15 Gratt. 634, State v. Craton, 6 Ired. 164, 1845; 1859; State v. Neeley, 20 Iowa, 108, Ex parte Nettles, 58 Ala. 268, 1877; 1866; State v. Clifford, 58 Miss. 477, Steph. Dig. Crim. Law, (5th ed.) art. 1878; State v. Johnston, 1 Ired. 354, 245 et seq. ³ Ibid. Infra, §§ 485, 496. For a 1840; State v. Lane, 4 Ibid. 113, 1843; laxer view, see Ex parte Wray, 30 State v. Tachanatah, 64 N. C. 614, Miss. 673, 1859; Moore v. State, 36 1869; State v. Matthews, 80 Ibid. 417, Ibid. 137, 1864. ⁴ Supra, §§ 114, 399; State v. John- 1879; State v. Ferguson, 2 Hill, (S. son, 1 Ired. 354, 1840; State v. Tilly, C.) 619, 1835; Lyon v. State, 22 Ga. 3 Ibid. 424, 1842. See Crane v. Com., 1899, 1856; State v. Green, 37 Mo. 466, (Ky.) 13 S. W. Rep. 1079, 1890. ⁵ Supra, § 114. See Whart. Cr. Ev. 1866; State v. Linney, 52 Ibid. 40, 40, 1874; State v. Christian, 66 Ibid. § 735; Murray v. Com., 79 Pa. 811, 138, 1877; Atkins v. State, 16 Ark. 443

meeting unexpectedly his adversary, who had intercepted him upon his lawful road and in his lawful pursuit, accept the fight where he might have avoided it by passing on, the provocation being sudden and unexpected, the jury may presume that the killing was not upon the old grudge, but that it was upon the insult given by stopping him on the way.¹ And after a reconciliation, the motive will be presumed to be the recent provocation, not the old grudge.²

On the other hand, if one seek another, and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him; if a homicide ensue it will be murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat.³ Thus, if A. from previous angry feelings, on meeting with B., strike him with a whip, with the view of inducing B. to draw a pistol, or, believing he will do so in resentment of the insult, determining if B. do so to shoot B. as soon as he draws, and B. draw, and A. immediately shoot and kill B., this is murder.⁴ But if there had been a quarrel between A. and B. and a reconciliation between them, and afterward, upon a new and sudden falling out, A. kill B., this is not murder; though if it appear that the reconciliation were but pretended or counterfeit, and that the hurt done were upon the score of the old malice, a conviction of murder will be sustained.⁵

1875; *State v. Savage*, 78 N. C. 520, 1 Hale, 451; *State v. Lane*, 4 Ired. 1878; *State v. Barnwell*, 80 Ibid. 466, 113, 1843; *State v. Ferguson*, 2 Hill, 1879; *Fitzpatrick v. State*, 37 Ark. (S. C.) 619, 1837; *State v. Harris*, 59 238, 1880; *Freeman v. State*, 70 Ga. Mo. 550, 1875. See *Mitchell v. Com.*, 736, 1882. See *State v. Dettmer*, (Mo.) 33 Gratt. 872, 1879; *Helm v. State*, 66 27 S. W. Rep. 1117, 1894; *People v. Miss.* 537, 1889.

Thomson, 92 Cal. 506, 1891.

⁴ *State v. Marten*, 2 Ired. 101, 1841.

¹ *Copeland v. State*, 7 Humph. 479, 1846. See *State v. Tachanatah*, 64 N. C. 614, 1870; *Cannon v. State*, 57 Miss. 147, 1879; *Pickens v. State*, 61 Ibid. 52, 1881. As to old grudge, see Whart. Cr. Ev. § 784; *Weller v. People*, 30 Mich. 16, 1874. As to continuance of malice, see *supra*, § 114.

² *State v. Barnwell*, 80 N. C. 466, 1879. See *State v. Crabtree*, 111 Mo. 136, 1892; *Brazzil v. State*, 28 Tex. App. 584, 1890; *State v. Perigo*, 80 Iowa, 37, 1890.

³ *R. v. Smith*, 8 C. & P. 160, 1837;

⁵ *Supra*, § 114; 1 Hale, 451; *Mason's Case*, 1 Fost. 132, 1756.

Where a sufficient provocation at the time to extenuate the homicide is proved, it is not competent for the prosecution, in order to show that the act of killing was not by reason of the immediate provocation, but of a pre-existing malice, to prove that a year before the prisoner declared his intention to kill two or three men, it being admitted that the deceased was not one of the men referred to. *State*

v. Barfield, 7 Ired. 299, 1847.

§ 478. When one person interferes in the quarrel of others, and kills one of the participants from malice, and not from negligence or passion, the party killing is guilty of murder. Thus, if a master maliciously intending to kill another take his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him, and the servants, seeing their master engaged, kill the other, they would be guilty of manslaughter only, but the master of murder. If they take part coolly and knowingly in the killing, it would be murder in all.¹

Malicious killing in another's quarrel is murder; but in hot blood is manslaughter.

§ 479. A distinction may be taken between the interference of servants and friends, and that of a mere stranger, and there may be cases in which a jury would properly infer hot blood in the interference of a friend or servant, when there could be no such inference as to the interference of a stranger. A stranger may interfere from pity or sense of fairness; a friend or servant, in addition to such motives, from affection or duty. At the same time, it has been properly observed that the nearer or more remote connection of the parties with each other seems to be more a matter of observation for the jury as to the probable force of the provocation, and the motive which induced the interference, than as furnishing any precise rule of law grounded on such a distinction.²

Hot blood extenuates a killing in proportion to the closeness of the relationship of the party interfering.

Hot blood is naturally to be expected in the case of a friend taking the side of a friend who is apparently maltreated; and hence if a third person should take up the cause of a friend who has been worsted in a fight, and should kill that friend's antagonist, the killing would, it seems, be manslaughter, and this though the party assisted might have been guilty of murder if the killing³ had been

¹ 1 Hawk. P. C. c. 13, s. 55; State v. Roberts, 1 Hawks, 341, 1822; Thompson v. State, 25 Ala. 41, 1854; Frank v. State, 27 Ala. 38, 1855. See 1 Russ. on Cr. 590, 592. And see 12 Rep. 89. As to crimes collateral to a conspiracy, see *supra*, § 214. But see State v. Howard, 112 N. C. 859, 1893. See State v. Brittain, 89 N. C. 481, 1883, for son assisting father, Mealer v. State, 32 Tex. Cr. 102, 1893.

² *Supra*, § 460; *infra*, §§ 490, 494; Irby v. State, 32 Ga. 496, 1861. See Sterling v. State, Ibid. 248, 1883.

Under statute, as has already been

seen, insulting words, addressed to a female relative, may be a provocation which, if acted on in hot blood, may reduce a homicide to manslaughter. People v. Turley, 50 Cal. 469, 1875; Eanes v. State, 10 Tex. App. 421, 1881. *Supra*, § 455.

³ *Supra*, § 215; State v. Roberts, 1 Hawks, 349, 1821; R. v. Harrington, 10 Cox C. C. 370, 1866; Branch v. State, 15 Tex. App. 96, 1883. See Thorpe v. State, 13 Lea, (Tenn.) 138, 1884. See State v. Hermann, 117 Mo. 629, 1893, for manslaughter in fourth degree. People v. Carter, 96 Mich. 583, 1893.

by him; and it is, at the most, manslaughter, for a brother who sees the slaying of his brother to kill in hot blood the slayer.¹

§ 480. Whether there has been cooling-time is eminently a question of fact, varying with the particular case and with the condition of the party.² There are some provocations which, with persons of even temperament, lose their power in a few moments; while there are others which rankle in the breast for days and even weeks, producing temporary insanity. Men's temperaments, also, vary greatly as to the duration of hot blood; and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal "reasonable man," but by that of the party to whom the malice is imputed. A man may be chargeable with negligence in not duly weighing circumstances which would have checked his passion, or which, when his passion was aroused, would have caused it more speedily to subside. But he is not chargeable with malice when he was acting wildly and in hot blood. Hence, whether there has been cooling-time, so as to impute to the defendant malice, is to be decided, not by an absolute rule, but by the conditions of each case.³

¹ *Guffee v. State*, 8 Tex. App. 187, Ashm. 289, 1821; *Com. v. Lenox*, 3 1880. See *Butler v. State*, (Tex.) 26 Brewst. 249, 1868; *Kilpatrick v. Com.*, S. W. Rep. 201, 1894; *Whatley v. State*, 91 Ala. 108, 1891. 31 Pa. 198, 1858; s. c. 3 Phila. R. 237, 1858; *McWhirt's Case*, 3 Gratt. 594, 1846; *Creek v. State*, 24 Ind. 151, 1865; *Ex parte Moore*, 30 Ibid. 197, 1869; *Murphy v. State*, 31 Ibid. 511, 1869; *People v. Mortimer*, 48 Mich. 37, 1882; *State v. Decklotts*, 19 Iowa, 447, 1865; *State v. Spangler*, 40 Ibid. 365, 1875; *State v. Jones*, 20 Minn. 58, 1875; *Gavin v. State*, 30 Ga. 67, 1860; *State v. McCants*, 1 Spears, 384, 1843; *State v. Jackson*, 3 Jones, (N. C.) 266, 1855; *State v. Hill*, 4 Dev. & C. & P. 437, 1824; *R. v. Lynch*, 5 Bat. 491, 1839; *State v. Moore*, 69 N. C. 267, 1873; *Cates v. State*, 50 Ala. 166, 1874; *Judge v. State*, 58 Ibid. 142, 1835; *R. v. Fisher*, 8 Ibid. 182, 405, 1878; *McNeill v. State*, (Ala.) 1837; *R. v. Eagle*, 2 F. & F. 827, 15 So. Rep. 352, 1894; *Preston v. State*, 25 Miss. 383, 1854; *Gladden v. State*, 12 Fla. 562, 1868; *Johnson v. R.* 629, 1860; *People v. Sullivan*, 3 State, 30 Tex. 748, 1868; *Mackey v. Selden*, 396, 1852; *Com. v. Green*, 1 State, 13 Tex. App. 360, 1883. See,

² See as to presumptions, *supra*, § 114. And see *Small v. Com.*, 91 Pa. 304, 1879.

³ *Supra*, §§ 114-5; Whart. on Hom. §§ 451 *et seq.*; 1 Hawk. c. 18, ss. 22, 29; 4 Bl. Com. 191; 3 Inst. 51; 1 Bulst. 86; *Ld. Morley's Case*, 7 St. Tr. 421; Kel. (3d ed.) 88; *Crompt.* 23; 1 Sid. 287; *Oneby's Case*, 2 Stra. 766, 1731; 2 *Ld. Raym.* 1485. See *R. v. Taylor*, 3 Burr. 2793; *R. v. Kessal*, 1 C. & P. 437, 1824; *R. v. Lynch*, 5 Ibid. 324, 1832; *R. v. Hayward*, 6 Ibid. 157, 1833; *R. v. Beeson*, 7 Ibid. 142, 1835; *R. v. Fisher*, 8 Ibid. 182, 1837; *R. v. Eagle*, 2 F. & F. 827, 1862; *R. v. Selten*, 11 Cox C. C. 674, 1871; *McCann v. People*, 6 Parker C. R. 629, 1860; *People v. Sullivan*, 3 Selden, 396, 1852; *Com. v. Green*, 1

§ 481. It has been already shown that an illegal attempt to restrain a man's liberty, even under color of legal process, is such provocation as to reduce the offence to manslaughter. This holds where a man is injuriously restrained of his liberty, as where a creditor stood at the door of his debtor with a drawn sword, to prevent him from escaping while he sent for a bailiff to arrest him; or where a sergeant put a common soldier under arrest, who thereupon killed the sergeant with a sword, and upon the trial the articles of war were not produced, nor any evidence given of the usage of the army, and so no authority in the sergeant appeared.¹ The same distinctions apply to all cases of illegal restraint.²

Restraint
or coercion
is adequate
provoca-
tion.

§ 482. Cool and deliberate homicide in a duel is murder in the guilty party, and this, though the latter had received the provocation of a blow,³ or had been threatened with dishonor.⁴ It is the deliberation which constitutes the grade of guilt. Thus if A. and B. meet deliberately to fight, and A. strike B., and pursue B. so closely that B., to protect his own life, kills A., this is murder in B.; because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done.⁵

Killing in
duel is
murder.

as differing from text, *State v. Sizemore*, 7 Jones, (N. C.) 206, 1859; *State v. Moore*, 69 Ibid. 267, 1873. As to burden of proof, see Whart. Cr. Ev. § 334. For an interesting collection of cases on this point, see Mr. Townsend's *Modern State Trials*, i. 151 *et seq.* As to cooling-time in riots, see *supra*, § 390 a.

¹ *Buckner's Case*, Styl. 467; *Wither's Case*, 1 East P. C. 233, 1784; *R. v. Curvan*, 1 Mood. C. C. 132, 1826; *R. v. Willoughby*, 1 East P. C. 288, 1791.

² *Goodman v. State*, 4 Tex. App. 349, 1878.

³ *R. v. Young*, 8 C. & P. 644, 1838; *Smith v. State*, 1 Yerg. 228, 1879; *R. v. Cuddy*, 1 C. & K. 210, 1843; *State v. Underwood*, 57 Mo. 40, 1874. *Supra*, § 215. As to duelling as a substantive offence, see *infra*, §§ 1767 *et seq.*

⁴ 1 Hale, 452. *Supra*, § 101; *Thomas*

v. State, 61 Miss. 60, 1881; *Thomas v. State*, 61 Miss. 60, 1883.

⁵ 1 Hale, 452, 480, who says: "Thus is Mr. Dalton, cap. 93, p. 241 (new ed. c. 145, p. 471), to be understood." But a *quære* is added in 1 Hale, 452, whether, if B. had really and truly declined the fight, ran away as far as he could, and offered to yield, and yet A. refusing to decline it had attempted his death, and B. after this had killed A. in his own defence, it would excuse him from the guilt of murder; admitting clearly that if the running away were only a pretence to save his own life, and was really designed to draw out A. to kill him, it would be murder. This *quære* of Lord Hale's is discussed in 1 East P. C. c. 5, s. 54, pp. 284 *et seq.*, and it is observed that Mr. J. Blackstone, (4 Bl. Com. 185) expressly puts the same case of a duel as Lord Hale, but without subjoining

If the agreement to fight be cool and deliberate, no subsequent hot blood will be a defence. Thus where B. challenged A., and A. refused to meet him, but in order to evade the law A. told B. that he should go the next day to a certain town about his business, and accordingly B. met him in the road to the same town, and assaulted him, whereupon they fought, and A. killed B., it was held that A. was guilty of murder; but the same conclusion would not follow if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting.¹ On the other hand, where upon a sudden quarrel the parties fight upon the spot, or they presently fetch their weapons and go into a field and fight, and one of them is killed, it will be but manslaughter, because it may be inferred that the blood

the same doubt; and that it was considered as settled law by the chief justice in *Oneby's Case*, 2 *Ld. Raym.* 1485, 1731. Mr. East, after reasoning in favor of the extenuation of the duellist so declining to fight, proceeds thus: "Yet still it may be doubtful whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity in self-defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon in defiance of the law." 1 *East P. C. c.* 5, s. 54, p. 285. See *Brafford v. Com.*, (Ky.) 23 *S. W. Rep.* 590, 1893.

¹ 1 *Hawk. P. C. c.* 13, s. 22; 1 *Hale*, 453; *R. v. Byron*, 19 *St. Tr.* 1177; *R. v. Walters*, 12 *Ibid.* 113, 1688. Reference may also be made to *Bromwich's Case*, 1 *Lev.* 180; 1 *Sid.* 277; 7 *St. Tr.* 42. *Bromwich* was indicted for aiding and abetting Lord Morley in the murder of Hastings.

For a valuable collection of cases on this point see Mr. Townsend's *Modern State Trials*, i. 151 *et seq.* The Eng-

lish judges, though generally laying down the law with becoming precision, sometimes go beyond our American authorities in mawkish sympathy with the accused. Thus on the trial of *Purefoy*, for killing Colonel Roper in a duel at Maidstone, in 1794, Baron Hotham thus charged the jury: "The oath by which I am bound obliges me to say that homicide, after due interval of consideration, amounts to murder. The laws of England, in their utmost lenity and allowance for human frailty, extend their compassion only to sudden and momentary frays; and then, if the blood has not had time to cool, or the reason to return, the result is termed manslaughter. Such is the law of the land, which undoubtedly the unfortunate gentleman at the bar has violated, though he has acted in conformity to the laws of honor. His whole demeanor in the duel, according to the witness whom you are most to believe, Colonel Stanwid, was that of perfect honor and perfect humanity. Such is the law, and such are the facts. If you cannot reconcile the latter to your conscience, you must return a verdict of guilty. But if the contrary, though the acquittal may trench on the rigid rules of law, yet

never cooled.¹ It is to be supposed, with regard to sudden encounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which the instinct of self-preservation has no inconsiderable share, the voice of reason is not heard; therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence.²

§ 483. Not only the *principals*, but the *seconds*, in a deliberate duel, are guilty of homicide. And with regard to other persons who are present, the question is, Did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence is not sufficient; but if they sustain the principals by their advice or presence, or if they go for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present, and assisting and encouraging at the moment when the pistol is fired, they are guilty of murder.³

Seconds
also re-
sponsible
for mur-
der.

the verdict will be lovely in the sight both of God and man." 1 Townsend's Modern St. Trials, 154, 1794.

¹ 1 Hale, 453; 1 Hawk. P. C. c. 13, s. 29; 3 Inst. 51. See State v. Underwood, 57 Mo. 40, 1874.

² Fost. 138, 296.

³ R. v. Young, 8 C. & P. 644, 1838. See R. v. Cuddy, 1 C. & K. 210, 1843.

In R. v. Young, 8 C. & P. 644, 1838, the prisoners were indicted for the murder of Charles Flower Mirfin, who was killed in a duel by a Mr. Elliott. Neither of the prisoners acted as a second on the occasion, but there was evidence to show that they and two other persons went to the ground in company with Mr. Elliott, and that they were present when the fatal shot was fired. Vaughan, B., told the jury, "When upon a previous arrangement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder; and the

seconds also are equally guilty. The question then is, Did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest?" After observing that neither prisoner had acted as a second, the learned judge continued: "If, however, either of them sustained the principal by his advice or presence; or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do anything, yet if he was present and was assisting and encouraging at the moment when the pistol was fired, he will be guilty of the offence imputed by this indictment." The prisoners were found guilty. R. v. Young, 8 C. & P. 644, 1838; Roscoe's Cr. Ev. p. 754.

As to responsibility of *surgeons* assisting at duels, see Cullen v. Com., 24 Gratt. 624, 1873.

As to venue, see § 185 of New York Penal Code of 1882.

XIII. EXCUSE AND JUSTIFICATION.¹1. *Repulsion of Felonious Assault.*

§ 484. *Vim vi repellere licet* is a cardinal doctrine of the Roman law; and by the English common law, as accepted throughout the United States, this principle has been asserted with equal emphasis. I have a right to resist the application of force to myself or to those under my immediate charge, by force proportioned to the attack.²

Force of
defence
may be
propor-
tioned to
force of
attack.

It is sometimes said, it is true, that only when the assailant threatened life can a defence involving the taking his life be sustained. But this is not true. A violent personal outrage may be repelled by any suitable means, no matter what the injury done to the assailant may be.³ But the offence threatened must be a *crime*. "Felony" has in our law been used to express the distinction; but this is not sufficiently exact, because a private person is authorized to take life to stop a riot, and a riot, though likely to involve felonies in its development, is technically but a misdemeanor.⁴ A mere assault, however, not directed at life or chastity, or other high right, cannot excuse homicide.⁵ Hence if a deadly

¹ As to burden of proof, see Whart. Crim. Ev. § 335.

² *Supra*, §§ 98-100, 140; People v. Pallister, 138 N. Y. 601, 1893; Fields v. State, 134 Ind. 46, 1892. See, as to charge, Cannon v. People, 141 Ill. 270, 1892; Coryell v. State, 130 Ind. 51, 1891; Kota v. People, 136 Ill. 655, 1891; Davis v. State, (Ga.) 20 S. E. Rep. 259, 1894; Maiden v. State, (Miss.) 11 So. Rep. 488, 1892; Martin v. State, 90 Ala. 602, 1891; Smith v. Com., (Ky.) 16 S. W. Rep. 137, 1891.

³ *Ibid.* That this right exists to repel a felony is well established. East P. C. 271; R. v. Hewlett, 1 F. & F. 91, 1858; U. S. v. Wiltberger, 3 Wash. C. C. 515, 1823; People v. Shorter, 4 Barb. 460, 1848; Stewart v. State, 1 Ohio St. 66, 1853; Dill v. State, 25 Ala. 15, 1854; Mattison v. State, 55 Ibid. 224, 1876; Smith v. State, 68 Ibid. 424, 1880; Kingen v. State, 45 Ind. 518, 1873; Pond v. Peo-

ple, 8 Mich. 150, 1860; People v. Doe, 1 Ibid. 451, 1854; State v. Burke, 30 Iowa, 331, 1870; Murphy v. People, 37 Ill. 447, 1866; State v. Savage, 78 N. C. 520, 1877; McPherson v. State, 22 Ga. 478, 1856; Green v. State, 28 Miss. 687, 1857; Staten v. State, 30 Ibid. 619, 1859; State v. Swift, 14 La. An. 827, 1859; Levells v. State, 32 Ark. 585, 1878; People v. Campbell, 30 Cal. 312, 1866; People v. Flanagan, 60 Ibid. 2, 1881; People v. Simons, Ibid. 72, 1881. See Eversole v. Com., (Ky.) 26 S. W. Rep. 816, 1894. And see cases cited *infra*, §§ 495 *et seq.*

⁴ See Pond v. People, 8 Mich. 150, 1860; Com. v. Daley, 4 Penn. L. J. 150, 1844, quoted in Whart. on Hom. App.; 4 Bl. Com. 179.

⁵ *Infra*, § 501; Com. v. Daley, 4 Pa. L. J. 150, 1844; Com. v. Drum, 58 Pa. 9, 1868; Claxton v. State, 2 Humph. 181, 1840; State v. Benham, 23 Iowa, 154, 1867; Bowman v. State,

weapon be not used by the assailant, or other circumstances do not exist to indicate a felonious attempt, for the assailed to take life is at least manslaughter.¹ "The intent," as is said by Judge Washington,² "must be to commit a felony. *If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor.*"³ If, however, such intended beating is of a character to imperil life, or to maim, or to deprive the assailed of some essential right, then the assailed is excused in taking life when necessary to repel the assault.⁴ On the other hand, the killing of an assailant whose apparent design was to beat and not commit a felony, or other violent injury, is not murder, and at the highest is manslaughter.⁵ But the right is limited to the emergency, and does not continue when the assailed retreats to a place of safety, arms himself, and renews the conflict.⁶

As we have already seen, the defence must not be disproportionate to the attack; and the assailed becomes himself responsible if he wantonly use excessive force in repelling the assault.⁷

(Tex.) 21 S. W. Rep. 48, 1893; *Garello v. State*, 31 Tex. Cr. 56, 1892; *Harris v. State*, (Tex.) 15 S. W. Rep. 172, 1890; *Fuller v. State*, 30 Tex. App. 559, 1891. State, 46 Miss. 683, 1872; *Stewart v. State*, 1 Ohio St. 66, 1853; *Kingen v. State*, 45 Ind. 518, 1873; *Burden v. People*, 26 Mich. 162, 1872.

¹ That there may be circumstances in which a deadly weapon may be used in self-defence by a party who is only struck by the hand, see *Davis v. People*, 88 Ill. 350, 1878; *Judge v. State*, 58 Ala. 405, 1877; and see *supra*, § 441; *Meredith v. State*, 122 Ind. 514, 1890; *Duncan v. People*, 134 Ill. 110, 1890; *Butler v. State*, 92 Ga. 601, 1893; *Byrd v. Com.*, 89 Va. 536, 1893; *Boatwright v. State*, 89 Ga. 140, 1892; *State v. Bodie*, 33 S. C. 117, 1890; *Shell v. State*, 88 Ala. 14, 1889; *People v. Temperle*, 94 Cal. 45, 1892.

² *U. S. v. Wiltberger*, 3 Wash. C. C. 515, 1823.

³ See, to same effect, *infra*, § 500; *Pierson v. State*, 12 Ala. 149, 1847; *Eiland v. State*, 52 Ibid. 322, 1874; *Field v. State*, Ibid. 348, 1874; *Judge v. State*, 58 Ibid. 405, 1877; *McPherson v. State*, 22 Ga. 478, 1856; *Floyd v. State*, 30 Ibid. 91, 1860; *Chase v.*

⁴ *Supra*, § 98; *infra*, § 501; *State v. Rhodes*, 1 Houst. C. C. 476; *State v. Benham*, 23 Iowa, 154, 1867; *State v. Burke*, 30 Ibid. 331, 1870; *Com. v. Drum*, 58 Pa. 9, 1868; *Kingen v. State*, 45 Ind. 518, 1873; *Young v. State*, 11 Humph. 200, 1850; *Williams v. State*, 44 Ala. 41, 1870; *Ayres v. State*, 60 Miss. 709, 1880; *State v. St. Geme*, 31 La. An. 30, 1879. As to Texas statutes, see *Gilly v. State*, 15 Tex. App. 287, 1883; *Messer v. Com.*, (Ky.) 20 S. W. Rep. 702, 1892; *State v. Bonner*, 29 Tex. App. 223, 1890; *Baltrip v. State*, 30 Tex. Cr. 545, 1891; *Ball v. State*, 29 Tex. App. 107, 1890.

⁵ *Copeland v. State*, 7 Humph. 479, 1846.

⁶ *Whart. on Hom.* § 481; *Territory v. Bannigan*, 1 Dak. 451, 1877; *People v. Westlake*, 62 Cal. 303, 1882.

⁷ *Supra*, § 102; *infra*, § 498; *Sanders v. Com.*, (Ky.) 18 S. W. Rep. 528, 1892;

§ 485. If the defendant in any way challenged the fight, and went to it armed, he cannot afterward maintain that in taking his assailant's life he acted in self-defence.¹ "A man has not," as is properly said by Breese, C. J.,² "the right to provoke a quarrel and take advantage of it, and then justify the homicide."³ Self-defence may be resorted to in order to repel force, but not to inflict vengeance.

A conflict provoked by the defendant cannot be set up by him as a defence.

Askew v. State, 94 Ala. 4, 1892; *Perry v. State*, 94 Ala. 25, 1892; *Lovett v. State*, 30 Fla. 142, 1892; see *Russell v. State*, 88 Ga. 297, 1892. An assault with fist does not justify use of deadly weapon. *Scales v. State*, 96 Ala. 69, 1892. One attacked may follow his adversary till secured from danger; *State v. Thompson*, (La.) 13 So. Rep. 392, 1893; but he has no right to hunt up his adversary. *Farris v. Com.*, (Ky.) 1 S. W. Rep. 729, 1886; *Smith v. State*, (Fla.) 6 So. Rep. 482, 1889.

If defendant has made out a case of self-defence, the burden is upon the State to show that he was at fault. *Holmes v. State*, (Ala.) 14 So. Rep. 864, 1894.

The burden of proving self-defence is on defendant. *Roden v. State*, 97 Ala. 54, 1893; *Gaines v. Com.*, 88 Va. 682, 1892; *Gibson v. State*, 89 Ala. 121, 1890; *State v. Brittain*, 89 N. C. 481, 1883; *State v. Pettit*, 119 Mo. 410, 1894; *Rains v. State*, 88 Ala. 91, 1890; *Rutledge v. State*, 88 Ala. 85, 1890; *Drake v. Com.*, (Ky.) 21 S. W. Rep. 36, 1893; *Godfrey v. Com.*, (Ky.) 21 S. W. Rep. 1047, 1893; *State v. Cable*, 117 Mo. 380, 1893; *Hite v. Com.*, (Ky.) 20 S. W. Rep. 217, 1892; *Chapman v. Com.*, (Ky.) 15 S. W. Rep. 50, 1891; *State v. Parker*, 106 Mo. 217, 1891; *Lee v. State*, 21 Tex. App. 241, 1886; *Babcock v. People*, 13 Colo. 515, 1889; *People v. Harris*, 95 Mich. 87, 1893; *People v. Wright*, 89 Mich. 70, 1891; *Kinney v. State*, 108 Ill. 519, 1884.

¹ *Supra*, § 476; *infra*, § 496; *Fost. v. Com.*, 58 Pa. 9, 1868; *Dock v. Com.*, 21 Gratt. 912, 1872; *Vaiden v. Com.*, 12 Ibid. 717, 1855; *State v. Brittain*, 89 N. C. 481, 1883; *State v. Kinney*, 108 Ill. 519, 1883; *State v. Clifford*, 58 Wis. 477, 1883; *Roach v. State*, 34 Ga. 78, 1865; *State v. Rogers*, 18 Kans. 78, 1864. See *State v. Stoffer*, 15 Ohio St. 47, 1840; *Hayden v. State*, 4 Blackf. 547, 1874; *Eiland v. State*, 52 Ala. 322, 1864; *Bain v. State*, 70 Ibid. 4, 1881; *Wills v. State*, 73 Ibid. 363, 1882; *Evans v. State*, 44 Miss. 762, 1871; *State v. Starr*, 38 Mo. 270, 1867; *State v. Linney*, 52 Ibid. 40, 1873; *State v. Hays*, 23 Ibid. 287, 1856; *White v. Maxey*, 64 Ibid. 552, 1866; *Dawson v. State*, 33 Tex. 491, 1870; *People v. Stonecifer*, 6 Cal. 407, 1856; *People v. Westlake*, 62 Ibid. 303, 1881; *People v. Tamkin*, Ibid. 468, 1881; see *Smith v. State*, 15 Tex. App. 338, 1884; *Trice v. State*, 89 Ga. 742, 1892; *State v. Edwards*, 112 N. C. 901, 1893. See *Gibson v. State*, (Ala.) 16 So. Rep. 144, 1894; *Webb v. State*, (Ala.) 14 So. Rep. 865, 1894.

² *Adams v. People*, 47 Ill. 208, 1868.
³ *Stewart v. State*, 1 Ohio St. 66, 1853; See, also, *State v. Neely*, 20 Iowa, 208, 1866; *Roach v. State*, 34 Ga. 78, 1865; *State v. Green*, 37 Mo. 466, 1866. See other cases cited *supra*, § 476; *State v. Trammell*, 40 S. C. 331, 1893; *Cotton v. State*, 91 Ala. 106, 1891; *Thompson v. State*, (Miss.) 9 So. Rep. 298, 1891; *Gibson v. State*, 89 Ala. 121, 1890; *People v. Hite*, 8 Utah, 461, 1893.

“Non ad sumendam vindictam, sed ad propulsandam injuriam.”¹

“There is certainly no law to justify the proposition that a man may be the assailant and bring on an attack, and then claim exemption from the consequence of killing his adversary on the ground of self-defence. While a man may act safely on appearances, and is not bound to wait until a blow is received,² yet he cannot be the aggressor and then shield himself on the assumption that he was defending himself.”³ And an adulterer caught in the act by the husband is guilty at least of manslaughter, if, in repelling a murderous attack by the husband, he kill the husband.⁴ But where the defendant, without an intent to take the deceased’s life, provoke the quarrel, this, while it destroys the excuse of self-defence, does not, if the deceased’s attack put the defendant’s life in danger, militate against reducing the offence to manslaughter.⁵

§ 486. But though the defendant may have thus provoked the conflict, yet if he withdraws from it in good faith, and clearly announces his desire for peace, then if he be pursued his rights of self-defence revive. Of course, there must be a *real and bonâ fide* surrender and withdrawal on his part; for if there be not, then, he will still continue to be regarded as the aggressor.⁶ But if A. really and evidently withdraws from the contest, and resorts to a place of security, and B., his antagonist, knowing that he is no

Self-defence exists when the defendant though aggressor retreats asking for peace.

¹ See *supra*, §§ 96, 97.

⁴ *Reed v. State*, 9 Tex. App. 317,

² *Selfridge’s Case*, Whart. on Hom. 1880. See *Franklin v. State*, 30 Tex. App. 1866; *Myers v. State*, 62 Ala. App. 628, 1892; *Drysdale v. State*, 83

599, 1879; *De Arman v. State*, 71 Ga. 744, 1889. *Ibid.* 351, 1881; *Sylvester v. State*, 72 *Ibid.* 201, 1881; *Putnam v. Com.*, (Ky.) 18 S. W. Rep. 527, 1892; *Palmer v. State*, (Tex.) 15 S. W. Rep. 286, 1890.

³ *Wagner, J., State v. Linney*, 52 Mo. 40, 1873; *S. P., Williams v. State*, 23 S. W. Rep. 1108, 1893; *State v. Tal-*

mage, 107 Mo. 543, 1891.

⁵ *Heisk.* 376, 1872; and see *R. v. Knock*, 14 Cox C. C. 1, 1877; *Cartwright v. State*, 14 Tex. App. 486, 1883; *Wilkins v. State*, 98 Ala. 1, 1893; *Coney v. State*, 90 Ga. 140, 1892; *State v. Scott*, 36 W. Va. 704, 1892; *Kirby v. State*, (Ala.) 8 So. Rep. 110, 1890. *Wills v. State*, (Tex.) 22 S. W. Rep. 969, 1893; *State v. Blunt*, 110 Mo. 322, 1892; *State v. Murdy*, 81 Iowa, 603, 1891.

⁶ See *Hodges v. State*, 15 Ga. 117, 1854; *State v. Hill*, 4 Dev. & Bat. 491, 1839; *State v. Howell*, 9 Ired. 485, 1849; *State v. Smith*, 10 Nev. 106, 1875; *People v. Wong Ah Teak*, 63 Cal. 486, 1883. See *supra*, §§ 95–102. *Thomas v. State*, (Ala.) 16 So. Rep. 4, 1894; *State v. Jefferson*, 43 La. An. 995, 1891; *Parker v. State*, 88 Ala. 4, 1890; *Franklin v. State*, 30 Tex.

longer in danger from A., nevertheless attacks A., then A.'s rights in self-defence revive.¹

§ 486 a. In case of personal conflict, it must appear, in order to establish excusable homicide in self-defence, that the party killing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him.² The last qualification is worthy of particular consideration. "Retreated to the wall" is sometimes given by the old text-writers as the exclusive test; but even if we accept this text exclusively, we must remember that it is to be taken in a figurative sense, as indicating a retreat to the limits of personal safety. First, the word "wall" is sometimes used interchangeably with "ditch;" showing that what is meant is that when the assailed cannot further recede without exposing himself to great peril (*e. g.*, as in crossing a ditch), then he may at that spot assume the aggressive. Secondly, "walls"

App. 628, 1892; Benningfield v. Com., Rep. 440, 1893; Thomas v. State, (Ky.) 17 S. W. Rep. 271, 1891; Roberts v. State, 30 Tex. App. 291, 1891; People v. Hite, 8 Utah, 461, 1893; Davis v. State, 31 Nebr. 240, 1891; People v. Johnson, 139 N. Y. 358, 1893.

¹ Stoffer v. State, 15 Ohio St. 47, 1864; Vaidon v. Com., 12 Gratt. 717, 1855; Hittner v. State, 19 Ind. 48, 1862; Evans v. State, 33 Ga. 4, 1863; Tidwell v. State, 70 Ala. 33, 1881; Evans v. State, 44 Miss. 762, 1871; State v. Linney, 52 Mo. 40, 1873; People v. Stonecifer, 6 Cal. 407, 1856; State v. Conally, 3 Oreg. 69, 1872; State v. Thompson, (La.) 13 So. Rep. 392, 1893; Dolan v. State, 40 Ark. 454, 1883.

² 1 Hale, 481, 483; Stoffer v. State, 15 Ohio St. 47, 1864; Judge v. State, 58 Ala. 406, 1877; Ingram v. State, 67 Ibid. 67, 1880; Bain v. State, 70 Ibid. 4, 1881; State v. Johnson, 76 Mo. 121, 1882; Parrish v. State, 14 Nebr. 60, 1883; Gilleland v. State, 44 Tex. 356, 1875; Com. v. Ware, 137 Pa. 465, 1890; State v. Roberts, 63 Vt. 139, 1890. See Ritter v. People, 130 Ill. 255, 1889; State v. McIntosh, 40 S. C. 349, 1893; Clark v. Com., (Va.) 18 S. E. App. 628, 1892; Benningfield v. Com., Rep. 440, 1893; Thomas v. State, (Ala.) 16 So. Rep. 4, 1894; Webb v. State, (Ala.) 14 So. Rep. 865, 1894; Holmes v. State, (Ala.) 14 So. Rep. 864, 1894; Wilkins v. State, 98 Ala. 1, 1893; Rockmore v. State, 91 Ga. 97, 1892. Party attacked may follow adversary till he himself is secure. State v. Thompson, (La.) 13 So. Rep. 392, 1893. See McDaniel v. State, 97 Ala. 14, 1893; Roden v. State, 97 Ala. 54, 1893; Amos v. State, 96 Ala. 120, 1892; Hash v. Com., 88 Va. 172, 1891; Underwood v. State, 88 Ga. 47, 1891; Keith v. State, 97 Ala. 82, 1892; State v. Murrell, 33 S. C. 83, 1890; State v. Jackson, 32 S. C. 27, 1889; State v. Evans, 33 W. Va. 417, 1890; Davis v. State, 92 Ala. 20, 1891; Gibson v. State, 89 Ala. 121, 1890; Stit v. State, 91 Ala. 10, 1890; State v. Mazon, 90 N. C. 676, 1884; State v. Dettmer, (Mo.) 27 S. W. Rep. 1117, 1894; Johnson v. State, 58 Ark. 57, 1893; Rutledge v. State, 88 Ala. 85, 1890; Nalley v. State, 30 Tex. App. 456, 1891; Perkins v. State, 78 Wis. 551, 1891; Parrish v. State, 14 Nebr. 60, 1883.

and "ditches" are not always accessible; and to make them prerequisites to the initiation of those offensive acts which are essential to self-defence would be to declare that there should be no self-defence where there are no "ditches" or "walls." The true view is, that a "wall" or "ditch" is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death.¹

¹ *Supra*, § 100; Fost. 273; 1 Hawk. c. 11, s. 14; R. v. Smith, 8 C. & P. 160, 1839; 4 Bl. Com. 185; Runyan v. State, 57 Ind. 80, 1873; State v. Tweedy, 5 Iowa, 433, 1857; State v. Thompson, 9 Ibid. 188, 1859; State v. Hill, 4 Dev. & Bat. 491, 1839; Oliver v. State, 17 Ala. 587, 1849; Storey v. State, 71 Ibid. 331, 1881; Dolan v. State, 41 Ark. 454, 1882; Plummer v. State, 135 Ind. 308, 1893; Fields v. State, 134 Ind. 46, 1892; State v. Kennedy, 91 N. C. 572, 1884.

That the assailed must retreat as far as the assault will permit, see Dock v. Com., 21 Gratt. 909, 1872; Evans v. State, 33 Ga. 4, 1861; McPherson v. State, 22 Ibid. 478, 1857. See remarks of Thurman, J., in Stewart v. State, 1 Ohio St. 66, 1852.

In Kentucky the right of self-defence has been pushed still further. Phillips v. Com., 2 Duv. 328, 1865; Carico v. Com., 7 Bush. 124, 1870; Bohannon v. Com., 8 Ibid. 481, 1871; Luby v. Com., 12 Ibid. 1, 1876; and see, to same effect, State v. Kennedy, 7 Nev. 374, 1872. These cases are criticised in Whart. on Hom. § 489.

Sir J. F. Stephen states the law to be that when the assailant assails with a deadly weapon, it is the duty of the assailed "to abstain from the intentional infliction of death or grievous bodily harm until he has retreated as far as he can with safety to himself." To this he appends as a note the following:

"If this were not the law, it would

follow that any ruffian who chose to assault a quiet person in the street, might impose upon him the legal duty of running away, even if he were the stronger man of the two. The passage of Hale appears to me to be applicable only to cases where deadly weapons are produced by way of bravado or intimidation — a case which, no doubt, often occurred when people habitually carried arms, and used them on very slight provocation. In such a case it might reasonably be regarded as the duty of the person assaulted to retreat rather than draw his own sword; but I cannot think that Hale meant to say that a man who in such a case closed with his assailant and took his sword from him would be acting illegally, or that if, in doing so, the assailant were thrown down and accidentally killed by the fall, the person causing his death would be guilty of felony. The minuteness of the law contained in the authorities, on which this article is founded, is a curious relic of a time when police was lax and brawls frequent, and when every gentleman wore arms, and was supposed to be familiar with the use of them." Steph. Dig. Crim. Law, (5th ed.) art. 221.

He proceeds to say in the text that "any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm." *Supra*, § 100.

Nor is retreat required from a party who at the time is standing on rights which can only be vindicated by maintenance even to the assailant's death.¹ But if, when the defendant is out of danger by retreat, he return and renew the attack, he can no longer set up self-defence;² nor is a mere illusive retreat any defence.³

§ 486 *b*. As has been already seen, a party is not precluded from setting up the plea of self-defence by the proof of prior malice on his part to his assailant. A. has no right to kill B. because B. bears old malice to A., and the fact of such malice does not in any way diminish B.'s right to defend himself against A.⁴ But if B., bearing such malice, attack A. with deadly weapons, and B. is driven to the wall by A. and then kills A., B. cannot set up self-defence.⁵

§ 487. It has been sometimes said that if A.'s life be made wretched by the reckless and desperate enmity of B., and if there be good reason to believe that B. is intending to assassinate A., A. is not obliged, forsaking his usual employments, to hide from B., but may arm himself, and on meeting B. shoot B. down without waiting to receive B.'s shot.⁶ No doubt, supposing a community to be without an authoritative police government, and supposing B. to be a ruffian actually seeking A.'s life, whom no other

¹ *Supra*, § 99; *infra*, § 502; *Pfomer v. State*, 4 Parker C. R. 558, 1860; *Dock v. Com.*, 21 Gratt. 909, 1873; *State v. Thompson*, 9 Iowa, 188, 1859; *State v. Maloy*, 44 Ibid. 104, 1876; *State v. Mazon*, 90 N. C. 676, 1884; *Aaron v. State*, 31 Ga. 167, 1860; *De Arman v. State*, 71 Ala. 351, 1882; *Sylvester v. State*, 72 Ibid. 201, 1882; *People v. Ye Park*, 62 Cal. 204, 1882. That a person in his dwelling-house need not retreat, see *infra*, § 502.

The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape although he would; in manslaughter, he would not escape if he could. Thus if A. assaults B. so fiercely that going back would endanger his life, in such case it is agreed that the party thus attacked need not retreat in order to bring his case

within the rule of necessity in self-defence; or if, in the assault B. fall to the ground, whereby he could not fly, in such case if B. kill A. it is in self-defence upon chance-medley. 1 Hawk. c. 11, s. 14; 4 Bl. Com. 185; 3 Inst. 56; *State v. Dixon*, 75 N. C. 275, 1876; *Holloway v. Com.*, 11 Bush, 344, 1875.

² *State v. Rhodes*, 1 Houst. C. C. 476, 1877; *Meurer v. State*, 129 Ind. 587, 1891; *Watkins v. State*, (Ala.) 8 So. Rep. 134, 1890.

³ *Ibid.*; *Hodges v. State*, 15 Ga. 117, 1854, and cases cited *supra*, § 486.

⁴ *Supra*, § 477; *Pickens v. State*, 61 Miss. 52, 1883; *State v. Wilson*, 43 La. An. 840, 1891.

⁵ *Ibid.* *State v. Hill*, 4 Dev. & Bat. 491, 1839.

⁶ See *Bohannon v. Com.*, 8 Bush, 481, 1871.

process can be used to check, then A. is excused in taking this violent but only possible way of saving his own life, by sacrificing that of B. But it is otherwise where there is opportunity to invoke the interposition of the law.¹ A man who believes his life is in danger, but whose rights are not as yet attacked, ought, if he have access to a tribunal clothed with the ordinary powers of a justice of the peace, to apply to such tribunal to interpose. If he have ground enough to excuse him in killing the person from whom he believes himself in danger, he has ground enough to have that person bound over to keep the peace, or committed in default of bail. And wherever this process can be applied, the endangered party is not excused in taking the law into his own hands and proceeding to attack his expected assailant.² He cannot himself seize on his antagonist in advance of the attack he fears; and if he wishes thus to anticipate the attack, he must resort to the law. Where the conflict can be avoided, the law must be relied on for redress.³ When, however, a right is actually attacked, the person possessing the right is not bound to yield in order to appeal to the law. He is entitled to repel force by force.⁴ Nor is he precluded from repelling an attack actually made by the fact that he had such prior notice of the attack that he might have called upon the public authorities to intervene. When the attack is actually made on him he is entitled to repel it, no matter for how long a time he may have anticipated it. If self-defence could only be resorted to in cases in which the attack is entirely unexpected, the right would cease to exist in the cases in which it is most important to society that it should be preserved. If I choose to become a sheep, so runs a pregnant German proverb,

¹ *State v. Martin*, 30 Wis. 216, 1872; That a person about to be assaulted *State v. Shippey*, 10 Minn. 223, 1865; with a deadly weapon can anticipate *Dyson v. State*, 26 Miss. 362, 1853; the blow, see *Fortenberry v. State*, 55 *Edwards v. State*, 47 *Ibid.* 581, 1873; Miss. 403, 1877; *State v. McDonald*, *Bailey v. Com.*, (Ky.) 25 S. W. Rep. 67 Mo. 13, 1877. *Selfridge's Case*, 883, 1894. Compare distinctions taken *supra*.

supra, § 97 a.

² *People v. Sullivan*, 3 Selden, 396,

³ *R. v. Langdon*, R. & R. 228, 1818; 1852; *State v. Downham*, 1 *Houst. C.* *State v. Rutherford*, 1 *Hawks*, 457, C. 45, 1858; *Shippey v. State*, 10 Minn. 1821; *Com. v. Drum*, 58 Pa. 9, 1868; 223, 1865. And see *Com. v. Drum*, 58 *Dock v. State*, 21 *Gratt.* 909, 1872; Pa. 9, 1868.

Stewart v. State, 1 *Ohio St.* 66, 1852; ⁴ *Supra*, § 97; *Bang v. State*, 60 *Balkum v. State*, 40 Ala. 671, 1867; Miss. 571, 1882; *King v. State*, 13 *Cotton v. State*, 31 Miss. 504, 1856; *Tex. App.* 277, 1882.

and see *supra*, §§ 399, 461; *Gardner v. State*, 90 Ga. 310, 1892.

I will be devoured by the wolf.¹ The social wolf is the production of the social sheep.

§ 487 a. Of course the rule just stated, that an attack cannot be anticipated by a private person who could have recourse to the law for this purpose, presupposes that the law gives machinery by which, if my life is threatened, I can cause the arrest of my expected assailant. Suppose, however, the law gives no such machinery? Am I to be shot down without the means of prevention, by an assassin who will fire at me on sight? Am I to wait to receive the shot, in order to comply with the technical requisite that before I can fire an attempt must be made on my life? In a state of nature, where there is no law to which I can appeal to have such a ruffian restrained, I am entitled, in order to save my life, to take the law into my own hands ; though I do this at my own risk. On this principle may be explained a remarkable case in California, where a party of persons were on an island belonging to the United States, engaged in gathering wild bird's eggs, and where another party attempted to land for the same purpose. It was held that if the first party resisted the landing by force, the second was justified in using force, and that if one of the occupants were killed in the encounter, this was excusable homicide.² But if there be any tribunal to which a party believing his life to be in danger may resort for protection, he must claim this protection ; and for him to take the law in his own hands, and to kill a supposed assailant, unless under the honest belief of an actual attack, is murder.

§ 488. It is conceded on all sides that it is enough if the danger which the defendant seeks to avert is *apparently* imminent, irremediable, and actual.³ But apparently as to whom? Here three

¹ Wer sich zum Schaaf macht, den frisst der Wolf. See, fully, *supra*, § 97. *Souey v. State*, 13 Lea, (Tenn.) 472, 1884; *State v. Evans*, (Mo.) 28 S. W. Rep. 8, 1894; *Gourho v. U. S.*, 153 U. S. 183, 1893. 1882; *People v. Westlake*, Ibid. 303, 1882; *Fields v. State*, 134 Ind. 46, 1892; *Price v. People*, (Ill.) 23 N. E. Rep. 639, 1890. As to sincere apprehension, see *Field v. Com.*, 89 Va. 690, 1893; *State v. West*, (La.) 12 So. Rep.

² *People v. Batchelder*, 27 Cal. 69, 1864. See this doctrine illustrated in the *Virginus Case*, as detailed in *Whart. on Hom.* § 490; and see, also, *supra*, § 271.

³ See *Davison v. People*, 90 Ill. 221, W. Rep. 127, 1891; *Com. v. Barnes*, 1878; *People v. Ye Park*, 62 Cal. 204, (Ky.) 16 S. W. Rep. 457, 1891; *State*

theories meet us: The first is, that the standpoint is that of the jury.¹ No, doubt, in a primary sense, this is correct. The jury must judge whether the danger was apparent, but it is absurd to say that it is necessary that the danger must have been such as to be apparent to themselves as they deliberate finally on the case. If this were true, an unloaded pistol would cease to be an apparent danger; for the jury, when they come to decide the case, know that the pistol was not loaded, and know that there was no real danger. Hence, what the jury have to decide, is not whether the danger is apparent to themselves, but whether it is apparent by some other standard. What, then, is the standard which the jury are thus to apply?

Whether the danger is apparent is to be determined from the defendant's standpoint.

The answer given by several of our courts to this question is,

v. Morey, 25 Oreg. 241, 1894; *People Com.*, 80 Ky. 32, 1882; *Williams v. Donguli*, 92 Cal. 607, 1891; *People Com.*, Ibid. 313, 1882; *Lightfoot v. Keuhn*, 93 Mich. 619, 1892; *Richards v. State*, 82 Wis. 172, 1892; *Bain* 48 Ala. 180, 1871; *Eiland v. State*, 70 Ala. 4, 1881; But it need 52 Ibid. 322, 1875; *Wills v. State*, 73 Miss. 142, 1884; *Bang v. State*, 60 55 Miss. 403, 1877; *Kendrick v. State*, Miss. 571, 1882; *Duncan v. State*, 49 Ibid. 436, 1877; *People v. Williams*, Ark. 548, 1887. 32 Cal. 280, 1867; *People v. Anderson*, 44 Ibid. 65, 1872; *State v. Bohan*, 19 Kans. 28, 1877. See *Hicks v. State*, 51 Ind. 407, 1875; *Teal v. State*, 22 Ga. 75, 1857; *Long v. State*, 52 Miss. 23, 1876; *Bang v. State*, 60 Ibid. 571, 1882; *State v. O'Connor*, 31 Mo. 389, 1861; *State v. Eaton*, 75 Ibid. 586, 1882; *State v. Johnson*, 35 La. An. 968, 1883; *Pharr v. State*, 7 Tex. App. 472, 1879; *May v. State*, 6 Ibid. 191, 1879; *Williams v. State*, 14 Ibid. 102, 1883; *Moore v. State*, 15 Ibid. 1, 1883; *Branch v. State*, Ibid. 96, 1883; *Smith v. State*, Ibid. 338, 1884; *State v. Mazon*, 90 N. C. 676, 1884; *Wilkins v. State*, 98 Ala. 1, 1898; *Keith v. State*, 97 Ala. 32, 1892; *State v. Littlejohn*, 33 S. C. 599, 1890. As to burden of proof, see *Whart. Cr. Ev.* § 335. As to question in relation to insanity, see *supra*, § 39.

¹ To the effect that "apparent" imminent danger is enough if there be a "reasonable" and honest belief in its existence, see *U. S. v. Wiltberger*, 3 Wash. C. C. 515, 1819; *People v. Austin*, 1 Parker C. R. 154, 1847; *Murray v. Com.*, 79 Pa. 311, 1875; *Pistorius v. Com.*, 84 Ibid. 158, 1879; *Abernethy v. State*, 101 Ibid. 322, 1882; *Darling v. Williams*, 35 Ohio St. 58, 1878; *Stoneman v. Com.*, 25 Gratt. 887, 1874; *State v. Abbott*, 8 W. Va. 741, 1875; *Stiles v. State*, 57 Ga. 183, 1882; *Heard v. State*, 70 Ibid. 598, 1883; *Wesley v. State*, 37 Miss. 327, 1859; *State v. Brown*, 64 Mo. 367, 1877; *Schnier v. People*, 23 Ill. 17, 1859; *Cahill v. State*, 106 Ibid. 621, 1883; *Roach v. People*, 77 Ibid. 25, 1875; *Creek v. State*, 24 Ind. 151, 1865; *West v. State*, 59 Ibid. 113, 1877; *Holloway v. Com.*, 11 Bush, 344, 1875; *Oder v.*

that if a "reasonable man" would have held that the danger was apparent, then the danger will be treated as apparent.¹ In other cases it is varied; it being said that when the danger is "reasonably apparent," then it is to be treated as apparent. We are, therefore, to infer that if a man of ordinary reason would consider an apparent though unreal danger to be imminent and real, then this is a good defence; but that to constitute a good defence it is necessary that the danger should have been such as to have been considered as imminent and real by a man of ordinary reason.²

§ 489. But who is the "reasonable man" who is thus invoked as the standard by which the "apparent danger" is to be tested? What degree of "reason" is he to be supposed to have? If he be a man of peculiar coolness and shrewdness, then he has capacities which we rarely discover among persons fluttered by an attack in which life is assailed; and we are applying, therefore, a test about as inapplicable as would be that of the jury who deliberate on events after they have been interpreted by their results. Or, if we reject the idea of a man of peculiar reasoning and perceptive powers, the

Impracticable to take an ideal "reasonable man" as standard.

¹ See *Odor v. Com.*, 80 Ky. 32, Mo. 67, 1883; *State v. Castello*, 62 1882; *People v. Morine*, 61 Cal. 367, Iowa, 404, 1883.

1882. See *Wacaser v. People*, 134 Ill. 438, 1890, as to instructions to jury to be "satisfied" that killing was done in self-defence. *State v. Roberts*, 63 Vt. 139, 1890; *State v. Joseph*, (La.) 12 So. Rep. 934, 1893; *Ballard v. State*, 31 Fla. 266, 1893; *McDaniel v. State*, 97 Ala. 14, 1893; *State v. West*, (La.) 12 So. Rep. 7, 1893; *Roden v. State*, 97 Ala. 54, 1893; *Springfield v. State*, 96 Ala. 81, 1892; *Lovett v. State*, 30 Fla. 142, 1892; *Wilson v. State*, 30 Fla. 234, 1892; *State v. Jackson*, 32 S. C. 27, 1889; *Pinder v. State*, 27 Fla. 370, 1891; *Nalley v. State*, 30 Tex. App. 456, 1891; *People v. Hyndman*, 99 Cal. 1, 1893; *Perkins v. State*, 78 Wis. 551, 1891; *State v. Row*, 81 Iowa, 138, 1890; *State v. Shreves*, 81 Iowa, 615, 1891; *People v. Lynch*, 101 Cal. 229, 1894; *Tiffany v. Com.*, 22 W. N. C. (Pa.) 261, 1888; *State v. Vansant*, 80

That aiming an unloaded gun may justify self-defence, when the defendant believes the gun to be loaded, see *People v. Anderson*, 44 Cal. 65, 1872; *Bode v. State*, 6 Tex. App. 424, 1879; and see *R. v. Weston*, 14 Cox C. C. 346; *Brown v. Com.*, (Ky.) 17 S. W. Rep. 220, 1891; *Green v. Alabama*, 69 Ala. 6, 1881.

² As illustrating this view see *State v. Bryson*, 1 Winst. Law, pt. ii. 86, 1864. See, also, *Davis v. People*, 88 Ill. 350, 1878; *Steinmeyer v. People*, 95 Ibid. 383, 1880; *Kennedy v. Com.*, 14 Bush, 340, 1878; *Draper v. State*, 4 Baxt. 246, 1874; *Parker v. State*, 55 Miss. 414, 1877; *Kendrick v. State*, Ibid. 436, 1877; *McKenna v. State*, 61 Ibid. 589, 1884; *People v. Flahave*, 58 Cal. 249, 1881. See Whart. on Hom. § 493; *Com. v. Ware*, 137 Pa. 465, 1890. See *State v. Howard*, 35 S. C. 197, 1891; see *Johnson v. State*, 58 Ark.

selection is one of pure caprice, the ideal reasonable man being an undefinable myth, leaving the particular case ungoverned by any fixed rule. And that this ideal reasonable man is an inadequate standard is shown by a conclusive test. Suppose the ideal reasonable man would at the time of the conflict have believed that a gun aimed by the deceased was loaded, whereas in point of fact the defendant knew the gun was not loaded; would the defendant be justified in shooting down an assailant approaching with a gun the defendant knows to be unloaded, simply because the ideal reasonable man would suppose the gun to be loaded? No doubt that in such case no honest belief of the ideal reasonable man would be a defence to the defendant who knew that the belief was false, and that he was not really in danger of his life. And if the belief of the ideal reasonable man be not admissible to *acquit, a fortiori*, it is inadmissible to *convict*.¹

57, 1893; *Sparks v. Com.*, (Ky.) 20 S. W. Rep. 167, 1885. In Missouri a "reasonable cause" for the belief is necessary. *State v. Parker*, 106 Mo. 217, 1891. See *State v. Reed*, (Kan.) 37 Pac. Rep. 174, 1894. In Indiana there must be reasonable belief. *McDermott v. State*, 89 Ind. 187, 1883.

¹ For a discussion of the authorities on this point see Whart. on Hom. § 495. And as to admissibility of evidence of deceased's bad character, see Whart. Cr. Ev. § 69; and see *Adams v. People*, 47 Ill. 376, 1868; *Schnier v. People*, 23 Ibid. 17, 1859; *State v. Middleham*, 62 Iowa, 150, 1883; *State v. Swift*, 14 La. An. 827, 1859; *Glad-den v. State*, 12 Fla. 562, 1868; *R. v. Forster*, 1 Lewin C. C. 187, 1825. As to admissibility of evidence of threats of deceased, see Whart. Cr. Ev. § 757.

Other cases exist in which a standard outside of the defendant is apparently set up, but in which the view actually taken is that the standard is to be the defendant's own consciousness; but, that, as is elsewhere shown,

if his error of fact is attributable to his own negligence, and if his apprehension of danger springs from this error in fact, then he is guilty of negligent homicide, that is, of manslaughter.¹ That this is correct, see *infra*, § 492.

In *Jordan v. Elliott*, Supreme Ct. Pa. 1882, 12 Weekly Notes, 56, it was held that when duress was set up by a person of weak nerves, it would be made out, although the threats were not such as a person of strong character would have yielded to. It was also held that evidence might be received to show that the person subjected to the duress had heard that the person threatening was violent and desperate. See Whart. on Cont. § 147.

The penal codes of many of the States leave the question open. The "fear," it is declared in language substantially the same, though with incidental variations, must be the "fear of a reasonable person," or must be a "reasonable fear," and the

¹ *Morris v. Platt*, 82 Conn. 75, 1864; *Shorter v. People*, 2 Comst. 193, 1849; *People v. Austin*, 1 Parker C. R. 154, 1847; *Creek v. State*, 24 Ind. 151, 1865. See *West v. Com.*, (Ky.) 23 S. W. Rep. 368, 1893, and cases cited in Whart. on Hom. § 500.

§ 490. As showing that it is the defendant's standpoint that is the test, we may appeal to a class of cases already noticed, where A.

killing must have been "under the influence of these fears," and "not in revenge." So it is presented by statute, though in language exhibiting much diversity, in New York,¹ California,² Arkansas, Illinois, Georgia, Kansas,³ Mississippi,⁴ and Minnesota.⁵ But in no statute do we find a determination of the question whether this "reasonableness" is to be tested by the defendant's lights, or those of an ideal reasonable man. Undoubtedly, courts have read the statutes so as to include the latter view.⁶ But this is not a necessary implication of the statutes, which leave it open to determine in what way the term "reasonable" is to be defined.

The leading maxim on this point is one which Mr. Broom, in his *Legal Maxims*, tells us Lord Erskine relied on as of controlling importance, and which is adopted in a well-known opinion of Baron Parke:⁷ "The rule of law founded in justice and reason is, that *Actus non facit reum, nisi mens sit rea*: the guilt of the accused must depend upon the circumstances as they appear to him." To the same effect may be cited the following expressions of Garrow, J., in a much earlier case:⁸ "Here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the de-

ceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter."

This test has been maintained, with only slight occasional and probably inadvertent departures, by the Pennsylvania courts. It was uniformly applied in all homicide cases by Judge King, a great master of criminal law.⁹

Following Judge King's lead, we find Judge Brewster, afterward presiding in the same court, declaring¹⁰ that "the attack must have been such *as in the belief of the prisoner* rendered it necessary to defend himself, even to the taking of the life of the deceased."

To the same effect may be cited an opinion of the late Chief Justice Thompson, of Pennsylvania, speaking for the whole supreme bench of that State.¹¹

In Massachusetts, if we are to judge from cases in which evidence of the deceased's ferocity and brutality was at one time rejected, the view here defended was at that time disapproved; yet we must not forget that in *Selfridge's Case*, which has always been held law in Massachusetts, evidence was received of the defendant's debility and of his expectation of being

¹ 2 R. S. 660, § 3, sub. 2, declared by Bronson, J., *Shorter v. People*, 2 Comst. 193, 1849, to be only declaratory of the common law.

² *People v. Hurley*, 8 Cal. 390, 1857; *People v. Williams*, 32 *Ibid.* 280, 1867.

³ Gen. Stat. 1868, p. 319.

⁴ *Dyson v. State*, 26 Miss. 362, 1853.

⁵ Stat. 1867, p. 598. I am indebted for these citations to Hor. & Thomp. Cas. p. 268.

⁶ See cases cited to § 488.

⁷ *R. v. Thurborn*, 1 Den. C. C. 387, 1849.

⁸ *R. v. Scully*, 1 C. & P. 319, 1824.

⁹ This view runs through the charges of this great jurist in the homicide cases growing out of the riots of 1844-5, as given in prior pages. It was accepted by him, as a matter of unquestioned law, in *Flavel's Case*, quoted in Whart. Crim. Law, (7th ed.) § 1027.

¹⁰ *Com. v. Carey*, 2 Brewster, 404, 1868.

¹¹ *Logue v. Com.*, 38 Pa. 265, 1861. See, also, *Com. v. Seibert*, quoted at large in Whart. on Hom. § 507; *State v. Wyse*, 33 S. C. 582, 1890; *Cochran v. State*, 28 Tex. App. 422, 1890; *People v. Bruggy*, 93 Cal. 476, 1892.

interferes to protect B., whom A. conceives to be unjustly and unfairly attacked by C. Now it does not matter whether A.'s impressions were right or wrong. If they were honest, and not negligently adopted, then A.'s

Analogy from cases of interference in the conflicts of others.

attacked by "some bully;" and Judge Parker expressly told the jury that these were among the chief points for them to consider in determining whether the danger to the defendant was apparent. And the present tendency of the Massachusetts Supreme Court is to return, though with the reservation that the impression must be reasonable, to the subjective tests established in Selfridge's Case. Thus, under the statutes authorizing the defendant to be examined in his own behalf, when the defendant has introduced evidence tending to show that, at the time he struck the blow, he had reasonable cause to apprehend an attack upon and serious bodily harm to himself from the man he killed, he is now allowed to testify that at that time he did in fact apprehend such an attack.¹ And by a still more recent decision the cases excluding evidence of the deceased's character for ferocity have been overruled, therein virtually adopting the subjective test.²

Judge Thurman, in a capital case in Ohio, in 1852 (*Stewart v. State*, 1 Ohio St. 66), says: "Whether a person assaulted is or is not bound to quit the combat, if he can safely do so, before taking life, it will not be denied that in order to justify the homicide he must, at least, *have reasonably* apprehended the loss of his own life, or great bodily harm, to prevent which, and under a real, or at least *supposed* necessity, the fatal blow must be given." But "reasonably" by what standard, and "supposed" by whom?

That the defendant was the person thus taken as a standard appears from a succeeding passage, in which Judge Thurman, when inquiring whether there was such a *bond fide* supposition by the defendant, says: "We find no evidence tending to prove that Stewart (the defendant), when he saw Dotey (the deceased), was in danger of loss of life or limb, or of great bodily harm, or that he apprehended such danger." It is clear, therefore, that "reasonably" is used by Judge Thurman in antithesis to "negligently." If the defendant "reasonably," i. e., in due exercise of his reason, believed himself in danger, this is a defence.

In New York, the opinion of Judge Bronson in *Shorter's Case*, as already cited, has been frequently referred to, in succeeding trials, as properly expounding the law. At the same time, in *Lamb's Case*, in 1866, the judge trying the case charged the jury as follows: "A man is not bound, if his life is in imminent peril or danger, to wait until he receives a fatal wound, or has some great bodily injury inflicted on him. *If he think his life is in imminent peril*, he has a right to act upon that thought and take life; but if he does it, it is at the risk of a jury, saying, when all the facts are developed before them, *whether he was justified in forming that opinion or not*. If you are satisfied from the evidence that the circumstances did not warrant the conclusion that he arrived at, and that he took life, it is no justification, and you have a right to convict.

¹ *Com. v. Woodward*, 102 Mass. 155, 1869. For the rule in Michigan, see *Pond v. State*, 8 Mich. 150, 1860.

² *Com. v. Barnacle*, 131 Mass. 216, 1883; *supra*, § 39.

offence is not higher than manslaughter.¹ And a similar analogy may be found in the rulings that in cheats by false pretences the standard of credulity is to be determined by the prosecutor's own capacity and experience, not by those of an ideal reasonable man.²

§ 491. Viewing the law in this respect on principle, we are compelled to hold that the question of apparent necessity can only be determined from the defendant's standpoint.³ Take the question, first, in its simpler relations. A. is assaulted by B. with what appears to be a loaded pistol in his hand. A. kills B., believing the pistol to be loaded,

On principle, the test is the defendant's honest belief.

It is not his impressions alone, but the question is, whether those impressions at the time he formed them were correct. If they were correct, it is a protection; if they were incorrect, then it affords him no immunity or protection." This is certainly very loosely put; and we can only reconcile the last statement with the first three by supposing that "correct," in the last sense, is to be understood as "correct according to the defendant's own opportunities of judging." But however this may be, we learn, on examining the opinions of the appellate judges, that the charge was, in the opinion of Davies, C. J., Smith, J., and Morgan, J., not erroneous, when taken as a whole; and that Smith, J., and Morgan, J., were of opinion that there were no facts proved to which a charge on the law of self-defence was applicable, and hence that it was not, if erroneous, calculated to prejudice the defendant. *People v. Lamb*, 2 Abb. Pr. (N. S.) 148, 1866; 2 Keyes, 360; s. c. 54 Barb. 342, 1865. See *Temple v. People*, 4 Lans. 119, 1871.

In Louisiana the belief must be the result of some overt act or hostile demonstration made by the deceased against the accused. *State v. Jackson*, 44 La. An. 160, 1892; *State v. Cosgrove*, 42 La. An. 753, 1890; *Jones v. People*, 6 Colo. 452, 1882.

As cases adopting the subjective test, see *State v. Cain*, 20 W. Va. 679,

1882; *Grainger v. State*, 5 Yerg. 459, 1830; *State v. Rippy*, 2 Head. 217, 1858; *State v. Williams*, 3 Heisk. 376, 1872; *Teal v. State*, 22 Ga. 75, 1857; *Green v. State*, 69 Ala. 6, 1881; *State v. Sloan*, 47 Mo. 604, 1871; *State v. Bryant*, 55 Ibid. 75, 1874; *Oliver v. State*, 17 Ala. 587, 1850; *Carroll v. State*, 23 Ibid. 28, 1877; *Noles v. State*, 26 Ibid. 31, 1855; *Wesley v. State*, 37 Miss. 327, 1859; aff. in *Evans v. State*, 44 Ibid. 762, 1870; *Gladden v. State*, 12 Fla. 562, 1868; *State v. Neeley*, 20 Iowa, 108, 1865; *State v. Collins*, 32 Ibid. 36, 1871; *State v. Morphy*, 33 Ibid. 270, 1871; *State v. Potter*, 13 Kans. 414, 1874; *People v. Los Angeles*, 61 Cal. 188, 1882; *Bode v. State*, 6 Tex. App. 424, 1879; *Sims v. State*, 9 Ibid. 586, 1880. And see *Stoneman v. Com.*, 25 Gratt. 887, 1874. In divergence from the text, it was held in *State v. Shoultz*, 25 Mo. 128, 1857, that evidence of defendant's peculiar nervousness was inadmissible. This, however, is overruled in *State v. Keene*, 50 Ibid. 357, 1872. As rejecting the distinction taken in the text, see *State v. McGreer*, 13 S. C. 464, 1880; *Wesley v. State*, 37 Miss. 327, 1859. See this question discussed in its relation to insanity, *supra*, § 38.

¹ Fost. 262; 1 Hawk. c. 13, § 44; and see *supra*, §§ 395 *et seq.*, 479; *infra*, 494.

² *Infra*, § 1192.

³ See *State v. Peacock*, 40 Ohio St.

when it is not. This, it is agreed, may constitute a good case of self-defence. When we come to analyze A.'s belief, however, we find that it is an ordinary conclusion of inductive reasoning ; a conclusion which is erroneous, because its minor premise is false. Putting this process in syllogistic form, it stands as follows :

Whoever assaults me with a loaded pistol endangers my life.

B. assaults me with a loaded pistol, etc.

Supposing, however, we substitute for the subject of the major premise the term "Garroter"—slightly varying the predicate, the process may be then thus stated :

A garroter taking me by the throat is likely to do me great bodily harm.

B. is a garroter taking me by the throat, etc.

Now, in the first case, it is enough if I honestly, though erroneously, believe that B.'s pistol is loaded ; and in the second case it is enough if I honestly, though erroneously, believe that B. is a garroter. In both cases the error of the conclusion is one of the apprehensive powers. I err in my apprehension ; I do not see aright ; or I have been misinformed ; or I have not heard aright. But in each case the error for which I am to be put on trial is *my* error, not somebody's else error. It is no excuse to me, if I resort to self-defence, that some "reasonable" looker-on believes the pistol to be loaded, when I know that it is unloaded. So it is no excuse to me, if I shoot down a person suddenly hustling me, that some "reasonable" looker-on believes the supposed assailant to be a garroter, when I know him not to be a garroter. So if I, according to my own lights, conclude the pistol to be loaded, or the assailant to be a garroter, then I am to be acquitted of malice, if I act upon this belief, though I cannot be acquitted of manslaughter if I arrive at this belief negligently. In other words, I cannot be convicted of murder, which involves a malicious intent, unless I have such a malicious intent ; though I may be convicted of manslaughter if I have killed another by aiming at him a dangerous

333, 1883 ; Bode v. State, 6 Tex. App. and desperately, the blame is in a large measure imputable to the assailant. The assailant acts with deliberation and with the weapons he has chosen for the purpose ; the assailant acts without deliberation and with any weapons he can pick up. See further comments in note to *supra*, § 102.

weapon without due consideration. Nor does it make any difference that my conclusion as to the imminency of the danger is not that which a cool observer of ordinary capacity would have reached. In the first place, we must remember that whoever puts me in a position of danger which so disturbs or flutters me that I act precipitately and convulsively, is liable for the consequences of such precipitate and convulsive action. In the second place, even supposing my intellect is so disordered as to be incapable of right reasoning, it is by this disordered and illogical intellect, and not by the intellects of saner and more logical observers, that I am to be judged.¹ To this effect may be cited the observations of one of the most vigorous of contemporaneous English commentators. "Partial insanity," says Sir J. F. Stephen, "may be evidence to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused. A man is tried for wounding with intent to murder. It is proved that he inflicted the wound under a delusion that he was breaking a jar. The intent to murder is disproved, and the prisoner must be acquitted; but if he would have no right to break the supposed jar, he might be convicted of an unlawful and malicious wounding."² So Berner, an authoritative German jurist,³ tells us that "whether the defendant actually transcended the limits of self-defence can never be determined without reference to his individual character. An abstract and universal standard is here impracticable. The defendant should be held guiltless (of malicious homicide) if he only defended himself to the extent to which, according to his honest convictions as affected by his particular individuality, defence under the circumstances appeared to be necessary."⁴

¹ See *supra*, §§ 37, 488 *et seq.* That the defendant may testify to his belief, see *State v. Harrington*, 12 Nev. 125, 1877; Whart. Cr. Ev. § 431.

² Criminal Law of England, London, 1863, p. 92. The better conclusion would be, that as he (the defendant) used a dangerous weapon negligently, he would be liable as for negligent wounding. *Infra*, § 492.

³ Lehrbuch d. Straf. 1871, p. 147.

⁴ As illustrations of this important principle the following cases may be here cited: To larceny a felonious in-

tent is necessary; a person who takes another's goods honestly, though erroneously, believing them to be his own, is not guilty of larceny. See *R. v. Reed*, 1 C. & M. 306, 1842; *Merry v. Green*, 7 M. & W. 623, 1841; *Com. v. Weld*, Thacher's C. C. 157, 1827. *Infra*, § 885.

A specific punishment is assigned to assaulting an officer: A., an officer, is assaulted by B., who is honestly and innocently ignorant that A. is an officer; B. is not liable for assaulting an officer, though chargeable with as-

§ 492. A man who deals with deadly weapons is bound to act considerately; and if he kill another person by his negligent use

saulting a private person. *Com. v. Logue*, 38 Pa. 265, 1861; *Yates v. People*, 32 N. Y. 509, 1865. See U. S. *v. Ortega*, 4 Wash. C. C. 531, 1825; U. S. *v. Liddle*, 2 Ibid. 205, 1808. See *supra*, §§ 87, 419; *infra*, § 649; and see, also, *Spicer v. People*, 11 Ill. App. 294, 1882.

A cruiser, under the innocent and honest belief that a merchant vessel is a pirate, captures the merchant vessel; this is not piracy in the cruiser. *The Mariana Flora*, 11 Wheat. 1, 1826. *Supra*, § 87. See *Clow v. Wright*, Brayt. 118, 1816.

So is it in cases of drunkenness. Drunkenness is itself negligence, and if a drunken man without prior malice kills another, it is manslaughter. But unless there be such prior malice, such killing is not murder, because the drunken man, supposing his mind to be stupefied by drink, is incapable of a specific intent to take life. *Keenan v. Com.*, 44 Pa. 55, 1862; *State v. Garvey*, 11 Minn. 154, 1866; *Jones v. State*, 29 Ga. 593, 1860; *Shannahan v. Com.*, 8 Bush, 463, 1871; and other cases cited *supra*, § 51.

In the same line may be noticed cases in which, under the influence of public excitement, the mind becomes so disturbed as to be incapable of a specific intent. During the Philadelphia riots of 1844 several cases of this character were brought before the courts. In such a whirlwind of terror and fanaticism as then swept over the Irish residents of Philadelphia, dividing them into two hostile camps, it was not strange that men of weak minds should lose their balance, and, while the conflict raged, with their powers of discrimination paralyzed or frenzied, should use wildly and mischievously any dangerous instruments

they might seize. Were such men to be held guilty, under the old common law rule, of murder, if it appeared that by them, or by those with whom they acted, others were killed? Neither Judge King, who tried the cases on their first presentation, nor Judge Rogers, of the Supreme Court, to which body one of the cases was subsequently removed, so thought. These clear-headed judges held that the defendant could not be convicted of murder in the first degree, unless a specific intent to kill could be proved; and that this intent could not be supposed to have been harbored by men who were so overcome by excitement as to be incapable of knowing what they were about. Hence the convictions were for murder in the second degree or manslaughter.

The mere fact that the defendant did not at the time of the killing believe such killing was necessary does not divest him of the right to set up self-defence if the killing was not intended by him, but was incidental to his excusable defence of himself when assaulted. *McDermott v. State*, 89 Ind. 189, 1883.

Whether threats uttered before a fatal collision, not communicated to the defendant, are admissible, is discussed in another volume. *Whart. Crim. Ev.* § 757. It is clear, however, that the very courts which hold the defendants, on the question of intent, to the strictest accountability, have been the most reluctant to admit evidence of the deceased having threatened the defendant, unless it could be proved that those threats were known to the defendant. But why should proof of threats when known to the defendant be received? Simply because, when known to the defendant,

But though defendant believes he is in danger of life, he is guilty of manslaughter if this belief is imputable to his negligence.

of such weapons, such killing, as is elsewhere fully shown, is manslaughter.¹

That this view underlies the English common law on this point a scrutiny of the preceding cases will demonstrate. In *Levett's* case, for instance, which is the crucial case in this branch of the law, we find a man, who, suddenly aroused from sleep, under information wholly false, killed another whom he supposes to be a burglar, acquitted on the ground that under the circumstances he acted under

they go to explain his motive when the question of self-defence comes up. They are therefore admitted; and when admitted are deemed of peculiar weight, because they tend to show that danger was imminent *to the defendant's apprehension*.

Another illustration may be drawn from the rulings with regard to the character of the deceased. As is elsewhere seen, the better opinion is that it is competent for the defendant in cases of self-defence to show that the deceased was a person of great physical strength and of brutal and lawless character. No doubt this is admissible on general grounds, for the purpose of showing the deceased's attitude. But it is eminently proper, for the purpose of proving that the defendant, according to his lights, had reason to believe that the attack on him endangered his life. See *Whart. Crim. Ev.* § 757. For a discussion of this topic in its general relations, see *supra*, § 102; *People v. Harris*, (Mich.) 54 N.W. Rep. 649, 1893; *Childers v. State*, 30 Tex. App. 160, 1891; *Wiley v. State*, (Ala.) 13 So. Rep. 424, 1893; *Perry v. State*, 94 Ala. 25, 1892; *Garner v. State*, 28 Fla. 113, 1891; *Bracken v. State*, 29 Tex. App. 362, 1891.

¹ See *supra*, § 343; *Murphy v. Com.*, (Ky.) 22 S. W. Rep. 649, 1893; *State v. Grote*, (Ark.) 19 S. W. Rep. 93, 1892; *State v. Morrison*, 104 Mo. 638,

1891; *State v. Graham*, 61 Iowa, 608, 1888. This view is approached in *Kinney v. State*, 108 Ill. 519, 1884, where it is held that the defendant's belief in danger must be "well grounded;" which is tantamount to saying that if the defendant's reasoning be defective, he cannot set up his belief as a full defence. If this defectiveness be imputable to negligence, the distinction is the same as in the text.

In *People v. Dann*, S. C. Mich. 18 Rep. 529, 1884, *Sherwood, C. J.*, giving the opinion of the court, said: "In such cases (of self-defence) courts cannot and will not undertake to pass upon the surroundings with very great nicety in determining just when, and at what particular stage of the affray, the defendant may be justified in using a deadly weapon in defending his person. Every case must be governed by its own particular circumstances, and they vary to such an extent, and depend so much upon appearances and incidents occurring at the moment of greatest danger, that he who encounters it must, to a very great extent, be left to determine for himself the means necessary to be used for his own protection, and, in reviewing the discretion used by him, no great amount of speculation and refinement as to probabilities can safely be indulged in by the court."

an innocent error of fact. But Foster¹ tells us that "possibly it" (the case in question) "might have better been ruled manslaughter at common law, *due circumspection not having been used*." Judge Bronson, in commenting on this passage,² says, "He" (Foster) "calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder." In other words, when a man kills another in an honest error of fact, murder is out of the question. The only issue is, was this error negligent or non-negligent? If negligent, the killing is manslaughter. If non-negligent, excusable homicide.

The same distinction is taken by Judge Bronson in the opinion last cited; and on this distinction rests the whole of Judge Bronson's argument—an argument which, as we have seen, has been subsequently adopted by several American courts. With peculiar clearness is this brought out by Judge Campbell, of Michigan, in his opinion in Pond's case:³ "The law," so he correctly states, "while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts, *unless their ignorance arises from fault or negligence*."⁴

§ 493. "The belief that a person designs to kill me," says Ruffin, C. J.,⁵ "will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or at least is in apparent situation so to do, and thereby induces me to think that he intends to do it immediately."⁶ "The situation spoken of, however," as is well observed by Chilton, C. J., when citing the above

Apparent attack, to be an excuse, must have actually begun and must be violent.

¹ Crown Cases, p. 299. See this case discussed *supra*, § 38. To same effect, see Guice v. State, 60 Miss. 714, 1883. 54 Barb. 342, 1865; Patterson v. Peo-ple, 46 Ibid. 625, 1866; Com. v. Drum, 58 Pa. 9, 1868; Stoneman v. Com., 25 Gratt. 887, 1874; Pond v. People, 8

² Shorter's Case, 2 Comst. 193, 1849. Mich. 150, 1860; State v. Morgan, 3

³ See *supra*, § 489; and see Darling v. Williams, 35 Ohio St. 58, 1878. Ired. 186, 1842; Stiles v. State, 57 Ga. 183, 1876; Lewis v. State, 51 Ala. 1,

⁴ See, also, other cases cited *supra*, §§ 343 *et seq.* 1874; Rogers v. State, 62 Ibid. 170, 1878; De Arman v. State, 71 Ibid.

⁵ State v. Scott, 4 Ired. 409, 1844. 351, 1882; Sylvester v. State, 72 Ibid. See Bowlin v. Com., (Ky.) 22 S. W. 201, 1882; Evans v. State, 44 Miss. Rep. 543, 1893. 762, 1870; Colton v. State, 31 Ibid.

⁶ U. S. v. Outerbridge, 5 Saw. C. C. 504, 1856; Scott v. State, 56 Ibid. 287, 620, 1868; People v. Shorter, 2 Comst. 1879; State v. Hays, 23 Mo. 287, 193, 1849; People v. McLeod, 1 Hill, 1856; Creek v. State, 24 Ind. 151, (N. Y.) 377, 1841; People v. Lamb, 1865; Farris v. Com., 14 Bush, 362,

palliation of hot blood to the same extent as has such person aided.¹

Whether the same right extends to the relationship of brother to brother may be questioned. That it does has been asserted by a learned judge of West Virginia. "What one may lawfully do in defence of himself when threatened with death or great bodily harm," so it was said, "he may do in behalf of a brother; but if the brother was in fault in provoking the assault, that brother must retreat as far as he safely can, before his brother would be justified in taking the life of his assailant in his defence of the brother. But if the brother was so drunk as not to be mentally able to know his duty to retreat, or was physically unable to retreat, a brother is not bound to stand by and see him killed or suffer great bodily harm, because he does not under such circumstances retreat."²

Where from any cause the brother interfering was charged with the duty of protecting the brother assailed, then the interference of the former may be sustained. But unless there were such duty, the reasoning which sustains a brother's interference would sustain the interference of a cousin or a friend. A line must be somewhere drawn, unless society is to be resolved into an association for mutual assistance in fights; and the only line that is intelligible, and is consistent with the general analogies of the law, is that which makes the test that of duty to assist.³ No undue burden is cast by the adoption of this distinction upon those who expose themselves in the effort to prevent a felony from being committed. Persons so intervening, as will be seen in the next section, are protected as far as is required by reason and justice. But this right is distinguishable from the right of self-defence. The right of self-defence justifies the anticipating a probable attack by counter-preparations; the right of prevention of felonies does not justify such counter-prepa-

¹ See *supra*, §§ 467, 484, 493; *infra*, 122, 1877; *People v. Lilly*, 38 Mich. §§ 501, 502, 505. *Cooper's Case*, Cro. 270, 1878. See *Branch v. State*, 15 Car. 544; *Semayne's Case*, 5 Co. 92; *Tex. App.* 96, 1883.

U. S. v. Wiltberger, 3 Wash. C. C. 515, 1819; *Com. v. Riley*, Thach. C. C. 471, 1837; *Curtis v. Hubbard*, 1 Hill, 471, 1837; *ut supra*. See *Whatley v. State*, 91 (N. Y.) 336, 1841; s. c. 4 *Ibid.* 437, 1842; *De Forest v. State*, 21 Ind. 23, 1863; *State v. Johnson*, 75 N. C. 174, 1876; *Cheek v. State*, 35 Ind. 492, 1871; *Waybright v. State*, 56 *Ibid.* 1871; *Waybright v. State*, 56 *Ibid.* 1871. ² *Johnson, J., State v. Greer*, 22 W. Va. 800, 819, 1883; see *Dyson v. State*, 26 S. W. Rep. 583, 1894; *Snell v. State*, 29 Tex. App. 236, 1890; *People v. Curtis*, 52 Mich. 616, 1884. ³ See *infra*, § 1563.

rations. To confound the two, would be to authorize every man to go armed to prevent wrongs being done by anybody else.¹

2. Prevention of Felony.

§ 495. A *bonâ fide* belief by the defendant that a violent felony is in the process of commission, which can only be arrested by the death of the supposed felon, makes the killing excusable homicide, though if such belief be negligently adopted by the defendant, then the killing is manslaughter.² Levett's case, which has been already discussed, rests on this principle.³ Levett, under the erroneous but honest belief that A. was attempting a burglary, killed A. It was adjudged excusable homicide in Levett, though if it had appeared that Levett had been negligent in arriving at this conclusion it might have been manslaughter.⁴ No doubt we frequently meet with expressions to the effect that to excuse homicide in such cases it must be shown that a felony was in fact about to be committed.⁵ But such expressions are not to be strained to mean more than that a felony is *apparently* about to be committed. In what case can more be shown? Even supposing we see a known pickpocket seizing a purse, is it not possible that in such case, even at the last moment, the thief may hesitate? Can we, as to a future event, reach to anything more than a high probability? If so, we may correctly accept, in this as well as in the analogous case of self-defence, the position that if A., honestly and without negligence on his part, believe that B. is in the process of

Bonâ fide
and non-
negligent
belief that
a violent
felony is
in progress
will excuse
homicide
in its re-
sistance.

¹ 1 East P. C. c. 5, s. 58, p. 290; (Tex.) 20 S. W. Rep. 737, 1892; Johnson's Case, 5 East, 660. Nantz v. Com., (Ky.) 20 S. W. Rep.

² As to burden of proof, see Whart. 1096, 1893.

Crim. Ev. § 335. This has been sometimes explained by the fact that all felonies are capital at common law.

But the rule still exists, though capital punishment is now abolished in all cases except those of murder and treason. The true reason is, that to prevent an atrocious wrong from being committed, bystanders are entitled to use all necessary force. See Crawford v. State, 90 Ga. 701, 1892; Bostic v. State, 94 Ala. 45, 1892; Saens v. State,

³ See *supra*, §§ 38, 405, 427, 467.

⁴ *Supra*, § 492.

⁵ East P. C. p. 300; Adams v. Moore, 2 Selw. N. P. 934; Burns v. Erben, 40 N. Y. 463, 1869; Hawley v. Butler, 54 Barb. 490, 1868; Brooks v. Com., 61 Pa. 352, 1869; Mitchell v. State, 22 Ga. 211, 1857; State v. Morgan, 3 Ired. 186, 1842; State v. Roane, 2 Dev. 58, 1828; Staten v. State, 30 Miss. 619, 1856.

committing a violent felony which can only be arrested by B.'s death, A. is excused in killing B.¹

§ 496. We must repeat, however, that this principle cannot be extended so as to justify anticipating the attack in cases where there is an opportunity to secure the prevention of the offence in due course of law.² It is on this ground that we must refuse assent to a Georgia case, in which it was ruled excusable in A. to shoot in the morning B., who on the previous night had attempted to have carnal intercourse with A.'s wife.³ No doubt had B.'s conduct in the morning amounted to a renewal of the attempt, showing that force was intended, then A. would have been excused. But as the evidence showed that B.'s offence in the morning consisted simply in taking his seat at the same breakfast table, at a public house, with the wife, there was no such evidence of the imminency of the danger as justified A. in having recourse to arms.⁴ It is otherwise, however, when A. discovers B. entering the bed-chamber of A.'s wife with the apparent intention of ravishing the latter.⁵ And it is also otherwise when the appeal to the law would be ineffective.⁶ Of course, hot blood could continue to exist, even after a day's delay, but this, which would sustain a conviction of manslaughter, is very different from a defence of excusable homicide, ending in an acquittal. And the question of duration of hot blood

¹ See *Ruloff v. People*, 45 N. Y. 213, (furem), maluit occidere, magis est, 1871; *People v. Payne*, 8 Cal. 341, ut iniuria fecisse videatur, ergo et 1857; *Payne v. Com.*, 1 Metc. (Ky.) Cornelia tenebitur. C. 18. de homicid. (5. 12.) quamvis vim vi repellere omnes leges et omnia iuria permittant: quia tamen id debet fieri cum moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad iniuriam propulsandum, non videtur idem sacerdos a pœna homicidii penitus excusari

² *Supra*, §§ 97 a, 487. Texas has special statutory provisions. *Whitten v. State*, 29 Tex. App. 504, 1891. 31 Tex. 132, 1868.

³ *Staten v. State*, 30 Miss. 619, 1856; and see *State v. Craton*, 6 Ired. 164, 1845. *Infra*, § 499. See *Futch v. State*, 90 Ga. 472, 1892.

⁴ *Biggs v. State*, 29 Ga. 723, 1860. The Roman law is clear on this point: L. 5. pr. D. ad L. Aquil. (9. 2.)

⁵ *Supra*, §§ 97 a, 487 a.

sin autem, quum posset apprehendere

is to be determined by the temperament of the party aggrieved. The sense of outrage may unseat reason for weeks ; and, as long as such a condition lasts, the cool deliberation necessary to constitute murder in the first degree cannot be assumed.¹

§ 497. If the felonious attempt be abandoned and the offender escape, the killing of the offender without warrant, on a pursuit organized after such escape, is murder. In such case the supposed offender is guilty only of an attempt at felony—an attempt qualified and reduced by the fact of abandonment more or less voluntary.² The right of pursuit, heretofore touched upon, does not, therefore, apply to such case ; and even if it did, it will not avail to defend a pursuer who has the opportunity of recourse to the law.³ “ A well-grounded belief,” says Henderson J., in a North Carolina case,⁴ “ that a known felony was about to be committed, will extenuate a homicide committed in prevention of the supposed crime—and this upon a principle of necessity ;⁵ but when that necessity ceases and the supposed felon flies, and thereby abandons his supposed design, a killing in pursuit, however well grounded the belief may be that he had intended to commit a felony, will not extenuate the offence of the prisoner.” So in a subsequent case,⁶ it was justly said by the same learned judge, that “ the law authorizes the killing of one who is in the act of committing a forcible felony, and even one who *appears* to be in the act of doing so, for the purpose of *prevention*, not by way of punishment.” This is of course consistent with the position that a person detected in an attempt to commit a felony may be arrested at once, for the purpose of being carried before a magistrate ; and if arrested in the night-time may be lawfully detained without a warrant until access to a magistrate may be had.⁷

But this does not excuse pursuit and killing when danger is over.

But after a larceny is completed, it is manslaughter for a third person, acting without warrant, to kill the felon in order to prevent his escape.⁸

§ 498. Nor is killing excusable if the crime resisted could be ap-

¹ *Supra*, § 480.

² See *supra*, § 484.

³ See *supra*, §§ 410, 432, 434.

⁴ *State v. Rutherford*, 1 Hawks, 457, 1821.

⁵ See to this point *Ruloff v. People*, 45 N. Y. 213, 1871. See *Com. v. Tex. App.* 403, 1879.

Pipes, 158 Pa. 25, 1893. See *supra*, § 102.

⁶ *State v. Roane*, 2 Dev. 58, 1828.

⁷ *R. v. Hunt*, 1 Mood. C. C. 93, 1825. See *supra*, §§ 461, 487.

⁸ *Supra*, § 410 ; *Lacy v. State*, 7

parently prevented by less violent action.¹ Thus, if a party attempting a felony be not armed (either actually or apparently) with a deadly weapon, or does not possess (either actually or apparently) such superior strength and determination as to enable him to effect his purpose unless he be killed, then killing him by a deadly weapon is not excusable.²

Nor an unnecessary killing.

§ 499. It has already been seen that a person when assailed is excused if, under the honest and non-negligent belief that an assailant is about to kill him or inflict on him some grievous bodily hurt, he kill such assailant as the only way of preventing the immediate commission of the offence. It has been seen, also, that this same excuse applies to the prevention of any other forcible and atrocious attack on the rights of the assailed.³ It certainly applies to attempts to commit a violent felony on a third person;⁴ and although generally the right is limited to the prevention of such felonies, yet as riots are often productive of the most serious crimes, and as it is the duty of a private citizen to interfere for the suppression of riots, so if a riot can only be apparently suppressed by the taking of life, taking of life, even by a private citizen, will under such circumstances be excusable.⁵ It would seem, however, that the right does not authorize the killing of persons attempting secret felonies, not accompanied with force.⁶

Violent and flagrant offences may be thus resisted.

¹ That this does not justify vindictive excessive counter-blows, see *R. v. Blow*, 14 Cox C. C. 1, 1877. *Supra*, § 484.

² *R. v. Scully*, 1 C. & P. 319, 1824; *R. v. Longden*, R. & R. 228, 1818; *McDaniel v. State*, 8 Sm. & M. 401, 1847; *State v. Roane*, 2 Dev. 58, 1828; *State v. Rutherford*, 1 Hawks, 457, 1821. See *R. v. Bull*, 9 C. & P. 22, 1839; and see *supra*, §§ 102, 493.

³ See *supra*, § 495; *Minton v. Com.*, 79 Ky. 461, 1881; *King v. State*, 13 Tex. App. 277, 1882.

⁴ *Supra*, § 495; *Dill v. State*, 25 Ala. 15, 1853. Thus the entrance by A. into the bed-room of B.'s wife with the apparent intention of ravishing the latter, is an attempt at felony excusing B. in killing A. *Staten v. State*, 30 Miss. 619, 1856. See *supra*,

§§ 460, 494. In respect to rape, the Roman law is clear to this point. "D. Hadrianus rescripsit, eum, qui strupram sibi vel suis per vim inferentem occidit, dimittendum." L. I. § 4, ad leg. Corn. de sic. D. 48. 4. But there must be an actual assault. The belief that the deceased was attempting to seduce by administering drugs is no justification. *People v. Cook*, 39 Mich. 236, 1878.

⁵ *Res. v. Montgomery*, 1 Yeates, 419, 1795. *Supra*, §§ 407, 428; *infra*, § 1555; Whart. Cr. Pl. & Pr. § 16; *Phillips v. Trull*, 11 Johns. 486, 1814; *Pond v. People*, 8 Mich. 150, 1860.

⁶ *State v. Vance*, 17 Iowa, 144; *Priester v. Augley*, 5 Rich. Law 44, 1851; and see *Pond v. People*, 8 Mich. 150, 1860.

§ 500. We have already seen¹ how far trespass is a palliation. We may here repeat that it is murder for A. to deliberately kill B. for merely trespassing on A.'s property, A. at the time knowing that only a mere trespass was intended.² The same rule applies, *mutatis mutandis*, to the vindication of the right to personal property.³ If the killing of the trespasser in either case take place in the passion and heat of blood, the killing is manslaughter, but unless it be in resisting robbery, it is not justifiable.⁴ The reason is, that in the given cases of trespasses, the killing was unnecessary, the party killing knowing that only a trespass, or at the most a trivial larceny, was intended.⁵

Trespass
no excuse
for killing
trespasser.

§ 501. On the other hand, when the defendant was not himself the aggressor, but was defending his own property from an assailant, he has a right to use as much force as is necessary to prevent its forcible illegal removal, or his exclusion from its use.⁶ It is true that when the wrong

Owner
may resist
to death
violent re-
moval of

¹ *Supra*, § 462. That killing a person dressed up as a ghost is murder when the intrusion was a mere trespass, see *R. v. Smith*, 1 Russ. on Cr. 546.

² *Com. v. Drew*, 4 Mass. 391, 1808; *People v. Cole*, 4 Parker C. R. 35, 1857; *Davison v. People*, 90 Ill. 221, 1878; *People v. Horton*, 4 Mich. 67, 1856; *State v. Vance*, 17 Iowa, 138, 1864; *State v. Kennedy*, 20 Ibid. 569, 1866; *State v. Shippey*, 10 Minn. 223, 1865; *State v. Lambeth*, 23 Miss. 322, 1852; *State v. Morgan*, 3 Ired. 186, 1842; *State v. McDonald*, 4 Jones, (N. C.) 19, 1856; *State v. Brandon*, 8 Jones, (N. C.) 463, 1862; *Oliver v. State*, 17 Ala. 588, 1850; *Carroll v. State*, 23 Ibid. 28, 1877; *Noles v. State*, 26 Ibid. 31, 1855; *Harrison v. State*, 24 Ibid. 67, 1853; *Keener v. State*, 18 Ga. 194, 1855; *Monroe v. State*, 5 Ibid. 85, 1848; *People v. Stone*, 82 Cal. 36, 1889.

³ *R. v. Archer*, 1 F. & F. 351, 1858. See *Callicoatte v. State*, (Tex.) 22 S. W. Rep. 1041, 1893; *State v. Levigne*, 17 Nev. 435, 1883.

⁴ *Supra*, § 462; and see *Claxton v. State*, 2 Humph. 181, 1840.

⁵ *Com. v. Drew*, 4 Mass. 391, 1808; *State v. Zellers*, 2 Halst. 220, 1824; *Davison v. People*, 90 Ill. 221, 1878.

⁶ See *Com. v. Kennard*, 8 Pick. 133, 1829; *Com. v. Power*, 7 Metc. (Mass.) 596, 1844; *Johnson v. Patterson*, 14 Conn. 1, 1840; *People v. Hubbard*, 24 Wend. 369, 1840; *Curtis v. Hubbard*, 1 Hill, 336, 1841; s. c. 4 Ibid. 487, 1842; *State v. Hill*, 69 Mo. 451, 1879; *People v. Payne*, 8 Cal. 341, 1857. It is true that we have cases intimating that only a dwelling-house can be defended by taking the assailant's life. *State v. Zellers*, 2 Halst. 220, 1824; *Kunkle v. State*, 32 Ind. 220, 1869; *Carroll v. State*, 23 Ala. 28, 1877; *Roberts v. State*, 14 Mo. 138, 1851; *Kendall v. State*, 8 Tex. App. 569, 1880. But this is true only so far as concerns the old common law right of making houses "castles" or fortifications. A dwelling-house has prerogatives of this class belonging to no other property. But this must not be so construed as to abridge the right to defend all other valuable rights to the utmost. See *supra*, § 100; *Morgan v. Durfee*, 69 Mo. 469, 1879.

A bank messenger, for instance,

property,
or attack
upon his
rights;
but not
attack on
honor.

attack.²
honor.³

is slight, or can be otherwise prevented or redressed, a cool and deliberate killing of a trespasser is murder.¹ But the question is mainly, is an essential right of the party forcibly assailed? If so, he is entitled, in absence of adequate legal remedy, to use such force as is necessary to repel the attack.² But he is not entitled to use such force for the defence of

3. *Protection of Dwelling-house.*

§ 502. When a person is attacked in his own house he need retreat no further. Here he stands at bay, and may turn on and kill his assailant if this be apparently necessary to save his own life; nor is he bound to escape from his house, in order to avoid his assailant. In this sense, and in this sense alone, are we to understand the maxim that "Every man's house is his castle." An assailed person, so we may paraphrase the maxim, is not bound to retreat out of his house, to avoid violence, even though a retreat may be safely made.⁴ But he is not entitled, either in the one case or the other, to kill his assailant unless he honestly and non-negligently believes that he is in

having a package of bonds in his custody, has a right to take life to repel a robber, no matter where the attack on him is made. See *supra*, §§ 484 *et seq.*

In *People v. Dann*, Sup. Ct. Mich. 18 Rep. 529, 1884, the attempt was to seize wheat in the defendant's custody. The defendant, said the court, "had a right to defend this property, . . . and use so much force as was necessary for the purpose." *Porez v. State*, 29 Tex. App. 618, 1891.

¹ *U. S. v. Williams*, 2 Cranch C. C. 438, 1823; *Com. v. Drew*, 4 Mass. 391, 1808; *State v. McDonald*, 4 Jones, (N. C.) 19, 1856; *State v. Morgan*, 3 Ired. 186, 1842; *Priester v. Augley*, 5 Rich. Law, 44, 1851; *State v. Vance*, 17 Iowa, 138, 1864.

² See *Pond v. People*, 8 Mich. 150, 1860; *Roach v. People*, 77 Ill. 25, 1875. *Supra*, §§ 98-100, 484.

³ *Supra*, § 101.

⁴ *Supra*, § 98; 1 Hale P. C. 486; 3

Greenl. Ev. § 117; *State v. Patterson*, 45 Vt. 308, 1873; *Com. v. Drew*, 4 Mass. 391, 1808; *State v. Zellers*, 2 Halst. 220, 1824; *State v. Horskin*, 1 Houst. C. C. 116, 1862; *State v. Dugan*, Ibid. 563, 1879; *Pond v. People*, 8 Mich. 150, 1860; *State v. Taylor*, 82 N. C. 554, 1880; *State v. Martin*, 30 Wis. 216, 1872; *Carroll v. State*, 23 Ala. 28, 1877; *Haynes v. State*, 17 Ga. 465, 1855; *Harris v. State*, 96 Ala. 24, 1892; *Wilson v. State*, 30 Fla. 234, 1892. An "open place before a stable" is not a place entitled to the privileges given to a man's house. *Perry v. State*, 94 Ala. 25, 1892. But in regard to "place of business," see *Askew v. State*, 94 Ala. 4, 1892. Right does not extend "outside the curtilage." *Lea v. State*, 92 Ala. 15, 1891; *Martin v. State*, 90 Ala. 602, 1891; *Hall v. Com.*, (Ky.) 22 S. W. Rep. 333, 1893; *Baker v. Com.*, (Ky.) 19 S. W. Rep. 975, 1892.

danger of his life from the assault.¹ If he acts under heat of passion, there being no sufficient cause, the offence is manslaughter.²

§ 503. An attack on a house or its inmates may be resisted by taking life. This may be when burglars threaten an entrance,³ or when there is apparent ground to believe that a felonious assault is to be made on any of the inmates of the house, or when an attempt is made violently to enter the house in defiance of the owner's rights. (1) There can be no question that a person who, according to his lights, *bonâ fide* believes that a burglar is breaking into the house, can take the life of such burglar, if this be apparently the only way of preventing the offence; and the *bonâ fide* belief is a defence, if not negligently adopted, even though an innocent person be killed. (2) The same rule applies to a proposed felonious attack on any of the inmates of the house.⁴ And where only so much force is used as is requisite to repel the attack on the residence of the assailed, he is not responsible if, from any undesigned circumstances, the attack prove fatal.⁵ (3) Aside from these two grounds, which may be also regarded as included in the right of prevention of felonies, the occupant of a house has a right to resist, even to the death, the entrance of persons attempting to force themselves into it against his will, when no action less than killing is sufficient to defend the house from entrance; and even the killing of an officer of the law, known to be such, endeavoring thus to intrude, is not murder, but manslaughter.⁶ A man's house, however humble, is his castle; and his castle he is entitled to protect against invasion. The rule is to be traced to old times when the peace of the body politic, as well as of individuals, depended upon the maintenance of the inviolability of houses as castles. And the rule continues to exist when there is an equal reason for the maintenance of the inviolability of houses as homes.⁷

¹ State v. Middleham, 62 Iowa, 150, 1883; Com. v. McLaughlin, 163 Pa. 651, 1894; State v. Scheele, 57 Conn. 307, 1889; State v. McIntosh, (S. C.) 18 S. E. Rep. 1033, 1894; King v. State, 55 Ark. 604, 1892; Brown v. State, 55 Ark. 593, 1892.

² State v. Murphy, 61 Me. 56, 1870; State v. Scheele, 57 Conn. 307, 1889; Main v. Com., (Ky.) 17 S. W. Rep. 206, 1891.

³ See *supra*, § 495.

⁴ People v. Lilly, 38 Mich. 270, 1878; Brownell v. People, Ibid. 732, 1878. See *supra*, §§ 489 et seq.

⁵ Morgan v. Durfee, 69 Mo. 459, 1879.

⁶ 1 Hale P. C. 458.

⁷ See §§ 502, 504, and cases there cited; R. v. Sullivan, C. & M. 209, 1841; Corey v. People, 45 Barb. 262, 1865; State v. Zellers, 2 Halst. 220, 1824; State v. Taylor, 82 N. C. 554, 1880; Haynes v. State, 17 Ga. 465, 1855. As to officers, see *supra*, § 439.

§ 504. But this right is only one of *prevention*. It cannot be extended so as to excuse the killing of persons not actually breaking into or violently threatening a house.¹ Nor is killing justifiable for the prevention of a trespass or non-felonious entrance where there is no attempt to force a way in against the owner's prohibition.² In such cases the offence is manslaughter.³

But this
does not
excuse
killing of
mere tres-
passers.

¹ Patten v. People, 18 Mich. 314, 1869; see R. v. Meade, 1 Lew. 184, 1823; Floyd v. State, 29 Tex. App. 349, 1891. as in the other. See Whart. on Hom. § 545; and see *supra*, § 98.

² Ibid.; R. v. Bull, 9 C. & P. 22, 1839; Patten v. People, 18 Mich. 314, 1869; People v. Walsh, 43 Cal. 447, 1872; Carroll v. State, 23 Ala. 28, 1877. See comments in Whart. on Hom. §§ 543-4. Still more indulgently, so far as concerns the right of a person apparently defending his own house, was the law interpreted by the Supreme Court of New York in 1838. The evidence was that the deceased and two companions sought to gain admittance into a house of ill-fame by violence, and against the will of the keeper thereof, who ran out and struck the deceased with a door bar, from which death ensued; and this being proved, it was held by Nelson, C. J., and Cowen, J. (Bronson, J., dissenting), that testimony that threats had been made a week before by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury under the instruction of the court; although it was intimated that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted. People v. Rector, 19 Wend. 569, 1834. Meade's Case was cited

In Patten v. People, 18 Mich. 314, 1869, a riotous approach was made toward the defendant's house, where his mother was living in bad health. It was ruled that if, from the defendant's knowledge of his mother's peculiar physical condition, he had reason to believe that her life was endangered by the riotous proceedings, and if the rioters were informed of her condition, or if all reasonable or practicable efforts had been made to notify them of the fact, it was sufficient to excuse his conduct toward them to the same extent as though the danger to her life had resulted from an actual attack upon her person, or as though he was in the like danger from an attack upon himself; and he was justified in using the same means of protection in the one case

as in the other. See Whart. on Hom. § 545; and see *supra*, § 98. Still more indulgently, so far as concerns the right of a person apparently defending his own house, was the law interpreted by the Supreme Court of New York in 1838. The evidence was that the deceased and two companions sought to gain admittance into a house of ill-fame by violence, and against the will of the keeper thereof, who ran out and struck the deceased with a door bar, from which death ensued; and this being proved, it was held by Nelson, C. J., and Cowen, J. (Bronson, J., dissenting), that testimony that threats had been made a week before by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury under the instruction of the court; although it was intimated that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted. People v. Rector, 19 Wend. 569, 1834. Meade's Case was cited

³ State v. List, 1 Houst. C. C. 133, 1863.

That resistance to an officer forcing an entrance to serve civil process is not indictable, see State v. Hooker, 17 Vt. 658, 1845. *Supra*, §§ 416 *et seq.*

In Lee v. Gansel, Cowp. 1, Lord

Mansfield said that "the privilege of a *mansion* house . . . is annexed to the house and door *for the protection of a man and his family*." See Brown v. State, 31 Fla. 207, 1893; State v. Smith, (Minn.) 57 N. W. Rep. 325, 1894.

§ 505. When there is resistance to a felonious attempt (*e. g.*, burglary or arson, or felonious assault on the person), the question of the ownership of the building does not arise. If such a felony be apparently attempted, and if it can-^{Friends may unite in defence.} not be apparently prevented except by taking the life of the assailant, then any person interested is justified in taking such life.¹ Hence, not only the owner of the house, but his friends, neighbors, and *a fortiori* his servants and guests, may arm themselves for this purpose.²

We must remember that there are three distinct relations in which the question now immediately before us comes up. The first is that of defence of property, which has been already noticed. The second is that of self-defence; and it would seem to be clear that not only is an attacked person excused from further retreat when he is in his own house,³ but that he has the same excuse when he is pursued into any building out of which he cannot escape without exposing himself to serious bodily harm when escaping. The difference between the two cases is this: that when in his own house he is not bound to escape, even though he could do so conveniently; but that if in the house of another it is his duty, if he can conveniently and safely

by Cowen, J., who said: "There" (in Meade's Case) "the death was occasioned by firing a loaded pistol. The case at bar presents the same circumstance of alarm one step more remote, the assailant not being identified with the previous rioters. That, *per se*, however, would not so absolutely remove apprehension that the killing could not be referred to it. The jury might have laid no stress upon the circumstance; but I think it should have been received, because we cannot say they would not. The lightness of a relevant circumstance is no argument for withholding it from the jury."

In Vermont, in 1873, the doctrine of Meade's Case was affirmed, it being expressly declared that the use of deadly weapons is permissible to avert an impending apparent felonious assault on the defendant or his household. *State v. Patterson*, 45 Vt. 308,

1873; 1 Green C. R. 490. See *supra*, § 98.

But in California, in *People v. Walsh*, 43 Cal. 447, 1872, it was rightly held that the mere act of attempting from outside to open a window would not justify a person inside in shooting without giving warning.

See *Steele v. State*, 33 Fla. 348, 1894.

¹ *Supra*, § 494.

² *Cooper's Case*, Cro. Car. 544; *Seymour's Case*, 5 Co. 92; *R. v. Tooley*, 11 Mod. 242, 1710; *Com. v. Drew*, 4 Mass. 391, 1808; *Curtis v. Hubbard*, 4 Hill, (N. Y.) 437, 1842; *Temple v. People*, 4 Lans. 119, 1871; *McPherson v. State*, 22 Ga. 478, 1857; *Pond v. People*, 8 Mich. 150, 1860; *De Forrest v. State*, 21 Ind. 23, 1863; *People v. Walsh*, 43 Cal. 447, 1872; *Maury v. State*, 68 Miss. 605, 1891.

³ See *supra*, § 502.

escape, to do so, and he is not excused, if he can make such escape, in taking his assailant's life. But wherever his property is situate, he is entitled to use violent means to repel from it a violent attack.¹ The third relation is that of the defence of the dwelling-house, or mansion, as such, and to which, as we have seen, peculiar sanctity is assigned by the law.²

§ 506. But when an intruder is in the house, the owner cannot kill him simply for refusing to leave. A man has a right to order another to leave his house, but has no right even when such order is given to put him out by force till gentler means fail; and if the owner attempt to use violence in the outset and is slain, it will not be murder in the slayer if there be no previous malice.³ So it will be at least manslaughter, if the owner of the house kill a visitor who has come in peaceably, though forbidden, and who refuses to leave when ordered out, and whose expulsion is not necessary for the prevention of

Right does
not excuse
killing in-
truder
when in
house.

¹ Com. v. Daley, 4 Penn. L. J. 150; s. c. 2 Clark, 361, 1844.

In an English case, where the prisoner was a lodger at a house to which there was a backway, of which the prisoner was ignorant, it being the first night he had lodged at the house, and some persons split open the door of the house in order to get the prisoner out and ill-treat him; Bayley, J., is reported to have said: "If the prisoner had known of the backway, it would have been his duty to have gone out backward, in order to avoid the conflict." R. v. Dakin, 1 Lew. 166, 1828. But the true view is, that the protection of the house extends to each and every individual dwelling in it; and it has been held that a lodger might justify killing a person endeavoring to break into the house where he lodged, with intent to commit a felony in it. R. v. Cooper, Cro. Car. 544. See 1 East P. C. c. 5, s. 57, p. 289; Fost. 274; and Ford's Case, Kel. (3d ed.) 82.

As parts of the dwelling-house are to be considered such out-houses as are kept for the use of the family. Thus in a Michigan case, elsewhere

fully cited, it was ruled that a building thirty-six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence. A fence, it was properly said, is not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings. Pond v. People, 8 Mich. 150, 1860. See §§ 495, 499.

² *Supra*, § 503; *infra*, § 624. See as to right of inn-keepers and of railroad officers, *infra*, §§ 622-627. As to the right of officers to enter inns, see *supra*, § 439.

³ Gregory v. Hill, 8 T. R. 299; R. v. Roxborough, 12 Cox C. C. 8; Greschia v. People, 53 Ill. 295, 1870; McCoy v. State, 3 Eng. (Ark.) 451, 1848; State v. Sloan, 47 Mo. 604, 1871. See *supra*, §§ 465-6. *Infra*, §§ 624 *et seq.*; Brinkley v. State, 89 Ala. 34, 1889; Tiffany v. Com., 22 W. N. C. (Pa.) 261, 1888.

felony.¹ But if an intruder refuse to leave, when a request to leave is either given or is implied from resistance to his entrance, he may be ejected by the employment of as much force as is requisite for the purpose,² though the use of excessive force makes the party using it responsible in case of death for manslaughter.³

§ 507. The use of spring-guns has been already incidentally noticed.⁴ We may here repeat the general principle, that

man is not justified in using instruments of destruction (*e. g.*, spring-guns) for the defence of his property in any case in which he would not be justified in taking life if his house was actually assailed by a person with felonious intent. Such guns may be used in a house to protect valuables there stored;⁵ but when they are negligently planted in a place where they may be reasonably expected to injure ordinary trespassers accustomed and likely to frequent such place, the killing of such a trespasser is manslaughter.⁶

Killing by spring-guns, when necessary to exclude burglars, is excusable; when such guns are set *bond fide*, but negligently, it is man-

¹ *R. v. Sullivan*, C. & M. 209, 1841; *State v. Smith*, 3 Dev. & Bat. 117, 1838; *McCoy v. State*, 3 Eng. (Ark.) 451, 1848. See *supra*, §§ 465-6; 2 Addis. on Torts, 793; *Meade's Case*, 1 Lew. 187, 1836; *Howell v. Jackson*, 6 C. & P. 723. As to the right of expulsion, see *infra*, §§ 624 *et seq.*

² *Pennsylvania v. Robertson*, Addis. 246, 1794; *State v. Dugan*, 1 Houst. C. C. 563, 1879; *Reins v. People*, 30 Ill. 256, 1863. See *Greschia v. People*, 53 Ibid. 295, 1870; *Lyon v. State*, 22 Ga. 399, 1857; *McCoy v. State*, 3 Eng. (Ark.) 451, 1848; *Hinton v. State*, 24 Tex. 454, 1859.

³ See *infra*, § 624; *supra*, §§ 465-6; *infra*, §§ 621 *et seq.*; *Wild's Case*, 2 Lew. 214, 1837; *State v. Murphy*, 61 Me. 56, 1870; *State v. Lazarus*, 1 Mill, 34, 1817. See *State v. Harman*, 78 N. C. 515, 1878, where it was held that a malicious and wanton homicide of a visitor who though forbidden had entered peaceably was murder. *Supra*, § 459.

⁴ See *supra*, § 464.

⁵ *State v. Moore*, 31 Conn. 479, 1863; *Gray v. Combes*, 7 J. J. Marsh. 478, 1832.

⁶ *Bird v. Holbrook*, 4 Bing. 628; *U. S. v. Gilliam*, 11 Wash. Law Rep. 119; Cent. Law J., 182, 1883; *Johnson v. Patterson*, 14 Conn. 1, 1840; *State v. Moore*, 31 Ibid. 479, 1863. See Whart. on Neg. § 347; *Townsend v. Wathen*, 1 East, 277. And see a striking article by Sydney Smith, in the *Edinburgh Review*, 1821, reprinted in his essays, Am. ed. p. 227.

In England it was originally held that the plaintiff, if he had notice of the spring-guns, could not recover for injury received by him. *Plott v. Wilkes*, 3 B. & A. 304; *Deane v. Clayton*, 7 Taunt. 489, 1817. Statutes followed making culpable injury by spring guns or man-traps a criminal offence. See, as to construction of statutes, *Wootton v. Dawkins*, 2 C. B. (N. S.) 412, 1857.

In *Jordin v. Crump*, 8 M. & W. 782, 1841, the rule is laid down that a person, passing with his dog through a wood, in which he knew dog-spears are set, has no right of action against the owner of the wood for the death or injury to his dog, who, by reason of his own natural instinct, and

slaughter; And where the intent is to kill any person entering, and
when ma- no due notice is given, the offence is murder.¹ The fact
liciously, murder. that the party setting the gun was absent at the explosion
is no defence.²

4. *Execution of the Laws.*

§ 508. The execution of malefactors, by the person whose office
obliges him, in the performance of public justice, to put
Killing those to death who have forfeited their lives by the laws
under and verdict of their country, is an act of necessity, where
mandate the law requires it.³ But the act must be under the im-
of law justifi- mediate precept of the law, or else it is not justifiable;
ble. and, therefore, wantonly to kill the greatest of malefactors without
specific warrant would be murder. And a subaltern can only justify
killing another on the ground of orders from his superior in cases
where the orders were lawful.⁴ As we have seen, a warrant that is
without authority is no defence; though it is otherwise when the
defects are merely formal.⁵

5. *Superior Duty.*

§ 509. It has already been observed that there are cases in
which a surgeon, when called upon to determine whether
And so a critical operation is to be performed, may undertake
may kill- such operation, though the prospects of success are slight,
ing under superior if the alternative be a certain miserable death, in the nat-
duty. ural progress of the disease.⁶ The same view may be accepted when
the alternative is the sacrifice in childbed of the life of a mother or
that of a child, and the life of the child is taken.⁷ Once more, sup-
posing that the safety of a city require that a house should be de-
stroyed by gunpowder, and supposing there be no time to rescue all
the inmates of the house, the killing of one of such inmates, under
the circumstances, would be excusable.⁸

against the will of his master, runs
off the path against one of the dog-
spears, and is killed or injured; be-
cause the setting of dog-spears was not
in itself an illegal act, nor was it ren-
dered so by the 7 & 8 Geo. IV. c. 18.
The cases are reviewed in able opin-
ions by Sherman, J., in *Johnston v.*
Patterson, 14 Conn. 1, 1840; and by
Doe, J., in *Aldrich v. Wright*, 53 N.
H. 398, 1873.

¹ *Simpson v. State*, 59 Ala. 1, 1877.

² *Supra*, § 218.

³ *Supra*, §§ 94, 307, 401.

⁴ *U. S. v. Carr*, 1 Woods, 480, 1872.

⁵ *Supra*, § 401.

⁶ *Supra*, §§ 95-6, 139, 144. See *Ter- ritory v. Yee Dan*, (N. M.) 37 Pac. Rep. 1101, 1894.

⁷ *Ibid.*

⁸ See *supra*, §§ 95-6, 139.

6. *Necessity.*

§ 510. The canon law, which lies at the basis of our jurisprudence in this respect, excuses the sacrifice of the life of one person, when actually necessary for the preservation of the life of another, and when the two are reduced to such extremities that one or the other must die,¹ Sacrifice of another's life excusable when necessary to save one's own. *quoniam necessitas legem non habet.*² Si quis propter necessitatem famis, aut nuditatis furatus fuerit cibaria, vestem, vel pecus; poeniteat hebdomadas tres, et, si reddiderit, non cogatur ieiunare.³ Quod non est licitum in lege, necessitas facit licitum. So an eminent French jurist:⁴ En un mot, l'acte ne peut-être excusable que lorsque l'agent cède à l'instinct de sa propre conservation, lorsqu'il se trouve en présence d'un péril imminent, lorsqu'il s'agit de la vie. In the same view leading German jurists unite.⁵

But it should be remembered that necessity of this class must be strictly limited. Hence it has been held by the canon jurists that the right can only be exercised in extremity, and in subordination to those general rules of duty to which even such a necessity as that before us must be subordinate. Hence when the question is between an unborn infant's life and a mother's, the mother is to be preferred; and between a sailor and a passenger, supposing there are more than enough sailors for the purpose of navigation, the passenger, as will presently be seen, ought to be preferred. But no assent by the party sacrificed can be by itself a defence.⁶

How far culpability precludes this defence has been already discussed.⁷

§ 511. Upon the great authority of Lord Bacon it has been held that where two shipwrecked persons get on the same plank, and one of them finding it not able to save them both, thrusts the other from it, whereby he is drowned, it is excusable homicide.⁸ Lord Hale, however, doubts this, on the Self-preservation in shipwreck.

¹ Can. 11. Dist. i. de consecrat.

² Cap. 3. x. de furt. (5. 18.)

³ Cap. 4. x. de reg. iur. (5. 41.)

⁴ Rossi, *Traité* ii. p. 212.

⁵ Berner, *De impunitate propter summan necessitatem*, etc. (1861); Geib, *Lehrbuch*, ii. 225; and an interesting compendium in Holtzendorf, ii. 180.

⁶ But see Holmes's Case, *infra*, § 511.

⁷ *Supra*, § 96.

⁸ 4 Bl. Com. 186; Ruth. Inst. c. 16, pp. 187-90; Pufendorff's Law of Nature, 204; Herbert's Legal Maxims, 7.

ground that a man cannot ever excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life if he do not comply; and that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance.¹ On this Mr. East remarks, that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion,² there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity; though, in case the party might have recourse to other apparent means for his protection in his apparent necessity, his fears furnish no excuse for killing.³

¹ 1 Hale, c. 28, s. 26; *Arp v. State*, 97 Ala. 5, 1893; *Hicks v. U. S.*, 150 U. S. 442, 1893.

² 1 East P. C. c. 2, s. 15, p. 70.

³ *Ibid.* c. 5, s. 61, p. 294.

In this country this topic has undergone the test of a judicial investigation, in a court and under circumstances peculiarly favorable to its careful consideration. In March, 1842, Alexander William Holmes was indicted, in the United States Circuit Court for the Eastern District of Pennsylvania, before Baldwin, J., for manslaughter. From the evidence it appeared that the ship *William Brown* left Liverpool on the 13th day of March, 1841, having on board sixty-five passengers and a crew composed of seventeen seamen, the whole number amounting to eighty-two, most of the passengers being Irish and Scotch emigrants. The voyage was very favorable until the evening of the 19th of April, at which time, while all were in their beds except the watch, consisting of seven persons, among whom was Alexander William Holmes, the prisoner, a Swede by birth, the vessel struck an iceberg, and immediately commenced leaking. The sails were shortened, and resort was had to the pumps. Upon examination it was found that the injury the vessel had

received rendered her loss inevitable, and that the crew could only be saved, if saved at all, by taking refuge in the boats at once. The boats were immediately launched; in the long-boat were crowded thirty-two passengers, besides a portion of the crew, in all forty-two persons; in the jolly-boat were placed nine persons. The two boats pushed away from the ship, and the ropes by which they were attached to her were cut just before the ship went down. They remained together until the next morning, when they separated. During the first day the weather was moderate and the sea calm. From the moment the long-boat reached the water it was necessary to bail; she was leaky, and the plug was insecure and insufficient for the purpose. She was so loaded that the gunwale was but a few inches from the water. Toward evening the sea became rough, and at times washed over the sides of the boat. On the second night, not much more than twenty-four hours after the abandonment of the ship, the sea becoming more and more tempestuous, and the danger of destruction imminent, the defendant, together with the remaining sailors, proceeded to throw overboard those passengers whose removal seemed necessary for the common

XIV. INDICTMENT.

Under this head it is practicable to notice only such points of pleading as are peculiar to homicide. Other points of pleading are elsewhere discussed.¹

safety. Relief shortly afterward came, but great conflict of evidence existed as to whether the boat could have held out in its originally crowded state even during that short period. The question, therefore, whether, with no prospect of aid, acting under the circumstances which surrounded the defendant at the time the act was committed, such necessity existed as would justify the homicide, was one of great doubt. But a new test was proposed by Judge Baldwin. Holding that in such an emergency there was no maritime skill required which would make the presence of a sailor of more value than that of a passenger, he maintained, with great power of argument, that in such case, it being the stipulated duty of the sailor to preserve the passenger's life at all hazards, if a necessity arose in which the life of one or the other must go, the life of the passenger must be preferred. If, on the other hand, the crew was necessary, in its full force, for the management of the vessel, the first reduction to be made ought to take place from the ranks of the passengers. But under any circumstances he insisted that the proper method of determining who was to be the first victim out of the particular class was by lot. The defendant, under the charge of the court, was convicted, but was sentenced to an imprisonment of light duration. *U. S. v. Holmes*, 1 Wall. Jr. 1, 1842.

On this case Sir J. F. Stephen (Dig.

Crim. Law, 3d ed., art. 33,) thus comments: "I doubt whether an English court would take this view. It would be odd to say that the two men on the raft were bound to toss up as to which should go." To this it may be added, that an agreement by all parties on board to abide by the lot would be no defence to an indictment for homicide, since A.'s consent that B. should kill him, even on a contingency, is no defence to such killing. (*Supra*, § 144.) Nor can it be understood why the indictment was for manslaughter. If the defence of necessity was made out, the case was one for an acquittal. If it was not made out, the case was common law murder, as there was a deliberate taking of life. See criticism in *London Quarterly Law Rev.*, Jan. 1885, p. 57. In his opinion in the *Mignonette Case*, Lord Coleridge concurs in this conclusion, and says that referring the matter to lot "can hardly be an authority satisfactory to a court of this country."

In *R. v. Dudley and Stephens* (*Mignonette Case*, London, 1884), where the defendants were indicted for killing and eating a boy named Parker, who, with them, was in a state of starvation in a boat at sea, Baron Huddleston charged the grand jury as follows: "It is impossible to say that the act of Dudley and Stephens was an act of self-defence. Parker, at the bottom of the boat, was not endangering their lives by any act of his; the boat could hold them all,

¹ See Whart. Cr. Pl. & Pr. §§ 90 *et seq.* For precedents, see Whart. Prec. 104 *et seq.*, tit. "HOMICIDE."

§ 512. The venue must aver jurisdiction in conformity with the statute law of the particular jurisdiction.¹ The conflict as to juris-

and the motive for killing him was not for the purpose of lightening the boat, but for the purpose of eating him, which they could do when dead, but not while living. What really imperilled their lives was not the presence of Parker, but the absence of food and drink. It could not be doubted for a moment that if Parker was possessed of a weapon of defence—say a revolver—he would have been perfectly justified in taking the life of the captain, who was on the point of killing him, which shows clearly that the act of the captain was unjustifiable. It may be said that the selection of the boy—as indeed Dudley seems to have said—was better, because his stake in society, having no children at all, was less than theirs; but if such reasoning is to be allowed for a moment, Cicero's test is that under such circumstances of emergency the man who is to be sacrificed is to be the man who would be the least likely to do benefit to the republic, in which case Parker, as a young man, might be likely to live longer, and be of more service to the republic than the others. Such reasoning must be always more ingenious than true. Nor can it be urged for a moment that the state of Parker's health, which is alleged to have been failing in consequence of his drinking the salt water, would justify it. No person is permitted, according to the law of this country, to accelerate the death of another. Besides, if once this doctrine of necessity is to be admitted, why was Parker selected rather than any of the other three? One would have imagined that his state of health and the misery in which he was at the time would have obtained for him more consideration at their hands.

However, it is idle to lose one's self in speculations of this description. I am bound to tell you that if you are satisfied that the boy's death was caused or accelerated by the act of Dudley, or Dudley and Stephens, this is a case of deliberate homicide, neither justifiable nor excusable, and the crime is murder, and you, therefore, ought to find a true bill for murder against one or both of the prisoners."

There was no drawing of lots in this case; this having been proposed but rejected. This, however, was held by the court to make no difference in the case.

The jury found a special verdict of murder, subject to the opinion of the court in banc, by which the verdict was sustained; Lord Coleridge, giving the opinion of all the judges, saying: "It is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity; but the temptation to the act which existed here was not what the law has ever called necessity." 31 Alb. Law Journ. 38.

The prisoners were sentenced to be hung, but the punishment was commuted by the crown to imprisonment for six months. London Law Times, Nov. 15, 1884.

¹ Hawk. b. 2, c. 25; 1 Ch. C. L. 178; 3 Ibid. 732; 1 Stark. C. P. 5, 6; Com. v. Linton, 2 Va. Cas. 205, 1820; State v. Orrell, 1 Dev. 139, 1826; State v. Haney, 67 N. C. 467, 1872; State v. Toomer, 1 Chev. (S. C.) 106, 1840; Stoughton v. State, 13 Sm. & M. 255,

diction in cases where the mortal blow was struck in one State and the death occurred in another has been already discussed.¹

Venue must aver jurisdiction.

§ 512 *a*. The deceased must be specified by name when known, though it is not necessary to aver him to be a "human being."² In what way names are to be pleaded is elsewhere examined.³

Deceased must be individuated.

§ 513. If a constable, watchman, or other minister of justice be killed in the execution of his office, the special matter need not be stated, but the offender may be indicted generally for murder.⁴ But where the case rests upon a neglect to provide sufficient food for the deceased, it must show that it was the duty of the prisoner to provide it.⁵

Averment of relationship between deceased and defendant when such is necessary to offence.

§ 514. Where A. shoots into a crowd, intending to hurt or kill any one whom he may hit, and B. is killed, then A. may be indicted for the murder of B., and the indictment may aver such intent.⁶ And where A., maliciously intending to kill B., shoots at and kills C., mis-

Variance as to intent to kill the particular individual killed.

1850; *Riggs v. State*, 26 Miss. 51, 1853; 32 S. C. 392, 1890. As to amendment *Riley v. State*, 9 Humph. 646, 1849; by inserting Christian name, see *Nash v. State*, 2 Greene, (Iowa) 286, *Miller v. State*, 68 Miss. 221, 1890. 1849; *People v. Aro*, 6 Cal. 207, 1856. As to "defendant" for "defendants," As to record on change of venue, see *Evans v. State*, 58 Ark. 47, 1893; *Watson v. Com.*, 87 Va. 608, 1891; *State v. Richmond*, 42 La. An. 299, see, also, *Muscoe v. Com.*, 87 Va. 460, 1890; *Milontree v. State*, 30 Tex. 1891; *Woolfolk v. State*, 85 Ga. 69, App. 151, 1891; *State v. Freidrich*, 3 1890; *Wolfforth v. State*, 31 Tex. Cr. Wash. 418, 1892; *People v. McNulty*, 387, 1892; *Smith v. State*, 31 Tex. Cr. (Cal.) 26 Pac. Rep. 597, 1891. 14, 1892.

² Whart. Crim. Pl. & Pr. §§ 96 *et*

¹ *Supra*, § 292. See *Stout v. State*, (Md.) 25 Atl. Rep. 299, 1892; *Futch v. State*, 90 Ga. 472, 1892; *State v. Blakeney*, 33 S. C. 111, 1890; *State v. Blunt*, 110 Mo. 322, 1892. Indictment for murder on high seas, *St. Clair v. U. S.*, 154 U. S. 134, 1893.

seq.; Whart. Crim. Ev. §§ 94 *et seq.*; see *Edmonds v. State*, 34 Ark. 720, 1879; *Edwards v. State*, 70 Mo. 480, 1879. See *Welsh v. State*, 96 Ala. 92, 1892; *Reese v. State*, 90 Ala. 624, 1891; *Smurr v. State*, 88 Ind. 504, 1883.

² *Merrick v. State*, 63 Ind. 327, 1878; *Bohannon v. State*, *infra*, § 516; *State v. Smith*, 24 W. Va. 814, 1884; *Boyd v. State*, 14 Lea, (Tenn.) 161, 1884; *Palmer v. People*, 138 Ill. 356, 1891.

⁴ *R. v. Mackally*, 9 Co. Rep. 68; 1 Hale, 460; 12 Rep. 17; *Boyd v. State*, 17 Ga. 194, 1855; *Wright v. State*, 18 Ibid. 383, 1855.

See *Lewis v. State*, 90 Ga. 95, 1892, for fatal variance. See *Jackson v. State*, 88 Ga. 784, 1892; *State v. Senn*, C. 443; 9 Cox C. C. 471, 1864.

⁵ See *R. v. Goodwin*, 1 Russ. C. & M. 563.

⁶ *Supra*, § 319; *R. v. Fretwell*, L. & C. 443; 9 Cox C. C. 471, 1864.

taking him for B., then A. may be indicted for the intentional murder of C. For if A. intend to kill C. under a false impression who C. is, then malice to C. (however mistaken it may be) is made out, supposing that the intent is malicious.¹ But if A. shoot at B. under circumstances in which it would have been excusable homicide to have killed B., then it is excusable homicide in A. by this act to kill (without negligence) C., supposing C. to be B.² Whether when A., intending to shoot B., shoots C. by a glance shot, without seeing him, A. is indictable for shooting C., is elsewhere considered.³

§ 515. It is not necessary to allege that the party killed was “in the peace of God and of the said State” (or commonwealth), etc., though such words are commonly inserted.⁴ The omission of the words is no ground for arrest of judgment.⁵

§ 516. As has been already seen,⁶ it is essential in all cases to show that the deceased was living at the time when the alleged mortal blow was struck. But an averment that the defendant was living at the time, or that he was a reasonable creature, is not necessary.⁷

§ 517. It is necessary to state that the act by which the death was occasioned was done feloniously;⁸ and especially that it was done of *malice aforethought*,⁹ which, as we have already seen, is the great characteristic of the crime of

¹ See *supra*, § 317; and, also, *R. v. Banks*, Yelv. 205, 1817; *Com. v. Holt*, 7 C. & P. 519, 1836.

² *Supra*, §§ 317–20.

³ *Supra*, §§ 107–111, 317.

⁴ 2 Hawk. P. C. c. 25, s. 73; 2 Hale, 186; 1 *Ibid.* 433. *Supra*, § 310.

⁵ *Com. v. Murphy*, 11 Cush. 472, 1853; *Dumas v. State*, 63 Ga. 600, 1879. See *R. v. Sawyer*, R. & R. 294; *State v. Howard*, 92 N. C. 772, 1885.

⁶ *Supra*, § 309.

⁷ *Bohannon v. State*, 14 Tex. App. 271, 1883. *Supra*, § 512 a.

⁸ Defective if “feloniously” is omitted. *Stroud v. Com.*, (Ky.) 19 S. W. Rep. 976, 1892; *People v. Bemis*, 51 Mich. 422, 1883.

⁹ 2 Hale, 186, 187; *Bradley v.*

Banks, Yelv. 205, 1817; *Com. v. Gibson*, 2 Va. Cas. 70, 1817; *Sarah v. State*, 28 Miss. 267, 1854; *Edwards v. State*, 25 Ark. 444, 1869; *Witt v. State*, 6 Cold. (Tenn.) 5, 1868; *McElroy v. State*, 14 Tex. App. 235, 1883; *People v. Schmidt*, 63 Cal. 28, 1883. In Massachusetts the terms may be omitted as to the assault, if given afterward as to the killing. *Com. v. Chapman*, 11 Cush. 422, 1853. See, also, *R. v. Nicholson*, 1 East P. C. 346; *Maile v. Com.*, 9 Leigh, 661, 1839. In Iowa, the indictment, under the statute, must aver both assault and killing to be wilful, deliberate, and premeditated. *State v. Knouse*, 29 Iowa, 118, 1870. In Wisconsin, under statute, “malice aforethought” need not

murder; and it must also be stated that the prisoner *murdered* the deceased.¹ If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner *murdered*, etc., or *killed* or *slew* the deceased, the conviction can only be for manslaughter.²

§ 518. Where the killing is alleged to have been caused by a battery, it is necessary to allege an assault.³ In indictments for neglect, however, where no violence is alleged, the "assault" may be omitted.⁴ But the term "assault"

thought"
necessary
at com-
mon law.

Allegation
of "as-
sault"
necessary
in violent
homicides.

be here used. *State v. Duvall*, 26 Wis. 415, 1870. In Louisiana, "wilfully" and "feloniously" are necessary to murder. *State v. Thomas*, 29 La. An. 601, 1877. See *State v. Harris*, 27 Ibid. 572, 1875. In Texas, "malice aforethought" is enough. *Henrie v. State*, 41 Tex. 573, 1874; *Bohannon v. State*, 14 Tex. App. 271, 1883. It is, however, essential. *McElroy v. State*, Ibid. 235, 1883. See Whart. Cr. Pl. & Pr. § 269. As to "wilful," see *State v. Eaton*, 75 Mo. 586, 1882; *Kansas v. Bridges*, 29 Kans. 188, 1883. In Florida the indictment must allege the act to have been done with "the premeditated design to effect death." *Simmons v. State*, 32 Fla. 387, 1893. For Alabama, see *Ward v. State*, 96 Ala. 100, 1892. "With malice aforethou" not enough. *Griffith v. State*, 90 Ala. 583, 1891. See *Com. v. Bucieri*, 153 Pa. 535, 1893; *Plake v. State*, 121 Ind. 433, 1889. As to "wilful," see *State v. Arnold*, 107 N. C. 861, 1890; *State v. Moore*, 104 N. C. 743, 1889. As to manner and means of killing, see *Taylor v. State*, 11 Lea, (Tenn.) 708, 1883; *State v. Banks*, 118 Mo. 117, 1893; *Williams v. State*, 30 Tex. App. 354, 1891. For ungrammatical indictment, see *State v. Turlington*, 102 Mo. 642, 1890. For omission of "unlawfully," see *Hunter v. State*, 30 Tex. App. 314, 1891; *Davis v. Utah*, 151 U. S. 262, 1893; *Jordan v. People*, 19 Colo. 417, 1894; *People v. Hyndman*, 99 Cal. 1, 1893; *People v. Davis*, 8 Utah, 412, 1893; *State v. Rector*, (Mo.) 23 S. W. Rep. 1074, 1893; *Hodge v. State*, 26 Fla. 11, 1890; *Scott v. State*, 31 Tex. Cr. 363, 1892; *St. Clair v. U. S.*, 154 U. S. 134, 1894; *State v. Schnelle*, 24 W. Va. 767, 1884.

¹ *Infra*, § 539; Whart. Prec. 7, 8; though see *Anderson v. State*, 5 Pike, 444, 1844; *State v. Bradford*, 38 La. An. 921, 1881. As to "strike," see § 530. In New York statutory murder may be proved under an indictment in the common law form. *People v. Osmond*, 138 N. Y. 80, 1893. See *Jones v. State*, 58 Ark. 390, 1894, for indictment of accessory and principal. Where "aforesaid" was used through error instead of "aforethought" it was fatal. *State v. Green*, 42 La. An. 644, 1890. But see *Smith v. State*, 21 Tex. App. 277, 1886; *State v. Dale*, 108 Mo. 205, 1891.

² *Usselson v. People*, 149 Ill. 612, 1894; *Weatherman v. Com.*, (Va.) 19 S. E. Rep. 778, 1894; *Blanton v. State*, 1 Wash. 265, 1890; *State v. Lockwood*, 119 Mo. 463, 1894.

³ *Lester v. State*, 9 Mo. 666, 1846; *Reed v. State*, 8 Ind. 200, 1856.

⁴ *R. v. Plummer*, 1 C. & K. 600, 1844; *R. v. Crumpton*, C. & M. 597, 1842; *R. v. Hughes*, 7 Cox C. C. 301, 1857; *D. & B.* 248; *R. v. Friend*, R. & R. 20, 1802.

does not vitiate the indictment, though it should appear that the deceased consented to the injurious act being done.¹

§ 519. The common law rule, in pleading the instrument of death, is, that where the instrument laid and the instrument proved are of the same nature and character, there is no variance; where they are of opposite nature and character, the contrary.² Thus evidence of a dagger will support the averment of a knife, though evidence of a knife will not support the averment of a pistol. But where the species of death would be different, as if the in-

At common law general character of instrument of death must be correctly given.

¹ R. v. Ellis, 2 C. & K. 470, 1846. Com. v. Macloon, 101

² R. v. Martin, 5 C. & P. 128, 1882; Mass. 1, 1869. R. v. Warman, 1 Den. C. C. 183; In Ohio a similar provision exists State v. Smith, 32 Me. 369, 1851; as to indictments for manslaughter. State v. Fox, 1 Dutch. 566, 1856; Act of May 6, 1869, § 7; Warren's People v. Colt, 3 Hill, (N. Y.) 432, Ohio Cr. L. p. 180. 1842; Dukes v. State, 11 Ind. 557, That in Maine the particular means 1858; West v. State, 48 Ibid. 483, need not be set out, see State v. 1874; State v. Smith, Phil. Law, (N. Morrissey, 70 Me. 401, 1879. The same is true in Pennsylvania. Volkavitch v. Com., 12 Atl. Rep. 84, 1888; State v. Gould, 90 N. C. 658, 1884; Noble v. Com., (Ky.) 13 S.W. Rep. 429, 1890; People v. Hyndman, 99 Cal. 1, 1893.

Statutory provisions.—In many States the instrument of death need not be specified.

As to Pennsylvania, see Rev. Act, 1860, sec. 28, Pamph. Laws, p. 435. Goerson v. Com., 99 Pa. 388, 1882. And so in Louisiana, State v. Bartley, 34 La. An. 147, 1882; and in Texas, Dwyer v. State, 12 Tex. App. 535, 1882; and in California, People v. Hong Ah Duck, 61 Cal. 387, 1882. As to New York statute to same effect, see People v. Colt, 3 Hill, 432, 1842.

Under the Massachusetts statute, an indictment which alleges that the death was caused by a wounding, an exposure, and a starving, is not bad for duplicity, nor for failure to allege that the wounding, exposure, and starving were mortal, or of a mortal nature; and may be sustained by proof of death by any of the speci-

In some jurisdictions, neither weapon nor wound need be described. Conners v. State, 45 N. J. L. 340, 1883; Graves v. State, Ibid. 347, 1883; Alexander v. State, 3 Heisk. 475, 1872; State v. McLane, 15 Nev. 345, 1880; State v. Bemis, 51 Mich. 422, 1883.

As to cumulation of instruments, see Whart. Cr. Pl. & Pr. § 158. As to pleading killing by burning produced by throwing a lighted lamp, see Mayes v. People, 106 Ill. 306, 1883.

In Alabama an allegation of shooting with a gun is not fatal where it was done with a pistol. Turner v. State, 97 Ala. 57, 1892; Johnson v. State, 88 Ga. 203, 1891. "Knife or other instrument" is not a good averment in the indictment. Hornsby v. State, 94 Ala. 55, 1891. See Lundy v. State, 91 Ala. 100, 1890; State v. Wil-

dictment allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance is fatal;¹ and the same if the indictment state a poisoning, and the evidence prove a starving. Thus, where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave him divers mortal blows and bruises of which he died, and it appeared in evidence that the death was by the deceased falling on the ground in consequence of a blow on the head received from the defendant; it was ruled that the cause of the death was not properly stated.² But if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill, or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material.³ The same view is taken where one kind of shot is averred and another proved.⁴ But where on an indictment for shooting with a pistol loaded with gunpowder and a bullet it appeared that there was no bullet in the room where the act was done, and no bullet in the wound; and it was proved that the wound might have been occasioned by the wadding of the pistol; Bolland, B., Park and Parke, JJ., held the indictment not proved.⁵ The same principle was applied where an

liamson, 106 Mo. 162, 1891. In *Sims v. Com.*, (Ky.) 13 S. W. Rep. 1079, 1890, held that indictment need not aver that pistol was loaded with powder and a leaden ball, etc. sufficiently declare the killing. *Haney v. State*, 34 Ark. 263, 1879. That proof of striking with a pistol will not sustain an averment of cutting with a knife, see *Phillips v. State*, 68 Ala. 469, 1881.

¹ *R. v. Martin*, 5 C. & P. 128, 1832. Where an indictment describes the instrument which caused the death by two names, it is sufficient if it be proved to be either. The prisoner was indicted for manslaughter, in causing the death of a female by negligently slinging a cask, which was described in the indictment as "a cask and puncheon;" and the indictment was objected to on the ground that it was so described; but Parke, J., held, that if it was either it was sufficient. *Rigmaidon's Case*, 1 Lew. 180, 1833. See *Whart. on Crim. Ev.* § 91. An averment that the killing was "with a gun loaded with gunpowder and leaden balls, and held in the hand" of defendant, does not

An indictment charging the death to have been occasioned by two co-operating causes, if the evidence fail to support one of the causes, is insufficient. *R. v. Sanders*, 7 C. & P. 277, 1835.

² *R. v. Thompson*, 1 Mood. C. C. 139.

³ *R. v. Mackally*, 9 Co. 67 a; *Gilb. Ev.* 231; *R. v. Brigg*, 1 Mood. C. C. 318, 1831. See *R. v. Culkin*, 5 C. & P. 121, 1832; *R. v. Grounsell*, 7 Ibid. 788, 1837; *R. v. Tye*, R & R. 345, 1818; *R. v. Edwards*, 6 C. & P. 401, 1834; *R. v. Waters*, 7 Ibid. 250, 1835.

⁴ *Goodwin v. State*, 4 S. & M. 520, 1845.

⁵ See *R. v. Hughes*, 5 C. & P. 126, 1832.

indictment charged that the defendant struck the deceased with a brick, and it appeared that he knocked the deceased down with his fist, and that the deceased fell upon a brick which caused his death.¹

At common law, proof of *striking* with a gun will not sustain an averment of *shooting*.²

§ 520. As we have already seen, the evidence must show that the death was caused by the particular blow described and proved.³ Thus in a case remarkable for the conflict of opinion among the assembled judges on other points, as well as for the public interest excited by the trial, all the judges concurred in the opinion, that where certain assaults were put in evidence, and relied on by the prosecution as being the cause of death, but where the clear surgical testimony was that the death was caused by a blow on the head, of which there was no evidence whatever, the defendants were entitled to an acquittal.⁴

§ 521. When the deceased died by fright produced by an impending blow by an unknown weapon, this, under statute, may be charged as a death from assault by a weapon unknown.⁵ When death is alleged to have been produced by the deceased being led by fright to self-injury, then the indictment must specify the apprehension of immediate violence, arising from the circumstances by which the deceased was surrounded; and it need not appear that there was no other way of escape; but it must be alleged that the step was taken to avoid the threatened danger.⁶ But if the charge be that the prisoner "did compel and force" another person to do an act which caused the death of a third party, this allegation will

¹ R. v. Kelly, 1 Mood. C. C. 113, Com., 9 Bush, 178, 1872; State v. 1825. See R. v. Wrigley, 1 Lew. C. C. Townsend, 1 Houst. C. C. 337, 1871. 127, 1829; R. v. Martin, 5 C. & P. 128, 1832; People v. Tannan, 4 Parker C. R. 514, 1860; Gibson v. Com., 2 Va. Cas. 111, 1817. See Edwards v. State, 25 Ark. 444, 1869. That it is not necessary to aver that the wound was not inflicted in a surgical operation, see Merrick v. State, 63 Ind. 327, 1878.

² Guedel v. People, 43 Ill. 226, 1867. See *infra*, § 530. But see State v. Morgan, 35 W. Va. 260, 1891, for indictment under the code of West Virginia.

³ See *supra*, §§ 153 *et seq.*; White v.

⁴ R. v. Bird, T. & M. 437; 5 Cox C. C. 11, 1850; 15 Jur. 193. As to variance in this respect, see Whart. Crim. Ev. § 91.

⁵ Cox v. People, 80 N. Y. 500, 1880. *Sed quaere.*

⁶ *Supra*, § 164; R. v. Pitts, 1 C. & M. 284, 1842; R. v. Evans, 1 Russ. C. & M. 651, 1812.

When the death was immediately from fright produced by the defendant's violence, the defendant is responsible. *Ibid.*

require the evidence of personal efficient force applied to the person in question. Thus where it was stated in the indictment that the prisoner "did compel and force" A. and B. to leave working at the windlass of a coal mine, by means of which the bucket fell on the head of the deceased, who was at the bottom of the mine, and killed him; and the evidence was that A. and B. were working at one handle of the windlass and the prisoner at the other, all their united strength being requisite to raise the loaded bucket, and that the prisoner let go his handle and went away, whereupon the others, being unable to hold the windlass alone, let go their hold, and so the bucket fell and killed the deceased; it was held that this evidence was not sufficient to support the indictment.¹

§ 522. In accordance with the reasoning already given,² poison administered by an agent, or injuries done by an agent, under the defendant's direction, may be laid, under recent statutes, as administered by the defendant himself.³

Acts of agent or associate may be averred to be acts of principal.

Where several are charged as principals, one as principal in the first degree and the others as present, aiding and abetting, it is not material which of them be charged as principal in the first degree, as having given the mortal blow, for the mortal injury done by any one of those present is, in legal consideration, the injury of each and every one of them.⁴ It is otherwise when there is a local statute assigning distinct penalties to the degrees.⁵ But an averment that the defendant was principal cannot, at common law, be supported by proof that he was accessory before the fact.⁶ An accessory before the fact, under the statutes making such principals, may be indicted as principal.⁷

¹ *R. v. Lloyd*, 1 C. & P. 301, 1824. Cotta, 49 Cal. 166, 1874; Whart. Crim.

² *Supra*, § 161.

³ *R. v. Michael*, 2 Mood. C. C. 120; 9 C. & P. 350, 1840; *R. v. Spiller*, 5 C. C. 120, 1832. See *supra*, § 218, where the cases are given at large; and see Whart. Cr. Ev. § 102.

Ev. § 102. See *State v. Atkinson*, (S. C.) 18 S. E. Rep. 102, 1894; *Combs v. Com.*, (Ky.) 25 S. W. Rep. 276, 1894;

State v. Stacy, 103 Mo. 11, 1890; *Watson v. State*, 28 Tex. App. 34, 1889.

⁵ *Supra*, § 221.

⁴ *Supra*, § 221; Fost. 551; 1 East P. C. 350; *R. v. Culkin*, 5 C. & P. 121, 1832; *R. v. O'Brien*, 1 Den. C. C. 9; 2 C. & K. 115, 1844; *Com. v. Chapman*, 11 Cush. (Mass.) 422, 1853; *State v. Mairs*, 1 Coxe, 453; *State v. Fley*, 2

⁶ *R. v. Soares*, R. & R. 25, 1802; *R. v. Fallon*, 9 Cox C. C. 242, 1862; *State v. Wyckoff*, 2 Vroom, 65, 1864; *Hughes v. State*, 12 Ala. 458, 1847; *Josephine v. State*, 39 Miss. 613, 1860. See *supra*, § 208.

⁷ *Campbell v. Com.*, 84 Ibid. 187, 1877; *Baxter v. People*, 3 Gilman, State, 26 Ala. 107, 1855; *People v.* 368, 1846; *Dempsey v. People*, 47 Ill.

Variance
in descrip-
tion of
poison not
fatal.

§ 523. It may be generally stated that when one kind of poison is averred and another proved, the variance is not fatal.¹

Scienter
requisite
in poison-
ing.

§ 524. A special *scienter* in cases of poisoning is usual,² though in Pennsylvania, at a time when granting the *allocatur* for review was at the discretion of the court, the omission of the *scienter* (the indictment containing the averment "knowingly") was held, after conviction, not ground for an *allocatur*.³ In Massachusetts it is not necessary to aver in poisoning a specific intent to kill when there are other allegations from which the *scienter* is inferable.⁴

Unknown
instru-
ment need
not be
averred.

§ 525. If the instrument by which the homicide was committed be not known, it is enough for the indictment to aver such fact; and under the circumstances the want of specification will be excused on the same principles as allow the non-setting out of a stolen or forged paper, when such paper is lost or in the prisoner's possession.⁵ There will be no variance if the indictment in this respect conforms to the informa-

323, 1868; Yoe v. People, 49 Ibid. 410, 1868; State v. Zeibart, 40 Iowa, 169, 1874; Jordan v. State, 56 Ga. 92, 1876. See *supra*, § 238. As to requisite of indictment, see Usselton v. People, 149 Ill. 612, 1894; Sage v. State, 127 Ind. 15, 1890. See Polly v. Com., (Ky.) 24 S. W. Rep. 7, 1893.

¹ 2 Hale P. C. 485; R. v. Tye, R. & R. 345, 1818; R. v. Culkin, 5 C. & P. 121, 1832; R. v. Waters, 7 Ibid. 250, 1835; R. v. Grounsell, Ibid. 788, 1835; R. v. Martin, 5 Ibid. 128, 1832. And see R. v. O'Brien, 2 C. & K. 115, 1846; R. v. Warman, Ibid. 195, 1844; Carter v. State, 2 Carter, (Ind.) 617, 1851; State v. Vawter, 7 Blackf. 592, 1845. As to ambiguous description of poison, see R. v. Clark, 2 B. & B. 473.

² State v. Yarborough, 77 N. C. 524, 1877. *Contra*, State v. Slagle, 83 Ibid. 630, 1880. See forms in Whart. Prec. 125 *et seq.*

³ Com. v. Earle, 1 Whart. R. 525, 1836.

⁴ Com. v. Hersey, 2 Allen, 173, 1861.

In Fairlee v. People, 41 Ill. 1, 1849, it was held that to sustain an indictment against A. for designedly communicating an infectious disease to B. through C., it must be shown that the defendant was aware of the infectiousness of the disease and communicated it intentionally. See Bittle v. State, (Md.) 28 Atl. Rep. 405, 1894.

⁵ Whart. Cr. Ev. § 93; Whart. Cr. Pl. & Pr. § 156; State v. Wood, 53 N. H. 484, 1873; Com. v. Webster, 5 Cush. 295, 1850; State v. Williams, 7 Jones Law, (N. C.) 446, 1860; People v. Cronin, 34 Cal. 191, 1867; *aff.* in People v. Martin, 47 Ibid. 101, 1873; Walker v. State, 14 Tex. App. 609, 1883.

In State v. Burke, 54 N. H. 92, 1873, it was held sufficient to aver that the defendant, "in some way and manner, and by some means, instrument, and weapon, to the jurors unknown," killed and murdered the deceased. S. P., Com. v. Martin, 125 Mass. 394, 1878, where it was held that where

tion before the grand jury.¹ But the instrument must be either specifically defined, or the want of such specification must be excused by the averment that the instrument was unknown.²

§ 526. In one count of an indictment for murder the death was stated to be by a blow of a stick, and in another by the throwing of a stone. The jury found the prisoners guilty of manslaughter generally, on both counts, and the judges held the conviction right, and that judgment could be given upon it; and it was said that these are not inconsistent statements of the modes of death, but that, if they had been been so, no judgment could have been given on the verdict.³ In this country the practice is to take a verdict of guilty if either count is sustained by the evidence, no matter how inconsistently the instrument may be stated in other counts.⁴ The proper course, no doubt, is to take the verdict on the count sustained by the evidence. Yet, in most jurisdictions,⁵ after a general verdict of guilty, the counts containing the misdescription may be removed by *nolle prosequi*, and judgment entered on the good count.

When counts are inconsistent, verdict should be taken on good counts.

§ 527. The allegation of value of instrument is now immaterial, and need not be proved.⁶ In England, where deodands are still recognized, it may be necessary to introduce it; though as this provision does not exist in this country the reason fails.⁷

Value need not be proved.

§ 528. Though the hand in which the instrument was held is set

an indictment charges the defendant in one count with killing by a certain weapon, and in another count with killing by means and instruments to the grand jurors unknown; and at the trial the killing by the defendant is proved beyond a reasonable doubt, and there is no evidence of the particular means of death, the jury may convict on the latter count. *Com. v. Coy*, 157 Mass. 200, 1892; *People v. Wright*, 136 N. Y. 625, 1892. A count is not bad for duplicity which avers that the blows causing death were struck with a "piece of iron, a sledge, and a shovel." *Jackson v. State*, 39 Ohio St. 87, 1883.

¹ *Cox v. People*, 80 N. Y. 500, 1880, cited *supra*, §§ 167, 521; *Edmonds v.*

State, 34 Ark. 720, 1879. See *Olive v. State*, 11 Nebr. 1, 1881.

² *Dry v. State*, 14 Tex. App. 185, 1883; *Johnson v. State*, 90 Ga. 441, 1892.

³ *R. v. O'Brien*, 2 C. & K. 115, 1846; 1 Den. C. C. 9.

⁴ *Infra*, § 540; *Lanergan v. People*, 39 N. Y. 39, 1868; *State v. Baker*, 63 N. C. 276, 1869. See *People v. Davis*, 56 N. Y. 95, 1874. And as to varying the agency of defendant, *R. v. O'Brien*, *ut supra*; *People v. Valencia*, 43 Cal. 552, 1872. *Infra*, § 540.

⁵ Whart. Cr. Pl. & Pr. § 907.

⁶ 1 East P. C. s. 108, p. 341.

⁷ Hale's Pleas of the Crown, by Messrs. Stokes & Ingersoll, i. 424.

Allegation of hand of defendant need not be made. out in the old forms, it is now not necessary either to make or to prove the allegation.¹

§ 529. The time need not be formally repeated: "then and there" carries the averment back to the original date.²

Even if the "then and there" be omitted, it would seem that the court will still give judgment on the indictment, if the

Averment of time need not be repeated. grammatical construction be such as to apply the time at the outset to the subsequent allegations. But where two distinct periods have been averred, the statement "then and there" is not enough; one particular time should be

averred.³

§ 530. Wherever death is caused by a blow, it is essential to the

Word "struck" essential where there has been a blow. indictment that it should allege that the defendant struck the deceased;⁴ and this must also be proved; though in Virginia it has been ruled that where the instrument was a dagger, "stab, stick, and thrust" would be held equivalent to strike; and such is no doubt the general rule.⁵ It

is not necessary, however, as has been seen, to prove that the defendant struck the deceased with a particular instrument mentioned in the indictment; and therefore, although the indictment allege that the defendant did strike and thrust, proof of a striking which produced contused wounds only will maintain the indictment.⁶

¹ 2 Hawk. c. 23, ss. 76-84; 1 East one was present when the act was P. C. 341; 1 Stark. Crim. Plead. (2d done by the other. *R. v. Devett*, 8 C. ed.) 92; 1 Russ. on Cr. (9th Am. & P. 639, 1838. Where indictment ed.) 753 *et seq.*; Archb. Crim. Plead. charged murder was committed "on (10th ed.) 407; *Com. v. Costley*, 118 or about the 25th day of March," etc., Mass. 1, 1875; *Coates v. State*, 72 Ill. "on or about" is surplusage. State 303, 1874; *Com. v. Robertson*, (Mass.) *v. McCarthy*, 44 La. An. 323, 1892. 38 N. E. Rep. 25, 1894.

² Whart. Cr. Pl. & Pr. §§ 120 *et seq.*, ⁴ See 5 Co. 122 a; 2 Hale, 184; 2 Hawk. c. 23, s. 82; and see *Haney v. State*, 34 Ark. 263, 1879; *Edmondson v. State*, 41 Tex. 496, 1874. 134; *State v. Howard*, 92 N. C. 772, 1885; *Cudd v. State*, 28 Tex. App. 124, 1889.

³ See, for authorities, Whart. Cr. Pl. & Pr. §§ 131-2. ⁵ *Gibson v. Com.*, 2 Va. Cas. 111, 1817.

⁶ Archb. Crim. Plead. (10th ed.) 486. An indictment against two which See *supra*, § 520. As to averment of charges an injury done by one of them throwing stones, see *R. v. Dale*, 1 R. on one day, and another injury done & M. C. C. 5; and see *White v. Com.*, by the other on another day, and that 6 Binn. 179, 183, 1813; *Turns v. Com.*, the death arose from both, is bad, 6 Metc. (Mass.) 224, 1843.

when there is no averment that the

“Firing” is not a sufficiently exact mode of averring “shooting;”¹ nor is “striking.”²

§ 531. Where the nature of the injury does not admit of the averment of a stroke, it is enough if the special instruments themselves are correctly enumerated.³ “Strangulation” and “choking” have been held sufficient to indicate the mode of killing.⁴

“Strike” not necessary when poison or other modes of death, not involving wounds, are used.

§ 532. In the old practice it was held that the indictment must show in what part of the body the wound was inflicted, though it was said that if the wound be stated to be on the right side, and be proven to be on the left, the variance is not fatal.⁵ It is now, however, generally conceded that “upon the body” is a sufficient averment of location,⁶ though if the description be inconsistent this may be bad on demurrer.⁷ Nor is a variance which does not prejudice the defendant material.⁸

General description of place of wound sufficient.

§ 533. The term “wound” has had two distinct interpretations given to it; the *first*, under the ordinary common law indictments for homicide; the *second*, under the English and American statutes making “wounding” specifically indictable.

When the term “wound” is used in an indictment for homicide (*i. e.*, in the clause, giving unto the deceased *one mortal wound*, etc.), the term is used in a popular sense, and is understood to include bruises,⁹ etc.

Term “wound” to be used in a popular sense.

Where, however, the indictment is under a statute

¹ *Shepherd v. State*, 54 Ind. 25, 36 Tex. 326, 1871; *State v. Sanders*, 1876.

² *Guedel v. People*, 43 Ill. 226, 76 Mo. 35, 1882; *State v. Yordi*, 30 Kans. 221, 1883. See *People v. Davis*, 56 N. Y. 95, 1874; *State v. Draper*, 65

³ *R. v. Webb*, 2 Lew. 196, 1823; *Mo.* 335, 1877. Even when a part of s. c. 1 M. & Rob. 405; *R. v. Tye*, R. & R. 345, 1818. the body is described, this is to be taken in a popular and not scientific

⁴ *Redd v. State*, 69 Ala. 255, 1881. sense. *R. v. Edwards*, 6 C. & P. 401,

⁵ 2 Hale, 186; Archb. Crim. Plead. 1834. “Upon the head” is sufficient; 384; *Dias v. State*, 7 Blackf. 20, 1843; *Com. v. Robertson*, (Mass.) 38 N. E. Nelson *v. State*, 1 Tex. App. 41, 1876; Rep. 25, 1894. For meaning of “body,” *Custis v. Com.*, 87 Va. 589, 1891. See, see *Walker v. State*, (Fla.) 16 So. Rep. as to variance, *Bryan v. State*, 19 Fla. 80, 1894.

⁶ *Sanchez v. People*, 8 E. P. Smith, 22 N. Y. 147, 1860; *Real v. People*, 42

⁷ *Dias v. State*, 7 Blackf. 20, 1843. ⁸ *Bryan v. State*, 19 Fla. 864, 1883; *State v. Ramsey*, 82 Mo. 133, 1884.

⁹ *R. v. Warman*, 2 C. & K. 195, 1846; 1 Den. C. C. 185; *State v. Leonard*, 22 Mo. 449, 1856.

making "wounding" specifically indictable, the construction varies with the terms of the statute. Under 7 Will. IV. and I. Vict., which makes it indictable to "stab, cut, or wound," etc., it was held by Lord Denman, C. J., and Park, J., in 1837, that a blow given with a hammer on the face, whereby the skin was broken internally but not externally, was a "wounding."¹ But in 1838, Coleridge, J., Bosanquet, J., and Coltman, J., held that a blow with a stone bottle, which did not break the skin, was *not* a wounding; and the court said, "to constitute a wound, that the skin should be broken, it must be the whole skin, and it is not sufficient to show a separation of the cuticle only."²

But under the statutes the injury must be inflicted by "some instrument, and not by the hands or teeth;" and hence biting off the joint of a finger, and biting off the end of the nose, have been held not "wounding" within the statutes.³ And so of injuries inflicted by throwing oil of vitriol on the face.⁴ But it is otherwise with an injury inflicted by a kick from a shoe.⁵ A scratch, when there is no breaking of the skin, is no wound.⁶ Nor is an internal dislocation.⁷

§ 534. It was formerly held to be necessary to insert a full description of the wound.⁸ The present rule, however, is to require no such particularity.⁹

Exactness
no longer
necessary
in descrip-
tion.

Where the death was occasioned by a bruise, a description of its dimensions is not necessary.¹⁰

¹ *R. v. Smith*, 8 C. & P. 173, 1837. See, to same effect, *R. v. Waltham*, 3 Cox C. C. 442, 1849.

² *R. v. McLoughlin*, 8 C. & P. 635, 1838; S. P., *R. v. Wood*, 1 Mood. C. C. 278, 1830; 4 C. & P. 381, 1830. See *R. v. Jones*, 3 Cox C. C. 441, 1848; *Moriarty v. Brooks*, 6 C. & P. 684, 1834.

³ *Jennings's Case*, 2 Lew. C. C. 130, 1823; *R. v. Harris*, 7 C. & P. 446, 1836.

⁴ *R. v. Murrow*, 1 Mood. C. C. 456, 1835; *Henshall's Case*, 2 Lew. C. C. 135.

⁵ *R. v. Briggs*, 1 Mood. C. C. 318, 1831.

⁶ *R. v. Beckett*, 1 M. & Rob. 526, 1824; *Moriarty v. Brooks*, 6 C. & P. 684, 1834; 2 Whart. & St. Med. Jur. § 1137.

⁷ *Anon.* cited Ewell on Malp. 316.

⁸ 2 Hale, 185, 186; 2 Hawk. P. C. c. 23, ss. 80, 81; Trem. Ent. 10; Staundf. 78 *b*, 79 *a*; 4 Co. 40, 41; 5 Co. 120, 121 *b*, 122; Cro. Jac. 95; Stark. Crim. Law, 375, 380.

⁹ *R. v. Tomlinson*, 6 C. & P. 370, 1834; *Turner's Case*, 1 Lew. 177, 1830; *R. v. Mosley*, 1 Mood. C. C. 98, 1825; *Com. v. Woodward*, 102 Mass. 155, 1869; *West v. State*, 48 Ind. 483, 1874; *State v. Robertson*, 30 La. An. Pt. I. 340, 1878; *State v. Snell*, 78 Mo. 240, 1883; *Com. v. Robertson*, (Mass.) 38 N. E. Rep. 25, 1894; *Com. v. Coy*, 157 Mass. 200, 1892; *Hodge v. State*, 26 Fla. 11, 1890.

¹⁰ *State v. Owen*, 1 Murph. 452, 1810. See *State v. Moses*, 2 Dev. 452, 1830; *contra*, afterward corrected by statute. Where an indictment merely alleged

Even of an incised wound, the dimensions need no longer be set forth.¹

§ 535. Where an indictment for murder charged the defendant with having shot the deceased in the head, breast and side, giving to him one mortal wound, of which mortal wound he then and there instantly died, it was held, that if either of the wounds described proved mortal, the indictment would thereby be sustained;² and this results from the principle that proof of either mortal wound is sufficient. Thus, on the trial of an indictment for murder, charging the killing to have been effected by shooting the deceased in the head, it being proved that there were two bullet-wounds, one in the head and the other in the body, either of which would produce death, the refusal of the court to charge, that "if the proof fails to show which wound it was that actually killed, the case is not made out according to the indictment," is not error.³

When two wounds are averred either may be proved.

§ 536. The wound must be alleged to have been "mortal,"⁴ and death therefrom must be distinctly averred.⁵

"Death" must be averred.

The averment of "languishing" is a matter of surplusage, and may be stricken out as such.⁶

the giving of "one mortal bruise," was given, is defective. *R. v. Lad*, 1 Leach, 96, 1773; s. c. 1 C. & M. 345.
and it was urged that the dimensions of the bruise ought to have been described, Mr. J. Parke said: "I am disposed to go further than the judges in *Mosley's Case*, and to say that it is not necessary to describe the bruise at all, such rule being, in my judgment, most consistent with common sense." *Turner's Case*, 1 Lew. 177, 1830.

² *Hamby v. State*, 36 Tex. 523, 1872. See *supra*, § 519; Whart. Crim. Ev. § 134.

³ *Real v. People*, 42 N. Y. (3 Hand) 270, 1870; *Com. v. Coy*, 157 Mass. 200, 1892.

⁴ *State v. Morgan*, 85 N. C. 581, 1881.

¹ *State v. Conley*, 39 Me. 78, 1854; *Com. v. Chapman*, 11 Cush. 422, 1853; *Com. v. Woodward*, 102 Mass. 155, 1869; *Dillon v. State*, 9 Ind. 408, 1857; *Jones v. State*, 35 Ibid. 122, 1871; *Stone v. People*, 2 Scam. 826, 1840; *Lazier v. Com.*, 10 Gratt. 708, 1853; *Smith v. State*, 43 Tex. 643, 1875.

⁵ *R. v. Lad*, 1 Leach, 96, 1773; *State v. Conley*, 39 Me. 78, 1854; *Shepherd v. State*, 64 Ind. 43, 1878; *State v. Blan*, 69 Mo. 317, 1879. See *Wood v. State*, 92 Ind. 269, 1883; *Littell v. State*, 133 Ind. 577, 1893. The manner of death must be alleged; *Adams v. State*, 28 Fla. 511, 1891; *Wood v. State*, 92 Ind. 269, 1883.

An indictment which states the death to have been caused by means of ravishing an infant, but omits to aver that a mortal wound or bruise

⁶ *Pennsylvania v. Bell*, Addis. 153, 1793; *State v. Conley*, 39 Me. 78, 1854. See Whart. Crim. Ev. §§ 138 *et seq.*; *State v. Luke*, 104 Mo. 563, 1891.

§ 537. The death must appear to have been within a year and a day of the wound.¹ The date of the death, therefore, as well as that of the stroke, must distinctly appear,² and for this purpose “immediately” is insufficient.³ Variance as to either, however, with the qualification just announced, is not fatal.⁴ The averment that the defendant “killed” the deceased on a certain day implies that the latter died on such

Must have been with-
in a year
and a day.

The causal relation between wound and death must be stated. *Waybright v. State*, 56 Ind. 122, 1877. An indictment which charges that the prisoner did administer the poison to the deceased, who took and swallowed it, by means of which taking and swallowing the deceased became mortally sick, and “of the said mortal sickness died,” is good, without also stating that the deceased died of the poisoning. *R. v. Sandys*, 1 C. & M. 345, 1841; 2 Mood. C. C. 227. It is enough to allege that the deceased died of the wound. It is not necessary to aver that he died of the stroke. *State v. Conley*, 39 Me. 78, 1854. Where an indictment charged a prisoner with having inflicted upon the deceased a mortal wound, of which mortal wound he did, on the 27th day of June, languish, and languishing did live until the 28th day of June, “on which said 28th day of June, in the year aforesaid, the said Richard O’Leary, in the county aforesaid, died,” it was held, that it sufficiently charged that the deceased then died of the mortal wound inflicted by the prisoner. *Lutz v. Com.*, 29 Pa. 441, 1857. But death after the “languishing” must be averred. *State v. Sides*, 64 Mo. 383, 1877.

An indictment stated that the mortal wound was inflicted on the 7th of November, 1845, and that the deceased languished on until the 8th of November, in the year aforesaid, and then said: “On which 8th day of May, in the year aforesaid, the deceased died.”

To this indictment the prisoner pleaded not guilty. It was held, that the insertion of May for November was a mistake, apparent on the face of the indictment, and would not exclude proof of the death subsequent to the 7th of November, or be cause for arresting the judgment. *Com. v. Ailstock*, 3 Gratt. 650, 1846. For a similar error, see *State v. Eaton*, 75 Mo. 586, 1882.

The killing of deceased by defendant must distinctly appear. *State v. Edwards*, 70 Mo. 480, 1879.

An indictment against two defendants, which states the death to be the result of two different injuries inflicted by each of the defendants separately, on different days, is bad. *R. v. Devitt*, 8 C. & P. 639, 1838.

¹ See *supra*, § 312; *State v. Orrell*, 1 Dev. 139, 1826; *People v. Aro*, 6 Cal. 207, 1856; *People v. Kelley*, *Ibid.* 210, 1856; *Edmonson v. State*, 41 Tex. 496, 1874; *Harding v. State*, 4 Tex. App. 355, 1878; *Brassfield v. State*, 55 Ark. 556, 1892.

² *State v. Conley*, 39 Me. 78, 1854; *State v. Huff*, 11 Nev. 17, 1876; *Lester v. State*, 9 Mo. 666, 1846; *State v. Mayfield*, 66 *Ibid.* 125, 1877; and cases cited to § 536. See *Whart. Cr. Pl. & Pr.* § 131. See, however, *State v. Hobbs*, 33 La. An. 226, 1881; *Kansas v. Harp*, 31 Kans. 496, 1884.

³ *Whart. Cr. Pl. & Pr.* § 132; *State v. Testerman*, 68 Mo. 408, 1878.

⁴ *Whart. Cr. Pl. & Pr.* § 139; *State v. Haney*, 67 N. C. 467, 1872.

day,¹ and when such date is distinctly averred, it is then enough to say that the deceased "then and there" died.² It has been held, however, that this averment is insufficient when it appears that the blow and the death were at different places.³

"Instantly died" does not sufficiently aver time of death,⁴ though it is otherwise when "then and there" are added.⁵

The general effect of the averment "then and there" is considered in another work.⁶

§ 538. The indictment at common law should also aver, in accordance with the facts, the place of the death of the deceased.⁷

Place must be averred.

Where the stroke was at one time and place, and the death at another time and place, the facts should be specially averred, specifying the day on which the party died, as well as that on which he was stricken; for until he died it was no murder.⁸

§ 539. Where the bill of indictment is found by the grand jury a true bill for manslaughter, and *ignoramus* as to murder, it is stated to have been the English course to strike out, in the presence of the grand jury, the words "maliciously" and "of malice aforethought," and "murder," and to leave only so much as makes the bill to be one for manslaughter;⁹ and this appears to be the practice at the present time upon some of the circuits; but the usual course in this country is, unless the emergency of the case prevents it, to present a new bill to the grand jury for manslaughter. And in England a learned judge went so far as to say that this should be done where the grand jury have returned manslaughter upon a bill for murder, saying, he thought it the better course to prefer a new bill, although the usual course on the circuit

Omission of terms "malice aforethought" and "murder" reduces the case to manslaughter.

¹ State v. Ryan, 13 Minn. 371, 1868. ⁷ 2 Hawk. b. 2, c. 25, s. 36; 1 Ch.

² State v. Haney, 67 N. C. 467, 1872; C. L. 178; 3 Ibid. 732; Com. v. Linton, Com. v. Robertson, (Mass.) 38 N. E. 2 Va. Cas. 205, 1820; State v. Orrell, 1 Rep. 25, 1894. Dev. 139, 1826; State v. Coleman, 17

³ Chapman v. People, 39 Mich. 357, 1878. S. C. 473, 1882. See this point discussed, *supra*, § 292; People v. Cox,

⁴ R. v. Brownlow, 11 A. & E. 119, 1839; State v. Lakey, 65 Mo. 217, 1877. 9 Cal. 32, 1858; Riggs v. State, 26 Miss. 51, 1853; Brassfield v. State, 55

⁵ State v. Steeley, 65 Mo. 218, 1877. Ark. 556, 1892; Ball v. U. S., 11 Sup. See Com. v. Ailstock, 3 Gratt. 650, Ct. Rep. 761, 1891.

1846; State v. Ward, 9 Mo. App. 587; ⁸ 1 East P. C. c. 5, s. 117, p. 347. s. c. 74 Mo. 253, 1881. See *supra*, § 292.

⁶ Whart. Cr. Pl. & Pr. § 132. *Supra*, § 529. ⁹ 2 Hale, 162.

had been to alter the bill for murder, on the finding of the grand jury.¹ The omission of the terms "malice aforethought" and "murder" makes the indictment incapable at common law of sustaining a conviction of murder.² If there are proper averments of killing, however, there can be a conviction of manslaughter under such an indictment.

§ 540. The joinder of counts, being common to indictments generally, is discussed at large in another work.³ It is sufficient here to repeat that counts varying the statements of the mode of death are constantly sustained;⁴ and that an indictment for murder charging in one count A. as principal and B. as accessory before the fact, and in another count B. as principal and A. as accessory before the fact, charges but one offence, and such counts are not repugnant.⁵

Varying
counts
may be
joined.

XV. VERDICT.

§ 541. Where the jury convicts of manslaughter (or of murder in the second degree), the verdict, in order to be technically correct, should be, "Not guilty of murder, but guilty of manslaughter (or of murder in the second degree)." In Maryland this exactness is held to be essential.⁶ But in most jurisdictions such nicety is not required.⁷ And where the indictment includes murder, and is itself

Conviction
or acquit-
tal of man-
slaughter
acquits of
murder.

¹ Turner's Case, 1 Lew. 176, 1830.

² R. v. Nicholson, 1 East P. C. 346, 1798; Com. v. Chapman, 11 Cush. N. J. L. 495, 1878; State v. Baker, 68 422, 1853; Com. v. Gibson, 2 Va. Cas. N. C. 276, 1869; Dill v. State, 1 Tex. 70, 1817; Maile v. Com., 9 Leigh, 661, 1839. See, for other cases, *supra*, § 517. Under Wisconsin statute, see Chase v. State, 50 Wis. 510, 1880.

If a person be indicted as accessory after the fact to a murder, he may be convicted as accessory after the fact to manslaughter, if the offence of the principal turns out to be manslaughter. R. v. Greenacre, 8 C. & P. 35, 1837. Either assisting the party to

conceal the death, or in any way enabling him to evade the pursuit of justice, will render a party, who knows the offence to have been committed, an accessory after the fact. Ibid.

³ Whart. Cr. Pl. & Pr. § 297.

⁴ *Supra*, § 525; Com. v. Webster, 5

Cush. 295, 1850; Hunter v. State, 40 App. 278, 1876. That this right is not affected by the division of murder into degrees, see Cox v. People, 19 Hun, 430, 1879; 80 N. Y. 500.

⁵ Whart. Cr. Pl. & Pr. §§ 290-97; State v. Hamlin, 47 Conn. 95, 1879; Hawley v. Com., 75 Va. 847, 1880; People v. Valencia, 43 Cal. 552, 1872.

⁶ State v. Flannigan, 6 Md. 166, 1854; Weighurst v. State, 7 Ibid. 445, 1854.

⁷ See Whart. Cr. Pl. & Pr. §§ 465, 757 *et seq.* See Pace v. State, (Tex.) 20 S. W. Rep. 762, 1892, where "guilty" instead of "guilty" was used.

valid, either a conviction or acquittal of manslaughter, as has been seen, is an acquittal of murder. The same effect attends a conviction or acquittal of murder in the second degree, on an indictment for murder at common law.¹

§ 542. On an indictment for murder the jury may find a verdict of manslaughter or of murder in the second degree,² but not in some jurisdictions, of the misdemeanor of involuntary manslaughter.³ And on an indictment for murder in the second degree there can be a conviction of manslaughter.⁴

Jury may
convict of
minor de-
gree.

Joint defendants may be convicted of different degrees.⁵

¹ See, fully, cases cited in Whart. Cr. Pl. & Pr. §§ 465, 742; Com. v. Herty, 109 Mass. 348, 1872; People v. Knapp, 26 Mich. 112, 1872; State v. Lessing, 16 Minn. 75, 1870; DeArman v. State, 71 Ala. 351, 1882; Sylvester v. State, 72 Ibid. 201, 1882; but see State v. McCord, 8 Kans. 232, 1871; Green v. State, 38 Ark. 221, 1881. In Missouri a statute has been passed modifying this rule; but this statute is unconstitutional as to all offences committed before its passage. Kring v. Missouri, 107 U. S. 221, 1882, cited *supra*, § 30.

Dak. Ter. 125, 1879; and see other cases cited Whart. Cr. Ev. § 145, and of manslaughter in the second degree, Brown v. State, 31 Fla. 207, 1893. As sustaining murder in the second degree, see State v. Dowd, 19 Conn. 388, 1849; Johnson v. State, 17 Ala. 618, 1850; State v. Smith, 53 Mo. 139, 1873; McPherson v. State, 29 Ark. 225, 1873. See other cases cited Whart Cr. Ev. § 144.

² 2 Hale, 246; Fost. 329; State v. Dearborn, 54 Me. 442, 1867; State v. Burt, 25 Vt. 373, 1853; McNevins v. People, 61 Barb. 307, 1872; Keefe v. People, 40 N. Y. 348, 1869; State v. Flannigan, 6 Md. 167, 1854; Davis v. State, 39 Ibid. 355, 1873; Com. v. Livingston, 14 Gratt. 592, 1857; Wroe v. State, 20 Ohio St. 460, 1870; Barnett v. People, 54 Ill. 325, 1870; Gordon v. State, 3 Iowa, 410, 1856; State v. Lessing, 16 Minn. 75, 1870; State v. Martin, 30 Wis. 216, 1872; Jordan v. State, 22 Ga. 545, 1857; Bell v. State, 48 Ala. 685, 1871; Hurt v. State, 25 Miss. 378, 1853; Watson v. State, 5 Mo. 497, 1838; State v. Sloan, 47 Ibid. 604, 1871; State v. McCord, 8 Kans. 232, 1871; People v. Gilmore, 4 Cal. 376, 1854; State v. Bradley, 34 S. C. 136, 1891; Territory v. Gay, 2

³ Com. v. Gable, 7 S. & R. 423, 1821; Walters v. Com., 44 Pa. 135, 1862; but see Whart. Cr. Pl. & Pr. § 261; and Hunter v. Com., 79 Pa. 503, 1873; Bruner v. State, 58 Ind. 159, 1877. In Kentucky and Louisiana there can be such a conviction. Buckner v. Com., 14 Bush, 601, 1879; State v. Griffin, 34 La. An. 37, 1882.

Under murder, in Kentucky, defendant cannot be convicted of fully striking. Conner v. Com., 13 Bush, 714, 1878.

⁴ State v. Smith, 53 Mo. 139, 1873.

⁵ Whart. Cr. Pl. & Pr. § 755; Mickey v. Com., 9 Bush, 593, 1873. *Supra*, § 236. See Brannigan v. People, 3 Utah, 488, 1869, where on an indictment of several persons verdict was "prisoner guilty." See Bowman v. State, (Tex.) 20 S. W. Rep. 558, 1892, for acquittal of accomplice. State v. Pratt, 88 N. C. 639, 1883; State v. Whitson, 111 N. C. 695, 1892. See State v. Whitt, 113 N. C. 716, 1893.

§ 543. In New York, on an indictment for murder at common law, a verdict of guilty, without specifying the degree, is a verdict of guilty of murder in the first degree.¹ But as a general rule, established in many States by statute (*e. g.*, Maine, Massachusetts, Pennsylvania, Ohio, and California), in others, as a common law principle, the degree must be designated.² In Missouri it is only necessary, by statute, to specify

Verdict
must
specify
degree.

¹ *Kennedy v. People*, 39 N. Y. 245, see *McGuffie v. State*, 17 Ga. 497, 1868; *S. P., Territory v. Romine*, 2 1855; *Washington v. State*, 36 *Ibid.* New Mexico, 114, 1881; *Territory v.* 222, 1867. As to Florida, see *Nelson Yarberry*, *Ibid.* 391, 1883; *People v.* *v State*, 32 Fla. 244, 1893; *Grant v. Cassiano*, 30 Hun, (N. Y.) 388, State, 33 Fla. 291, 1894. 1883.

² *State v. Verrill*, 54 Me. 408, 1867; *State v. Cleveland*, 58 Me. 564, 1870; *Com. v. Herty*, 109 Mass. 348, 1872; *State v. Dowd*, 19 Conn. 388, 1849; *Ford v. State*, 12 Md. 514, 1858; *State v. Oliver*, 2 Houst 585, 1855; *State v. Town*, *Wright*, 75; *Dick v. State*, 3 Ohio St. 89, 1853; *Parks v. State*, *Ibid.* 101, 1853 (in Ohio, however, the indictment must be special under statute, as there are no common law crimes); *Fouts v. State*, 8 *Ibid.* 98, 1857; *Hagan v. State*, 10 *Ibid.* 459, 1859; *State v. Moran*, 7 Clarke, (Iowa) 236, 1858; *State v. Redman*, 17 *Ibid.* 329, 1864 (see, however, *State v. Weese*, 53 *Ibid.* 92, 1880); *Tully v. People*, 6 Mich. 273, 1859; *Hogan v. State*, 30 Wis. 428, 1872; *State v. Reddick*, 7 Kans. 143, 1871; *State v. Huber*, 8 *Ibid.* 447, 1871; *Johnson v. State*, 17 Ala. 618, 1850; *Hall v. State*, 40 *Ibid.* 698, 1867; *Robertson v. State*, 42 *Ibid.* 509, 1868 (by statute); *Levison v. State*, 54 *Ibid.* 520, 1875 (a case of poisoning); *Storey v. State*, 71 *Ibid.* 331, 1882; *Kendall v. State*, 65 *Ibid.* 492, 1880; *McGee v. State*, 8 Mo. 495, 1844; *State v. Upton*, 20 *Ibid.* 397, 1855; *People v. Campbell*, 40 Cal. 129, 1870; *Isbell v. State*, 31 Tex. 138, 1868; *Dubose v. State*, 13 Tex. App. 418, 1883; *State v. Rover*, 10 Nev. 388, 1875. As to Georgia,

In Massachusetts, in a celebrated case which has been the subject of much discussion, in 1865-6, it was held that a plea of "guilty of murder in the first degree," to the ordinary indictment for murder, is good without specifying the facts which make murder in the first degree, and that on this a capital sentence could be imposed. *Green v. Com.*, 12 Allen, 155, 1866.

In Missouri only the minor degrees need be specially found. *State v. Brannon*, 45 Mo. 329, 1870. But see *State v. Jackson*, 99 Mo. 60, 1889. See *State v. Meyers*, 99 Mo. 107, 1889.

See, further, as to verdicts, *Kannon v. State*, 10 Lea, 386, 1882; *State v. Potter*, 16 Kans. 80, 1876; *State v. Bowen*, *Ibid.* 475, 1876; *Ford v. State*, 34 Ark. 649, 1879; *Wooldridge v. State*, 13 Tex. App. 443, 1883; *Walker v. State*, *Ibid.* 618, 1883; *Johnson v. State*, 30 Tex. App. 419, 1891.

In Pennsylvania, on an indictment for murder by poisoning, a verdict of guilty in manner and form as indicted is a verdict of guilty of murder in the first degree. *Com. v. Earle*, 1 Whart. 525, 1836. But if the indictment is one which fits equally to murder in the second degree, then a general verdict of guilty carries only the second degree. *Johnson v. Com.*, 24 Pa. 386, 1855. But now the verdict,

the degree when a minor offence is found.¹ In Georgia, a verdict of "guilty of manslaughter" is regarded as a verdict of guilty of voluntary manslaughter, the highest grade of that offence by statute.²

In some States, where the indictment is specifically for murder in the first degree, then a verdict of guilty "in manner and form as indicted," is for the first degree.³

As we have seen,⁴ a common law indictment for murder will sustain a verdict of murder in the first degree.

§ 544. At common law—for the reason that in such case the defendant would be convicted of a misdemeanor on a trial, in which he, from the form of the indictment, would be deprived of privileges to which on indictments for mere misdemeanors he is entitled, there can be no conviction for an assault under an indictment for murder.⁵ In what respect this rule has been varied by statute or otherwise has been discussed elsewhere.⁶

by statute, must state the degree. *Lane v. Com.*, 59 *Ibid.* 371, 1868.

In Indiana, where there are no common law crimes, it is held that the indictment must specially designate the grade under the statute; and hence a general verdict of guilty under an indictment for the first degree convicts of the first degree. *Kennedy v. State*, 6 *Ind.* 485, 1855. See *Fahnestock v. State*, 23 *Ibid.* 231, 1864; *Snyder v. State*, 59 *Ibid.* 105, 1877.

In *State v. Buzzell*, 58 *N. H.* 257, 1878, which was an indictment against an alleged accessory before the fact to a murder, the jury returned a verdict of guilty, without finding whether the defendant was accessory to murder in the first or second degree. The principal had been convicted of murder in the first degree, which appeared by the record. It was ruled that the verdict was equivalent to guilty of being accessory to murder in the first degree.

In *Garvey v. People*, 6 *Colo.* 559, 1883, it was held that a plea of guilty goes to the lowest degree.

Verdict of "guilty in the mercy of

the court;" *State v. Murrell*, 33 *S. C.* 83, 1890. See *Hays v. Com.*, (*Ky.*) 14 *S. W. Rep.* 833, 1890; *State v. West*, (*La.*) 13 *So. Rep.* 173, 1893.

In some States not only the degree but the punishment must be specified. *Infra*, § 547.

¹ *State v. Brannon*, 45 *Mo.* 329, 1870. That in a verdict for "manslaughter in the second degree," the italicized words can be discharged as surplusage, see *Traube v. State*, 56 *Miss.* 153, 1878.

² *Welch v. State*, 50 *Ga.* 128, 1873.

³ *State v. Hooker*, 17 *Vt.* 658, 1845; *Com. v. Earl*, 1 *Whart.* 525, 1821; *White v. Com.*, 6 *Binn.* 179, 1813, but see *Lane v. Com.*, 59 *Pa.* 371, 1868; *State v. Weese*, 53 *Iowa*, 92, 1880; *State v. Jennings*, 24 *Kans.* 642, 1881. See *Evans v. State*, 58 *Ark.* 47, 1893.

⁴ *Supra*, § 393.

⁵ See *Whart. Cr. Pl. & Pr.* (9th ed.) § 249.

⁶ *Whart. Cr. Pl. & Pr.* § 742; *Whart. Crim. Ev.* § 132.

That such convictions can now be had both in England and this country, see *R. v. Birch*, 7 *Den. C. C.* 185;

Excusable
homicide
acquits.

§ 545. Where the jury find the homicide is excusable, the practice in this country is not to find so specially, but to acquit.¹

Accessory
to second
degree.

§ 546. A person may be legally convicted as accessory before the fact of murder in the second degree.²

Designa-
tion of
punish-
ment.

§ 547. In several States, it is incumbent on the jury to designate the punishment to be inflicted. In such case the statute must be followed in the verdict.³

Com. v. Drum, 19 Pick. 479, 1837; As to accessory to manslaughter, see People v. McDonnell, 92 N. Y. 657, *supra*, § 232.

1883; Scott v. State, 60 Miss. 268, ¹ Walston v. State, 54 Ga. § 242, 1882; State v. O'Kane, 23 Kans. 244, 1875; Green v. State, 55 Miss. 454, 1880; Peterson v. State, 12 Tex. App. 1877. See Whart. Cr. Pl. & Pr. §§ 650, 1882. The distinctions are more 736 *et seq.*

fully given in Whart. Cr. Pl. & Pr. See, as to specification of punishment, Buster v. State, 42 Tex. 315, (9th ed.) § 249. 1875; People v. Welch, 49 Cal. 174,

¹ See *supra*, § 308.

² Jones v. State, 13 Tex. 168, 1854. 1874.

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

Premeditation and Malice Must Be Shown.

The court charged the jury as follows: "Malice is implied from any deliberate, cool, injurious, and unlawful act against another which shows an abandoned and malignant heart, and if one person without apparent provocation, wilfully and intentionally and unlawfully shoots another with a deadly weapon, although he had no previous malice or ill-will against the party slain, yet he is presumed to have had such malice at the moment of the shooting; and unless the evidence shows that he was acting from some innocent or proper motive, or that he was justified or excusable, such killing would be murder." Held error. Adams v. State, 28 Fla. 511, 1891.

Failure to Completely Prove an Alibi is No Evidence of Guilt.

The court charged: "When proof of an alibi is attempted, and proven to the satisfaction of the jury, it is conclusive of the case. When it is attempted, and the proof to sustain it is not satisfactory, the failure to prove it satisfactorily is a circumstance unfavorable to the defendant; but it is no more so than an attempt to clear himself by any other false or fabricated testimony." Held error. Ibid.

Error to Assume Defendant Struck the Fatal Blow if the Fact is Disputed.

Where there is no direct proof that defendant inflicted the wounds which caused death, it was held error to charge that "in considering whether the

killing was justifiable on the ground the killing was in self-defence, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and immediately prior thereto, and the degree of force used by the prisoner in making what is claimed to be his self-defence, as bearing upon the question whether the blows, cuts, and wounds given the deceased were actually given in self-defence, or whether they were given in carrying out an unlawful purpose; and if the jury believe from the evidence that the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact in determining whether the killing was in self-defence or not." *Cannon v. People*, 141 Ill. 270, 1892.

Right of Self-defence with a Deadly Weapon.

Where the only evidence as to the deceased assaulting defendant is that he assaulted him with a deadly weapon, an instruction was given at the request of the people "that a person has no right to use any more force in self-defence than a person of ordinary prudence would deem necessary under the circumstances; if he is struck with the naked hand and there is no reason to believe there is a design to do him great bodily harm, he will not be justified in returning blows with a dangerous weapon; and if the jury believe that Martin Ryan did strike or slap the defendant with his naked hand, without any design to do him great bodily harm, and they further find from the evidence beyond a reasonable doubt that the defendant then assaulted the said Martin Ryan with a deadly weapon, inflicting serious and fatal wounds upon his person, thereby causing his death, then the jury should find the defendant guilty." Held error. *Cannon v. People*, Ibid.

Accidental Shooting—Binding Charge.

Where the evidence indicated an accidental shooting, it was held error to charge that the jury could render but one verdict, guilty generally, or guilty with a recommendation that the defendant be imprisoned in the penitentiary for life, or not guilty. *Burton v. State*, 92 Ga. 449, 1893.

State Must Prove Defendant Committed First Assault.

The defendant requested the court to charge that when it is uncertain who committed the first assault, then it is the duty of the State to prove beyond a reasonable doubt that it was the defendant. Refused. Held error. *State v. Workman*, 39 S. C. 151, 1892.

Definition of Murder Must Be Explicit.

An instruction that "murder in the second degree embraces all cases of murder at common law in which there was no specific intent to kill, but in which the law presumes an intent to kill, and which are not made manslaughter or murder in the first degree by statute," is too abstract for a jury. *State v. Mitchell*, 98 Mo. 657, 1889.

Guilt Must Be Shown Beyond a Reasonable Doubt.

It was error for the court to refuse to charge the jury that "if they are not satisfied beyond a reasonable doubt that when defendant threw the brick

he intended to kill deceased, or that the act is one from which death or great bodily harm would ensue, they must acquit defendant of manslaughter in the first degree." *Lewis v. State*, 96 Ala. 6, 1892.

Self-defence Need Not Be Proved by Preponderance of Evidence.

An instruction that if the State should first make out a case of murder or manslaughter beyond a reasonable doubt, it would then be necessary for defendant to prove self-defence by such a preponderance of evidence as would show beyond a reasonable doubt his being guilty, is not only ambiguous, but leads to the belief that more than a preponderance of evidence would be necessary to establish the self-defence. *State v. Summers*, 36 S. C. 479, 1892.

Except in Cases of Conspiracy, the Defendant Must Be Shown to Have Struck the Fatal Blow.

Where there is no evidence that the conflict was brought about in pursuance of any conspiracy, or that there was any premeditated co-operation between the different participators, it is error to instruct that "if defendant voluntarily brought on a difficulty or shooting with deceased, and thereby caused other persons to take part in the unlawful affray in which deceased was killed, defendant is guilty of murder, although he may not have fired the fatal shot." *Brabston v. State*, 68 Miss. 208, 1890.

Technical Words Not to Be Used Without Explanation.

Where the Code of Mississippi, § 2878, provides that a killing is justifiable when committed in lawful defence of any other human being, where there are reasonable grounds to apprehend a design to commit a felony, it was held error to instruct the jury that in order to acquit the defendant it must appear that the homicide "was necessary to save the life of L., feloniously attacked by deceased without provocation," as it fails to define what constitutes a felonious attack by deceased. *Brabston v. State*, *supra*.

Defendant requested the court to charge that "if the jury believe from the evidence that deceased was making a deadly assault on L., and that defendant had reasonable ground to apprehend that deceased designed to kill L., or to do him great personal injury, and that there was imminent danger of such design being accomplished, the defendant had the right to kill deceased in defence of L." Refused. Error. *Ibid*.

The court refused to charge that "if the jury find that the thing the defendant (the owner of the premises) did in the first instance was to speak to deceased in a peaceable, quiet manner, to warn him not to trespass on his premises, then the defendant was not the aggressor." Held error. *Gibson v. State*, 91 Ala. 64, 1890.

Self-defence. Right Qualified to too Great an Extent.

The following charge was held objectionable as being ambiguous and as giving undue prominence to the necessity for deliberation: "If the defendant, being without fault, believed himself in imminent danger of great bodily

harm, and could think of no less dangerous means of preventing the same than the use of the weapon employed, he would be justified in making such use of it as then appeared necessary." This was followed by a statement that they were to be very careful on this point, that deceased's right to life was as sacred as defendant's right of self-defence. *Fields v. State*, 134 Ind. 46, 1892.

Self-defence. Proper Charge Refused.

It was held error to refuse an instruction that "if the jury believe from the evidence that neither of defendants brought on, provoked, or encouraged the difficulty, but were talking with deceased in a quiet, orderly, and peaceable manner, and that deceased threatened to shoot defendant, B., and at the same time placed his hand in his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw a weapon and shoot, and drew it in a threatening manner, and said he would cut his throat, and jumped at B. and cut and disabled his left arm, and was putting himself in a position to strike again, and at the moment there was no reasonable mode of escape without increasing defendant's peril, then defendant was authorized to anticipate deceased and shoot first, having the right to act upon the reasonable appearance of things." *Gibson v. State*, 91 Ala. 64, 1890.

Self-defence. That Defendant Provoked Quarrel Does Not Necessarily do away with Right of.

The court instructed the jury that if defendant voluntarily provoked the difficulty which resulted in death of deceased by defendant, "then the jury cannot acquit defendant on ground of self-defence; and this is true, although . . . at the time defendant fired the shot that resulted in the death of deceased, he was pursued by deceased and was hard pressed, and endeavoring to get away from deceased and to abandon the combat." Held error. *State v. Cable*, 117 Mo. 380, 1893.

Self-defence. Right to Eject Trespassers.

Where homicide occurred on defendant's premises, of which deceased and others were unlawfully trying to dispossess him, it was error to fail to instruct on the question of self-defence, that defendant being on the premises was not bound to retreat, but had the right to use such force as was reasonable and necessary to repel a forcible entry thereon. *Baker v. Com.*, 93 Ky. 302, 1892.

So, also, as to defence to the person. *Crane v. Com.*, (Ky.) 13 S. W. Rep. 1079, 1890.

In *Moody v State*, 30 Tex. App. 422, 1891, it was held error for the court to instruct the jury that the penalty may be either fine or imprisonment, where the statute provides that there may be "both such fine and imprisonment." Also error for the court to fail to instruct the jury as to malice aforethought, and this is not cured by definitions of express and implied malice. *Ibid.*

CHAPTER II.

RAPE.

DEFINITION.

Intent to use force necessary,
§ 550.

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Under fourteen, boy presumed
to be incapable of offence,
§ 551.

Impotency a defence, § 552.

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second degree, § 553 *a*.

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Penetration must be proved,
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And of acquiescence through
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She may be corroborated by her
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Two defendants may be joined
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Rape may be joined with assault,
§ 570.

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§ 571.

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§ 572.

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against her will," are essential,
§ 573.

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§ 574.

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minor offence, § 575.

VI. ASSAULT WITH INTENT TO RAVISH.

Assault may be sustained when
rape is not consummated,
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VII. CARNAL KNOWLEDGE OF INFANTS.

This indictable by statute,
§ 578.

POINTS FOR DEFENCE IMPROPERLY
REFUSED, AND ERRONEOUS CHARGES. (See end
of chapter.)

DEFINITION.

§ 550. RAPE is the act of a man having unlawful carnal knowledge of a woman without her conscious and voluntary permission.¹ How far, if such permission be given, the fact that it was obtained by fraud or through the woman's ignorance affects the case, is hereafter discussed.² "Forcibly," is frequently introduced as essential to the offence;³ but it is not ^{Intent to use force necessary.} (except so far as force is an ordinary incident of the act of coition) requisite in those cases in which acquiescence is caused by fraud or stupefaction.⁴ But "forcibly" must be alleged in the indictment; though in the cases just referred to the allegation is satisfied by mere proof of penetration.⁵ The intent to use force, however, in case fraud or stupefaction should fail, is essential to the offence.⁶

I. DEFENDANT'S CAPACITY TO COMMIT OFFENCE.

§ 551. At common law a boy under fourteen is irrebuttably presumed to be incapable of committing a rape,⁷ though in several States in this country this presumption is held to be rebuttable.⁸ Whether a boy under fourteen is indictable at common law for an assault with intent to ravish, has been disputed. The affirmative has been maintained ^{Under fourteen, boy presumed to be incapable of offence.}

¹ See Steph. Dig. Crim. Law, c. v. State, 50 Ga. 79, 1873; McNair v. xxix.; Walton v. State, 29 Tex. App. State, 58 Ala. 453, 1875; Dawson v. 168, 1890.

² *Infra*, § 559.

³ 1 East P. C. 434; 4 Bl. Com. 210; 22 Wis. 580, 1868; Stephens v. State, 1 Russ. on Cr. (9th Am. ed.) 904; 107 Ind. 185, 1886; White v. State, Bradley v. State, 32 Ark. 704, 1878. 136 Ind. 308, 1894. For other cases,

⁴ See *infra*, § 563; Pomeroy v. State, see *infra*, § 563. 94 Ind. 96, 1888.

⁵ *Infra*, § 573. See Com. v. Fogerty, v. Eldershaw, 3 C. & P. 396, 1828; R. 8 Gray, 489, 1857; Jones v. State, 10 v. Groombridge, 7 Ibid. 582, 1836; R. Tex. App. 552, 1881. v. Philips, 8 Ibid. 736; R. v. Jordan,

⁶ *Infra*, § 563; R. v. Lloyd, 7 C. & 9 Ibid. 118, 1839; R. v. Brimilow, P. 318, 1836; R. v. Stanton, 1 C. & K. Ibid. 366, 1840; State v. Sam, Wins- 415, 1844; R. v. Case, 1 Den. C. C. ton, (N. C.) 300, 1864; State v. Pugh, 580, 1850; 4 Cox C. C. 220; R. v. 7 Jones, (N. C.) 61, 1859; Stephen v. Wright, 4 F. & F. 967, 1866; Com. v. State, 11 Ga. 225, 1852; McKinny v. Merrill, 14 Gray, 415, 1860; Smith v. State, 29 Fla. 565, 1892. See *supra*, State, 12 Ohio St. 466, 1861; State v. § 69.

Hagerman, 47 Iowa, 151, 1877; State ⁸ People v. Randolph, 2 Parker C. v. Erickson, 45 Wis. 86, 1878; Taylor R. 174, 1855; People v. Croucher, 2

in Massachusetts;¹ and in other States it has been held that while there is a presumption of incapacity, this presumption may be overcome by counter proof.² But the prevalent opinion is that in such cases the presumption of incapacity is irrebuttable.³

But whatever may be the limits of the defendant's capacity as a direct agent, it is clear that when concerned with others he may, when otherwise penally responsible, be convicted as principal in the second degree;⁴ or of a simple assault, even on evidence of rape.⁵

§ 552. Impotency is a sufficient defence to an indictment for the consummated offence, though not for an assault with intent.⁶ The subject of impotency is fully considered in another work.⁷

§ 553. Though a husband cannot be convicted of the offence,⁸ he may be tried as the accessory of another therein, and the wife is a competent witness against both to prove the violence.⁹

Wheeler C. C. 42, 1800; Williams v. ilow, Ibid. 366, 1840; State v. Sam, State, 14 Ohio, 222, 1846; Smith v. Winston, (N. C.) 300, 1864; State v. State, 12 Ohio St. 466, 1861; Hiltabiddle v. State, 35 Ibid. 52, 1878; v. Handy, 4 Harring. 566, 1845; and Wagoner v. State, 5 Lea, 352, 1882. see *supra*, § 69. Whether absolute

The section in the Code of Criminal legal incapacity bars an indictment Procedure (74 O. L. 349, § 31), dispensing with proof of emission, has no relation to capacity; and hence it does not so enlarge the meaning of the statutory provision in relation to rape (74 O. L. 245, § 9) as to include persons not theretofore amenable to that provision. If it appear, on the trial of one charged with rape, that he is a boy under fourteen years of age, the burden is on the State to prove capacity to commit the crime. Hiltabiddle v. State, 35 Ohio St. 52, 1878. See criticism in 10 Weekly Bulletin, 222.

That the defendant's good character may be considered by the jury, see State v. Witten, 100 Mo. 525, 1890; Lincecum v. State, 29 Tex. App. 328, 1890.

¹ 1 Russ. on Cr. 921 *et seq.* (9th Am. ed.).

² R. v. Eldershaw, *supra*; State v. Pugh, *supra*; R. v. Phillips, 8 C. & P. 736, 1839.

³ See *supra*, § 184; Nugent v. State, 18 Ala. 521, 1850.

⁴ 3 Whart. & St. Med. Jur. §§ 201 *et seq.*

⁵ See on this point remarks of Sir J. Hannen, in S. v. A., 39 L. T. (N. S.) 128, 1878.

⁶ 1 Hale, 629; Lord Audley's Case, 12 Mod. 340, 454, 1700; 1 St. Trials, 387; 1 Stra. 633.

¹ Com. v. Green, 2 Pick. 380, 1824.

² People v. Randolph, 2 Park. C. R. 174, 1855.

³ R. v. Eldershaw, 3 C. & P. 396; R. v. Groombridge, 7 Ibid. 582, 1836; R. v. Philips, 8 Ibid. 736, 1839; R. v. Jordan, 9 Ibid. 118, 1839; R. v. Brim-

§ 553 *a*. All concerned as assistants may be convicted as principals in the second degree; though only the actual perpetrator can be charged as principal in the first degree.¹ A woman assisting may be charged as principal in the second degree.²

All assistants are principals in second degree.

II. IN WHAT CARNAL KNOWLEDGE CONSISTS.

§ 554. "A very considerable doubt," remarks Mr. East, "having arisen as to what shall be considered sufficient evidence of the actual commission of this offence, it is necessary to enter into an inquiry which would otherwise be offensive to decency. Considering the nature of the crime, that it is a brutal and violent attack upon the honor and chastity of the weaker sex, it seems more natural and consonant to those sentiments of laudable indignation which induced our ancient lawgivers to rank this offence among felonies, if all further inquiry were unnecessary after satisfactory proof of the violence having been perpetrated by actual penetration of the unhappy sufferer's body. The quick sense of honor, the pride of virtue, which nature, to render the sex amiable, hath implanted in the female heart, as Mr. Justice Foster has expressed himself, is already violated past redemption, and the injurious consequences to society are in every respect complete. Upon what principle and for what rational purpose any further investigation came to be supposed necessary, the books which record the dicta to that effect do not furnish a trace." The doubts, however, that existed in England have been put to rest by the 9 Geo. IV. c. 31, making the least penetration enough. In this country the proof of emission seems rarely to have been required; and, aside from statute, the prevalent opinion here is that as the essence of the crime is the violence done to the person and feelings of the woman, which is completed by penetration without emission, it will be sufficient to prove penetration no matter how slight.³ In Ohio proof of emission was once but is no longer re-

Penetration must be proved, but not emission.

¹ *Infra*, § 569; *Kessler v. Com.*, 12 the girl to aid and abet a male person Bush, 18, 1876. See *State v. Com-* in committing, or to incite him to stock, 46 Iowa, 265, 1877. commit, the misdemeanor of having

² *State v. Jones*, 83 N. C. 605, 1880. unlawful carnal knowledge of her. But under Section 5 of the Criminal Queen *v. Tyrrell*, [1894] 1 Q. B. 710.

Law Amendment Act (1885), forbid-³ See *State v. Shields*, 45 Conn. 256, ding illicit intercourse with girls under 1877; *Powers v. Sullivan*, Addis. 143, sixteen, it is not a criminal offence for 1793; *Comstock v. State*, 14 Nebr.

quired.¹ In New York, by statute, penetration alone is made sufficient to support conviction, without emission.²

§ 555. But while the slightest penetration is sufficient, there must be proof beyond reasonable doubt of *some*,³ though the proof of this may be inferred from circumstances aside from the statement of the party injured.⁴ It must be shown, to adopt the phraseology of Tin-

205, 1883. See *State v. Le Blanc*, 1 Cr. 371, 1892; *Rodgers v. State*, 30 Treadw. 354; 3 Brev. 339, 1813; *Taylor v. State*, 111 Ind. 279, 1887; *State v. Depoister*, 21 Nev. 107, 1891; *Lujano v. State*, 32 Tex. Cr. 414, 1893. 4 See *R. v. Lines*, 1 C. & K. 393, 1844;

¹ *Williams v. State*, 14 Ohio, 222, 1846; *Blackburn v. State*, 22 Ohio St. 102, 1871, in which latter case the court questioned the former ruling. See *State v. Hargrave*, 65 N. C. 466, 1871, holding this to be necessary, which proof is now dispensed with both in Ohio and North Carolina by statute. *Supra*, § 551.

When, on an indictment for fornication and bastardy, the witness testified, "He forced me; he worked himself under me, and in that way forced me; I did not give my consent;" upon a demurrer to this evidence, it was held that it was not such as would merge the offence charged in the crime of rape, but that the defendant might be legally convicted of fornication. *Com. v. Parr*, 5 W. & S. 345, 1843.

² *People v. Crowley*, 102 N. Y. 234, 1886; s. c. 23 N. Y. Week. Dig. 24, 1886.

³ *R. v. Russen*, 1 East, P. C. 438; *R. v. Allen*, 9 C. & P. 31, 1839; *R. v. Jordan*, *Ibid.* 118, 1839; *Pennsylvania v. Sullivan*, Addis. 143, 1793; *State v. Le Blanc*, 3 Brev. 339, 1813; 1 Treadw. 354, 1813; *Waller v. State*, 40 Ala. 325, 1867; *Davis v. State*, 43 Tex. 189, 1875; *Thompson v. State*, *Ibid.* 583, 1875; *Ward v. State*, 12 Tex. App. 174, 1882; *Ledbetter v. State*, (Tex.) 26 S. W. Rep. 725, 1894; *White v. Com.*, (Ky.) 28 S. W. Rep. 340, 1894; *Massey v. State*, 31 Tex.

Cr. 371, 1892; *Rodgers v. State*, 30 Tex. App. 510, 1891; *State v. Dalton*, 106 Mo. 463, 1891. See 3 Whart. & St. Med. Jur. §§ 593 *et seq.*

⁴ See *R. v. Lines*, 1 C. & K. 393, 1844; *State v. Hodges*, Phil. Law, (N. C.) 231, 1867, (overruling *State v. Gray*, 8 Jones, 170, 1860); *Brauer v. State*, 25 Wis. 413, 1870; *State v. Tarr*, 28 Iowa, 397, 1869; *Taylor v. State*, 111 Ind. 279, 1887. Medical testimony is admissible both in proof and in rebuttal of penetration. *State v. Watson*, 81 Iowa, 380, 1890. Very questionable is the ruling on this point in the remarkable case of *Com. v. Beale*, Phila. Q. S. Nov. 1854, reported more fully in 3 Whart. & St. Med. Jur. §§ 245, 596, 612, and also in the 8th edition of the present work, § 555.

Mere proof by the prosecutrix of resistance and then of unconsciousness on the part of the prosecutrix (there being no other evidence) is not enough to sustain a conviction. *Wesley v. State*, 65 Ga. 731, 1880.

In Connecticut a conviction has been sustained on the uncorroborated testimony as to penetration of a young child. *State v. Lattin*, 29 Conn. 389, 1860. See *R. v. Rearden*, 4 F. & F. 76, 1864; *People v. Tyler*, 36 Cal. 522, 1869.

It was formerly thought that if the female conceived, this was evidence of consent which negated rape. This notion, however, has long since been exploded. 1 Hale, 631; 1 Hawkins, c. 16, s. 8; *State v. Knapp*, 45 N. H. 148, 1863. On the other hand, in this country, it has been expressly

dal, C. J., and afterward of Williams, J., that the private parts of the male entered at least to some extent in those of the female.¹ At one time it was even thought that there must be proof that the hymen was ruptured,² though this is no longer considered necessary.³ The law may now indeed be considered as settled that while the rupturing of the hymen is not indispensable to a conviction, there must be proof of some degree of entrance of the male organ "within the labia of the pudendum;"⁴ and the practice seems to be, to judge from the cases just cited, not to permit a conviction in those cases in which it is alleged violence was done, without medical proof of the fact, whenever such proof is attainable.⁵ It seems but right, both in order to rectify mistakes and to supply the information necessary to convict, that the prosecutrix should be advised of this at once, so that she can take necessary steps to secure such an examination in due time. If this test be generally insisted upon, there is no danger of any conviction failing because of non-compliance with it; and on the other hand many mistaken prosecutions will be stopped at the outset.⁶

III. IN WHAT WANT OF WILL CONSISTS.

§ 556. The term "against her will" was used in the old statutes convertibly with "without her consent;"⁷ and it may now be received as settled law that rape is proved when carnal intercourse is effected with a woman without her consent, although no positive resistance of the will

"Against her will" is equivalent to "without her consent."

held that an introduction of an averment that the prosecutrix was gotten with child does not vitiate the indictment. *U. S. v. Dickinson*, Hempst. C. C. 1, 1820. This case was tried before the territorial court of Arkansas, in 1820. An extraordinary feature of the case is, that the defendant was sentenced to be castrated. He was pardoned, however, and the sentence consequently was never executed.

¹ *R. v. Allen*, 9 C. & P. 31, 1839; *R. v. Jordan*, *Ibid.* 118, 1839.

² *R. v. Gammon*, 5 C. & P. 321, 1832. See 3 Whart. & St. Med. Jur. §§ 249, 593.

³ *R. v. Hughes*, 9 C. & P. 752, 1841. See *R. v. McRue*, 8 *Ibid.* 641, 1838.

⁴ *R. v. Lines*, 1 C. & K. 393, 1844; *R. v. Jordan*, 9 C. & P. 118, 1839. See 3 Whart. & St. Med. Jur. §§ 249, 593 *et seq.*; *Stephen v. State*, 11 Ga. 225, 1852.

⁵ As to the admissibility of medical testimony in Nevada, see *State v. Depoister*, 21 Nev. 107, 1891; *West v. State*, (Tex.) 21 S. W. Rep. 686, 1893; *Rogers v. State*, 30 Tex. App. 462, 1891.

⁶ See 3 Whart. & St. Med. Jur. §§ 233 *et seq.*, 593 *et seq.*; *infra*, § 565. See *White v. Com.*, (Ky.) 28 S. W. Rep. 340, 1894.

⁷ See *State v. Jackson*, 46 La. An.

can be shown.¹ Such being the law, the cases will be now considered specifically.

§ 557. Consent, however reluctant, if free, negatives rape;² but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity), the consummated act is rape.³ Thus where a father by his

Acquies-
cence
through
fear is not
consent.

547, 1894. That the jury must be satisfied beyond reasonable doubt that there was no consent, see *Com. v. McDonald*, 110 Mass. 405, 1872; *Brown v. People*, 36 Mich. 203, 1878; *State v. Burgdorf*, 53 Mo. 65, 1873; *People v. Brown*, 47 Cal. 447, 1874; *Hollis v. State*, 27 Fla. 387, 1891.

¹ *R. v. Fletcher*, Bell C. C. 63; 8 Cox C. C. 131, 1859; *R. v. Camplin*, *infra*, § 562; *State v. Shields*, 45 Conn. 256, 1877; *Hawkins v. State*, (Ind.) 36 N. E. Rep. 419, 1894; *Harvey v. State*, 58 Ark. 425, 1890; *Maupin v. State*, (Ark.) 14 S. W. Rep. 924, 1890; and see an able exposition of the law to this effect by Judge Gray in *Com. v. Burke*, 105 Mass. 376, 1870, and cases cited *infra*, § 855. See, also, *R. v. Jones*, 4 L. T. (N. S.) 154, 1864; as to robbery, § 855; 1 Hawk. c. 41; and on the general question of consent, *supra*, §§ 141 *et seq.* That the woman subsequently agreed to receive compensation for the injury is no defence. *State v. Hammond*, 77 Mo. 157, 1882.

Kelly, C. B., in 1873, on a crown case reserved, said: "I think that when a child submits to an act of this kind in ignorance, the offence is similar to that perpetrated by a man who has connection with a woman while asleep. If that were not an assault, our law would be very defective. *In such a case, consent is out of the question, for a woman whilst asleep is in such a state that she cannot consent, and the act of connection with her under the circumstances is quite sufficient to constitute an assault. There are many cases*

which show that having connection with a woman whilst asleep, or by a power which induces the woman to suppose that it is her husband, amounts to an assault."

R. v. Lock, 27 L. T. (N. S.) 661, 1872. According to another report (L. R. 2 C. C. R. 10), the language of the Chief Baron was: "It is much like the case of an act done to a person while asleep. And although I do not say that connection with a woman in that state would be rape, it would be an assault." And see particularly *infra*, § 577; § 278 of the New York Penal Code of 1882 includes cases of this class.

See, for a discussion of the law as to consent where the offence is committed while the victim is asleep, *Mooney v. State*, 29 Tex. App. 257, 1890.

² *Infra*, § 577; *People v. Dohring*, 59 N. Y. 374, 1874; *State v. Burgdorf*, 53 Mo. 65, 1873. See *People v. Morrison*, 1 Parker C. R. 626, 1854; *State v. Murphy*, 6 Ala. 765, 1844; *Oleson v. State*, 11 Nebr. 276, 1881; *Charles v. State*, 6 Eng. (Ark.) 389, 1850; *Anshicks v. State*, 6 Tex. App. 524, 1879; *Territory v. Potter*, 1 Ariz. 421, 1883; *State v. Nash*, 109 N. C. 824, 1891.

³ See *supra*, 141 *et seq.*; Dalt. c. 105, 607; 1 Hawk. P. C. c. 41; 3 Whart. & St. Med. Jur. § 606; *R. v. Rudland*, 4 F. & F. 967, 1866; *State v. Ruth*, 21 Kans. 583, 1879; *Pleasant v. State*, 8 Eng. (13 Ark.) 360, 1852; *Lewis v. State*, 30 Ala. 54, 1859; *Sharp v. State*, 15 Tex. App. 171, 1883; *State v. Fernald*, (Iowa) 55 N. W. Rep. 534,

ferocity establishes "a reign of terror" in his family, and under this power his daughter remains passive while he has carnal intercourse with her, this intercourse, effected by terror, and without consent, is rape.¹ Nor is it necessary that there should be force enough to create "reasonable apprehension of death."² But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance of all resistance.³

It is admissible for the prosecution under this head to give evidence of the defendant's bodily strength, and of the prosecutrix's bodily weakness,⁴ but not that the prosecutrix knew of the defendant's bad character.⁵

While the degree of resistance is an incident by which consent can be determined, it is not in law necessary to show that the woman

1893; *People v. Flynn*, 96 Mich. 276, State, 8 Ohio Cir. Ct. 313, 1894; *Toul-*
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King v. Com., (Ky.) 20 S. W. Rep. 1893; *State v. Owsley*, 102 Mo. 678,
224, 1892. Whether resistance ceased 1891.

because it was useless and dangerous, "It is submitted that the true rule
or because the prosecutrix ultimately must be, that where the man is led
consented, is for the jury to decide; from the conduct of the woman to be-
and in the last case to acquit of the lieve that he is not committing a crime
rape. *R. v. Hallett*, 9 C. & P. 748, known to the law, the act of connec-
1841; *Turner v. People*, 33 Mich. 363, tion cannot under such circumstances
1876; *Wright v. State*, 4 Humph. 194, amount to rape. In order to consti-
1848. See *supra*, §§ 140 *et seq.*; *infra*, tute rape there must, it would appear,
§ 576. be an intent to have connection with

As to provisions of Minnesota stat- the woman notwithstanding her resist-
ute, see *State v. Vorey*, 41 Minn. 134, ance. In the case of *R. v. Urry*, tried
1889. at Lincoln Spring Assizes, 1873, the

¹ *R. v. Jones*, L. R. 2 C. C. 10; 4 L. above passage was approved of by
T. (N. S.) 154, 1861. See, also, *R. v. Denman*, J. See, also, case cited
Woodhurst, 12 Cox C. C. 448, 1871; where Parke, B., says that the guilt
Sharp v. State, *ut supra*; *State v. Wil-*
cox, 111 Mo. 569, 1892. But see *Ter-*
ritory v. Potter, 1 Ariz. 421, 1883; of the accused must depend upon the
Hammond v. State, (Nebr.) 58 N. W. circumstances as they appear to him."
Rep. 92, 1894. *Roscoe's Crim. Ev.* (ed. of 1878) p. 648;

² *Walter v. State*, 40 Ala. 325, 1867. 1890.
But see *Territory v. Potter*, 1 Ariz. 421, 1883.

³ *Supra*, § 550; *R. v. Wright*, 4 F. & F. 967, 1866; *Strang v. People*, 24
Mich. 1, 1871. See *Moore v. State*, 79
Wis. 546, 1891; *Porter v. State*, (Tex.)
26 S. W. Rep. 626, 1894; *Blannett v.*

⁴ *State v. Knapp*, 45 N. H. 148,
1863; *Richards v. State*, 36 Nebr. 17,
1893; *Walton v. State*, 29 Tex. App. 163,
1890.

⁵ *State v. Porter*, 57 Iowa, 691,
1882.

opposed all the resistance in her power, if her resistance was honest, and was the utmost, according to her lights, that she could offer.¹

§ 558. The consent of a female of such tender years as to be unconscious of the nature of the act, or even her aiding the prisoner in the attempt, is no defence;² and in a case before the Court of Criminal Appeal it was held rape by Lord Campbell, C. J., and all the judges, where a man had carnal knowledge of a girl of thirteen, of imbecile mind, and the jury found that it was by force, and without her consent, she being incapable of giving consent, but it was not found to be against her will.³ In Virginia and Louisiana the rule is applied to girls under twelve,⁴ and in New Jersey to girls under ten years.⁵ The

Nor is acquiescence of infant.

¹ *R. v. Rudland*, 4 F. & F. 495, 1865; 1867; *O'Meara v. State*, 17 *Ibid.* 515, *Com. v. McDonald*, 110 *Mass.* 405, 1867; *Moore v. State*, *Ibid.* 521, 1867; 1872; *Crockett v. State*, 49 *Ga.* 185, *State v. Handy*, 4 *Harring.* 566, 1845; 1873. See *Jenkins v. State*, 1 *Tex.* *Lawrence v. Com.*, 30 *Gratt.* 845, 1878; *App.* 346, 1876; that rape implies force in the man and resistance in the woman, see *Mills v. State*, 52 *Ind.* *People v. McDonald*, 9 *Mich.* 150, 187, 1875. *Cf.* *People v. Dohring*, 59 *N. Y.* 374, 1874; *Hollis v. State*, 27 *Fla.* 387, 1891; *Holton v. State*, 28 *Fla.* 303, 1891; *Rhea v. State*, 30 *Tex.* *App.* 483, 1891; *State v. Patrick*, 107 *Mo.* 147, 1891; *State v. Murphy*, (Mo.) 25 *S. W. Rep.* 95, 1893; *Shields v. State*, 32 *Tex. Cr.* 498, 1893; *State v. Shroyer*, 104 *Mo.* 441, 1891; *Anderson v. State*, 104 *Ind.* 467, 1885; *Huston v. People*, 121 *Ill.* 497, 1887; *People v. Connor*, 9 *N. Y. Sup.* 674, 1890; *Hawkins v. State*, (Ind.) 30 *N. E. Rep.* 419, 1894; *Hammond v. State*, (Nebr.) 58 *N. W. Rep.* 92, 1894; *Eberhart v. State*, 134 *Ind.* 651, 1893; *Toullee v. State*, (Ala.) 14 *So. Rep.* 408, 1893.

² *R. v. Martin*, 9 *C. & P.* 213, 1840; 2 *Mood.* 123; *R. v. Johnson*, L. & C. 632, 1865; 10 *Cox C. C.* 114. See, on the same topic, *R. v. Reed*, 1 *Den. C. C.* 377; 2 *C. & K.* 957, 1849. *Cf.* *Hays v. People*, 1 *Hill*, (N. Y.) 351, 1840; *Smith v. State*, 12 *Ohio St.* 466,

³ *R. v. Fletcher*, 8 *Cox C. C.* 181, 1859. So, also, *State v. Tarr*, 28 *Iowa*, 397, 1869; *S. P.*, *Stephen v. State*, 11 *Ga.* 225, 1852.

⁴ *Lawrence v. Com.*, 30 *Gratt.* 845, 1878; *State v. Tilman*, 30 *La. An.* pt. ii. 1249, 1878. As to Texas, see *Russell v. State*, (Tex.) 26 *S. W. Rep.* 990, 1894; *Comer v. State*, (Tex.) 20 *S. W. Rep.* 547, 1892. As to Missouri, see

⁵ *Cliver v. State*, 45 *N. J. L.* 46, 1883. See *Territory v. Potter*, 1 *Ariz.* 421, 1883.

statutory offence of sexual knowledge of children is hereafter discussed.¹

§ 559. As to how far acquiescence produced by surprise or fraud will be a defence has been the subject of some fluctuation of opinion in the English courts. At one time it was ruled that it was not an assault with an intent to commit a rape for a medical man, under the pretence of administering an injection, to induce a woman to kneel down with her face on the bed, and then to attempt sexual connection with her by surprise, there being nothing to show an intent to use force; but it was said that it would have been rape had the defendant intended to have connection with the prosecutrix by force, and had succeeded.² It was afterward held that, when connection with a girl is obtained by inducing her to believe she is at the time submitting to medical treatment, such consent is no defence to an indictment for an assault;³ nor to an indictment for a rape.⁴ But it must be a clear case of ignorance and innocence in the prosecutrix to justify a conviction of rape when connection was obtained by the defendant by such process with her acquiescence,⁵ and a conviction of rape cannot be sustained where there is proof of consent given by a weak-minded woman after a mock marriage.⁶ The test is, did the woman voluntarily consent, not to something else (*e. g.*, medical treatment), but to sexual intercourse. If she did, this is a defence,

Question of acquiescence through fraud.

State *v.* Houx, 109 Mo. 654, 1891; In R. *v.* Flattery, the defendant kept State *v.* Wilcox, 111 Mo. 569, 1892. a stall in a public market, and professed to give medical and surgical Ignorance by defendant that a girl had not reached the statutory age is, advice. He obtained possession of a on statutory prosecutions for abusing girl's person by pretending that he a female child, no defence. *Supra*, was going to perform a surgical operation to cure her of her illness. She § 88. was nineteen years old, and made a feeble resistance, and only acquiesced

¹ *Infra*, § 578.

² R. *v.* Stanton, 1 C. & K. 415. See, to same effect, R. *v.* Flattery, 13 Cox C. C. 388, 1877; Don Moran *v.* People, 25 Mich. 356, 1872; Pomeroy *v.* State, 94 Ind. 96, 1883. See cases cited *infra*, § 563.

³ R. *v.* Case, 4 Cox C. C. 220, 1850; 1 Den. C. C. 580; 1 Eng. L. & Eq. 544.

⁴ R. *v.* Flattery, 13 Cox C. C. 388, 1877; 36 L. T. (N. S.) 32; L. R. 2 Q. B. D. 410; Eberhart *v.* State, 134 Ind. 651, 1893.

under the belief that the prisoner was treating her medically, and performing a surgical operation. The court held that there was no consent to the act of sexual intercourse, and that the prisoner was guilty of the crime of rape.

⁵ Walter *v.* People, 50 Barb. 144, 1867; State *v.* Nash, 109 N. C. 824, 1891.

⁶ Bloodworth *v.* State, 6 Baxt. 614, 1872.

no matter how much she was imposed upon.¹ The effect of artificial stupefaction will be considered under another head. That an unconscious submission during sleep is rape is now settled.²

§ 560. In respect, also, to unconsciousness through mental disease, must again be invoked the position, that in cases of rape, "without her consent" is to be treated as convertible with "against her will."³ From this it follows that carnal intercourse with a woman incapable, from mental disease (whether that disease be idiocy or mania), of giving consent, is rape.⁴ But the question as to whether the mental dis-

And acquiescence through mental disorder.

¹ Ibid.; *State v. Riggs*, 1 Houst. C. 120, 1862; *State v. Burgdorf*, 53 Mo. 65, 1873; *Clark v. State*, 30 Tex. 448, 1867.

² *R. v. Mayers*, 12 Cox C. C. 311, 1872; 3 Whart. & St. Med. Jur. §§ 242, 593 *et seq.* See *infra*, § 562. See § 278 of New York Penal Code of 1882, which includes cases of submission through stupor or weakness of mind.

³ *Supra*, § 556.

⁴ As to idiocy, see this affirmed in *R. v. Pressy*, 10 Cox C. C. 635, 1867; *R. v. Fletcher*, 8 Ibid. 131, 1851; *R. v. Barrett*, 12 Ibid. 498, 1873; L. R. 2 C. C. 81; *Stephen v. State*, 11 Ga. 225, 1852; *State v. Tarr*, 28 Iowa, 397, 1869; *State v. Crow*, 10 West. L. J. 501, 1853; 3 Whart. & St. Med. Jur. §§ 599 *et seq.*; as to mania, *R. v. Charles*, 13 Shaw's J. P. 746; as to stupefaction, *infra*, § 562; *R. v. Ryan*, 2 Cox C. C. 115, 1846. See as to other mental conditions, *State v. Murphy*, (Mo.) 25 S. W. Rep. 95, 1893.

In *R. v. Barrett*, 12 Cox C. C. 498, 1873; L. R. 2 C. C. 81, Kelly, C. B., said: "I am of opinion that the prisoner, in point of law, was guilty of the crime of rape in this case. I entirely concur in the definition of the crime of rape, as given by Willes, J., in his direction to the jury, 'that if the jury were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent

or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty.' In this case the poor creature was not capable of giving her consent. As to the cases of *Reg. v. Fletcher*, I cannot see the distinction between them in principle."

Blackburn, J.: "I am of the same opinion. I agree with the decision in the first case of *Reg. v. Fletcher*, and think that the correct rule was laid down in that case. I do not think that the court, in the second case of *Reg. v. Fletcher*, intended to differ from the decision in the first case of *Reg. v. Fletcher*. In all these cases the question is whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent or exercising any judgment upon the matter, or, in other words, is there sufficient evidence of such an extent of idiocy or want of capacity. In the first case of *Reg. v. Fletcher*, 8 Cox C. C. 134, and also in the present case, there was evidence of such an extent of idiocy in the girl as to lead the jury to believe that she was incapable of giving assent, and that therefore the connection was without her consent. In the second case of *Reg. v. Fletcher*, L. R. 1 C. C. 39, the evidence of that was much less strong, and the point reserved for the court was whether the case ought to have

ease is such as to incapacitate the patient from assenting, is one to be examined with great care. There are many persons laboring under mitigated insanity who are incapable of making contracts, but who, in a modified degree, are responsible for crime.¹ For a man knowingly to have criminal intercourse with a woman of intellect thus impaired is no doubt peculiarly wrongful; yet if she be capable of consenting, and does consent, it is not rape.² And *a fortiori* is this the case when the man has no knowledge that the woman's intellect is disturbed. Hence, in such cases, if there be consent, a prosecution for rape cannot be sustained.³

§ 561. In England, having carnal knowledge of a woman under circumstances which induce her to suppose it is her husband has been held by a majority of the judges not to amount to rape; but several of the majority intimated that, should the point again occur, they would direct the jury to find a special verdict.⁴ In two subsequent cases, where the defendants were indicted for rapes under similar circumstances, Gurney and Aldersen, BB., directed an acquittal for the rape, but held that the defendants might be convicted of the assault, under the stat. 7 Wm. IV. & 1 Vict. c. 85, s. 11; and the judges afterward held, that upon such conviction hard labor might be added to the sentence of imprisonment.⁵

Acquiescence by married woman mistaking defendant for her husband is no defence.

In 1854, in a case where the finding was that the defendant got into bed with a married woman and had criminal connection, she

been left to the jury at all, there being no evidence except the fact of connection and the imbecile state of the girl; and all that the court said was, that some evidence of its being against her will and without her consent ought to be given in these cases, and that there was not in that case the sort of testimony on which a judge would be justified in leaving it to a jury to find a verdict. Upon the authority of the decision in the former case of *Reg. v. Fletcher*, it is enough to say in this case that the evidence here was that the connection was without the girl's consent."

¹ See 1 Whart. & St. Med. Jur. §§ 50, 122, 242.

² *State v. Enright*, (Iowa) 58 N. W. Rep. 901, 1894.

³ *Crosswell v. People*, 13 Mich. 426, 1860; *Baldwin v. State*, 15 Tex. App. 275, 1883; a case where the disease set up was occasional epileptic fits which had not produced intermediate insanity. See *R. v. Fletcher*, L. R. 1 C. C. 39, 1865; *State v. Atherton*, 50 Iowa, 189, 1878; *Bloodworth v. State*, 6 Baxt. 614, 1872; *State v. Crow*, 10 West. L. J. 501, 1853; *Thompson v. State*, (Tex.) 26 S. W. Rep. 987, 1894. See the Iowa statute. *State v. Enright*, (Iowa) 58 N. W. Rep. 901, 1894.

⁴ *R. v. Jackson*, R. & R. 487, 1820.

⁵ *R. v. Saunders*, 8 C. & P. 265, 1838, and *R. v. Williams*, Ibid. 286,

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In 1854, in a case where the finding was that the defendant got into bed with a married woman and had criminal connection, she

been left to the jury at all, there being no evidence except the fact of connection and the imbecile state of the girl; and all that the court said was, that some evidence of its being against her will and without her consent ought to be given in these cases, and that there was not in that case the sort of testimony on which a judge would be justified in leaving it to a jury to find a verdict. Upon the authority of the decision in the former case of *Reg. v. En-Fletcher*, it is enough to say in this case that the evidence here was that the connection was without the girl's consent."

¹ See 1 Whart. & St. Med. Jur. §§ 50, 122, 242.

² *State v. Enright*, (Iowa) 58 N. W. Rep. 901, 1894.

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⁴ *R. v. Jackson*, R. & R. 487, 1820.

⁵ *R. v. Saunders*, 8 C. & P. 265, 1838, and *R. v. Williams*, Ibid. 286, 1838.

no matter how much she was imposed upon.¹ The effect of artificial stupefaction will be considered under another head. That an unconscious submission during sleep is rape is now settled.²

§ 560. In respect, also, to unconsciousness through mental disease, must again be invoked the position, that in cases of rape, "without her consent" is to be treated as convertible with "against her will."³ From this it follows that carnal intercourse with a woman incapable, from mental disease (whether that disease be idiocy or mania), of giving consent, is rape.⁴ But the question as to whether the mental dis-

And acquiescence through mental disorder.

¹ Ibid.; *State v. Riggs*, 1 Houst. C. C. 120, 1862; *State v. Burgdorf*, 53 Mo. 65, 1873; *Clark v. State*, 30 Tex. 448, 1867.

² *R. v. Mayers*, 12 Cox C. C. 311, 1872; 8 Whart. & St. Med. Jur. §§ 242, 593 *et seq.* See *infra*, § 562. See § 278 of New York Penal Code of 1882, which includes cases of submission through stupor or weakness of mind.

³ *Supra*, § 556.

⁴ As to idiocy, see this affirmed in *R. v. Pressy*, 10 Cox C. C. 635, 1867; *R. v. Fletcher*, 8 Ibid. 131, 1851; *R. v. Barrett*, 12 Ibid. 498, 1873; L. R. 2 C. C. 81; *Stephen v. State*, 11 Ga. 225, 1852; *State v. Tarr*, 28 Iowa, 397, 1869; *State v. Crow*, 10 West. L. J. 501, 1853; 3 Whart. & St. Med. Jur. §§ 599 *et seq.*; as to mania, *R. v. Charles*, 13 Shaw's J. P. 746; as to stupefaction, *infra*, § 562; *R. v. Ryan*, 2 Cox C. C. 115, 1846. See as to other mental conditions, *State v. Murphy*, (Mo.) 25 S. W. Rep. 95, 1893.

In *R. v. Barrett*, 12 Cox C. C. 498, 1873; L. R. 2 C. C. 81, Kelly, C. B., said: "I am of opinion that the prisoner, in point of law, was guilty of the crime of rape in this case. I entirely concur in the definition of the crime of rape, as given by Willes, J., in his direction to the jury, 'that if the jury were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent

or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty.' In this case the poor creature was not capable of giving her consent. As to the cases of *Reg. v. Fletcher*, I cannot see the distinction between them in principle."

Blackburn, J.: "I am of the same opinion. I agree with the decision in the first case of *Reg. v. Fletcher*, and think that the correct rule was laid down in that case. I do not think that the court, in the second case of *Reg. v. Fletcher*, intended to differ from the decision in the first case of *Reg. v. Fletcher*. In all these cases the question is whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent or exercising any judgment upon the matter, or, in other words, is there sufficient evidence of such an extent of idiocy or want of capacity. In the first case of *Reg. v. Fletcher*, 8 Cox C. C. 134, and also in the present case, there was evidence of such an extent of idiocy in the girl as to lead the jury to believe that she was incapable of giving assent, and that therefore the connection was without her consent. In the second case of *Reg. v. Fletcher*, L. R. 1 C. C. 39, the evidence of that was much less strong, and the point reserved for the court was whether the case ought to have

ease is such as to incapacitate the patient from assenting, is one to be examined with great care. There are many persons laboring under mitigated insanity who are incapable of making contracts, but who, in a modified degree, are responsible for crime.¹ For a man knowingly to have criminal intercourse with a woman of intellect thus impaired is no doubt peculiarly wrongful; yet if she be capable of consenting, and does consent, it is not rape.² And *a fortiori* is this the case when the man has no knowledge that the woman's intellect is disturbed. Hence, in such cases, if there be consent, a prosecution for rape cannot be sustained.³

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⁴ *R. v. Jackson*, R. & R. 487, 1820.

⁵ *R. v. Saunders*, 8 C. & P. 265, 1838, and *R. v. Williams*, Ibid. 286, 1838.

being awake and believing him to be her husband, but where at the same time it was found the intention on his part was not to consummate the act by force in case of discovery, but if detected to desist, it was held by Jervis, C. J., Coleridge, J., Alderson, J., Martin, B., and Crowder, J., in a case reserved, that this was not rape.¹

In 1878, a conviction was sustained by the English Court of Criminal Appeal in a case where the act was partially completed with a married woman, she at the time being asleep, and not consenting, or giving the defendant any reason to believe she consented, and the connection being found by the jury to be against her will.²

¹ R. v. Clark, 29 Eng. L. & Eq. 542; cured by a police-constable. None of Dears. C. C. 397; 6 Cox C. C. 412, the parties had ever seen the prisoner before. 1854; S. P., R. v. Sweeney, 8 Ibid. 223, 1858; R. v. Barrow, L. R. 1 C. C. 156; 11 Cox C. C. 191, 1868.

² R. v. Young, 38 L. T. (N. S.) 540; s. c. 14 Cox C. C. 114, 1878, Lord Coleridge, C. J., Mellor and Lush, JJ., Cleasby, B., and Lopes, J., assenting.

In this case, Huddleston, B., reported as follows: "The evidence proved that the prosecutrix, a married woman, being partially under the influence of drink on the 2d Feb. 1878, went to bed in her lodgings in the Seven Dials with her youngest child about nine o'clock; her husband with another child came home about midnight.

"About four o'clock in the morning, when all four were asleep, the prisoner entered the room, the door not having been locked, got into bed, in which were the prosecutrix, her husband, and the two children, and proceeded to have connection with the prosecutrix, she being at the time asleep. When she awoke, at first the prosecutrix thought that it was her husband, but on hearing the prisoner speak she looked round, and seeing her husband by her side, she immediately flung the prisoner off her, and called out to her husband.

"The prisoner ran away, but before he could make his escape he was se-

"In answer to questions put by me the jury found that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent."

"I put the last question to the jury in consequence of what fell from Denman, J., in R. v. Flattery, 2 Q. B. Div. 410-414; 13 Cox C. C. 388, 1878.

"Upon these findings I directed a verdict of guilty, but reserved the question as to whether the conviction was right, the Court of Criminal Appeal in R. v. Flattery having expressed a desire that the case of R. v. Barrow (L. Rep. 1 C. C. R. 156, 1869; 28 L. J. M. C. 20; 11 Cox C. C. 191) should be reconsidered."

Lord Coleridge, C. J., said: "We are all of opinion that the addition made by the learned baron to the statement of this case puts an end to any doubt as to the case, under the circumstances, being clearly one of rape."

The rest of the court concurred.

It may be, however, that this case may be distinguished from R. v. Barrow by the fact that in R. v. Young the connection was at least partially

In 1858, in the High Court of Justiciary in Scotland, it was held (two judges dissenting) not to be rape, when the carnal intercourse was effected by the same fraud, there being nothing in the fact to show whether or not the defendant intended to use force.¹

In Virginia, in a case where the evidence was that the defendant, not intending to have carnal knowledge of a white woman by force, but intending to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, using no other force, it was held that this was not an attempt to ravish within the meaning of the statute.² In New York it was determined that when the offence was consummated before the prosecutrix, a married woman, found out that the defendant was not her husband, the rape was complete.³ And so it is said to have been determined in an anonymous case before Thompson, C. J., in Albany, at a court of oyer and terminer.⁴ So in an early case, it seemed to be assumed in Connecticut that a stealthy connection with a woman, under the impression on her part that it was her husband, was rape.⁵ A contrary view, however, is taken by the Supreme Courts of Tennessee,⁶ Alabama,⁷ and North Carolina.⁸

In Ireland, in 1884, in a crown case reserved before all the judges, it was held to be rape where the woman assented to the act under the impression that the defendant was her husband.⁹ And it seems most consistent with rulings as to consent in other cases, to hold that consent is not a defence when it was to something essentially different from the act proposed.¹⁰ We have already seen that consent is no defence when what the woman agreed to was a medical operation and not sexual intercourse;¹¹ and the same reasoning ob-

had when the woman was asleep, and when she could not have given assent. See *R. v. Mayers*, 12 Cox C. C. 311, 1872.

¹ *R. v. Sweeney*, 8 Cox C. C. 223, 1858.

² *Com. v. Fields*, 4 Leigh, 648, 1832. It would be otherwise if the intent was to use force. *Carter v. State*, 35 Ga. 263, 1866.

³ *People v. Metcalf*, 1 Wheel. C. C. 378, 1823. See *Walter v. People*, 50 Barb. 144, 1867.

⁴ *Anon.*, 1 Wheel. C. C. 381, 1823.

⁵ *State v. Shephard*, 7 Conn. 54, 1828.

⁶ *Wyatt v. State*, 2 Swan, 394, 1852.

⁷ *Lewis v. State*, 30 Ala. 54, 1857.

⁸ *State v. Brooks*, 76 N. C. 1, 1877, resting in part on the overruled case of *R. v. Barrow*, L. R. 1 C. C. 156, 1869.

In Texas, by statute, the fraud must consist in the use of some stratagem to induce the woman to believe that the ravisher is her husband. *Mooney v. State*, 29 Tex. App. 257, 1890.

⁹ *R. v. Dee*, reported in 31 Alb. L. J. 43; Lond. L. T. Jan. 24, 1885.

¹⁰ *Supra*, § 150.

¹¹ *Supra*, § 559.

tains when what the woman agreed to was legitimate sexual intercourse with her husband, and not adulterous sexual intercourse with a stranger.¹ But to make out the offence of rape, the defendant must have intended to ravish, by force, or by inducing consent under the belief that he was her husband.

§ 562. In England, in a crown case reserved, it was proved that the prisoner made the prosecutrix drunk, and that when she was in a state of insensibility took advantage of it, and violated her. The jury convicted the prisoner, and found that the prisoner gave her the liquor for the purpose of exciting her, and then having sexual intercourse with her, and not with the intention of rendering her insensible. The judges held that the prisoner was properly convicted of rape.²

And so of acquiescence obtained by artificial stupefaction.

¹ This is put by Paine, C. B., in *R. v. Dee*, as follows: "What the woman consented to was not adultery, but marital intercourse. The act was not a crime in law. It would not subject her to a divorce. Were adultery criminally punishable by our law, she would not be guilty. It is hardly necessary to point out (but to avoid any misapprehension I desire to do so) that what took place was not a consent in fact, voidable by reason of his fraud, but something which never was a consent *ad hoc*." Lawson, J. said: "The question is, What must be the nature of the consent? In my opinion it must be consent to the prisoner having connection with her, and if either of these elements be wanting, it is not consent. Thus in Flattery's case, where she consented to the performance of a surgical operation, and under pretence of performing it the prisoner had connection with her, it was held clearly that she never consented to the sexual connection; the case was one of rape. So if she consents to her husband having connection with her, and the act is done, not by her husband but by another man personating the husband, there is no consent to the prisoner having connection with her,

and it is rape. The general principles of the law as to the consent apply to this case. To constitute consent there must be the free exercise of the will of a conscious agent, and therefore if the connection be with an idiot incapable of giving consent, or with a woman in a state of unconsciousness, it is rape. In like manner, if the consent be extorted by duress or threats of violence, it is not consent."

² *Supra*, § 559; *R. v. Camplin*, 1 C. & K. 746, 1845; s. c. 1 Den. C. C. 89. In a letter to Mr. Denison, by Mr. Baron Parke (1 Den. C. C. Add. p. 1), that learned judge, in commenting on Camplin's case, says: "Of the judges who were in favor of the conviction several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether that state is caused by the man or not—the accused knowing at that time she was in that state." And Tindal, C. J., and Parke, B., remarked, that in Stat. West. 2, c. 34, the offence of rape is described to be ravishing a woman "when she did not consent, and not ravishing *against her will*." But all the ten judges agreed that in this case, where the prosecutrix was

A conviction was sustained in Massachusetts, in 1870, in a case in which the evidence went simply to the fact that the prosecutrix was at the time of the act unconscious through intoxication, though there was no allegation that she was made so by the defendant.¹ On the other hand, in New York, where such intoxication was proved, but where there was no evidence that the original intent was to use force, it was held that rape was not made out under the particular statute.² To rape, it is essential, we should remember, that the act should be intended to be done with force and without the woman's consent.³ In all cases of alleged unconsciousness, however, we should keep in mind the old caution: *Non omnes dormiunt qui clausos et conniventes habent oculos*. It is at the same time clear, as we have seen, that connection secured when a woman is *bonâ fide* asleep, and known to be such by the defendant, is rape.⁴ Force is incident to the physical character of the act; *against the will* (or *without consent*) must be inferred from all the circumstances of the case, to secure a conviction.⁵

made insensible by the act of the prisoner, and that by an unlawful act, and where also the prisoner must have known that the act was against her consent at the last moment she was capable of exercising her will, because he had attempted to procure her consent, and failed, the offence of rape was committed. See, also, comments on this case in *R. v. Page*, 2 Cox C. C. 133, 1846.

¹ *Com. v. Burke*, 105 Mass. 376, 1870. See *State v. Stoyell*, 54 Me. 24, 1866. In *Com. v. Bakeman*, 131 Mass. 577, 1881, on evidence of this character the defendant was convicted of adultery.

² *People v. Quin*, 50 Barb. 128, 1867. In this case, although Judge Johnson, who gave the opinion of the Supreme Court, threw out doubts as to the soundness of the ruling in *R. v. Campbell*, the decision was put on the single ground that the legislature having made carnal knowledge of an intoxicated woman an independent offence, it must be so treated by the courts.

³ *Supra*, § 550. For cases of con-

viction for rape committed on a woman under the influence of ether, see *State v. Green*, 3 Whart. & St. Med. Jour., (4th ed.) § 597; *Com. v. Beale*, *Ibid.* §§ 245 *et seq.*, 596, 612.

⁴ *R. v. Mayers*, 12 Cox C. C. 311, 1872; *R. v. Young*, *supra*, § 561.

⁵ *Carter v. State*, 35 Ga. 263, 1866, cited *infra*, § 576. See *R. v. Cockburn*, 3 Cox C. C. 543, 1849; *Com. v. McDonald*, 110 Mass. 455, 1872; *People v. Bransby*, 32 N. Y. 525, 1865; and cases cited *supra*, § 650.

In an interesting pamphlet by Dr. Stephen Rogers on chloroform (N. Y. Harper & Bros. 1877), it is argued with much force that for the purposes of attack chloroform cannot be effectively used. See 3 Whart. & St. Med. Jur. § 594.

In *Com. v. Beale*, *ut supra*, the rightness of the verdict was much doubted at the time, and shortly afterward, after a careful re-examination, and on the express ground of the doubts entertained, a pardon was granted by Governor Pollock.

Acquies-
cence after
act no de-
fence. § 562 *a.* Acquiescence after penetration is held to be no defence;¹ nor, *a fortiori*, is acquiescence after the act is consummated.²

How far
fraud is
equivalent
to force. § 563. It has been ruled, in cases where acquiescence was obtained by fraud, that the offence, though an assault, is not rape, if the consent was to illegal sexual intercourse;³ though it is otherwise when the consent was to something else.⁴ But when the consent was to something else, *e. g.*, to medical treatment from a physician, then such consent is not a defence.⁵

Prior un-
chastity of
prosecu-
trix no
defence. § 564. The fact of the woman being a common strumpet, or the mistress of the defendant, is no bar, though such fact undoubtedly would prejudice her testimony, and is relevant for the defence as one of the circumstances from which assent may be inferred.⁶

To what extent evidence impeaching the prosecutrix's character may be received will be presently considered.

§ 565. The party aggrieved is always competent as a witness for the prosecution,⁷ and in a case of an indictment against B., a hus-

¹ See *infra*, § 577; *supra*, §§ 557, 561; and see *Whittaker v. State*, 50 Wis. 518, 1880, where "submission" is distinguished from "consent."

² See *supra*, §§ 146 *et seq.*; *Brown v. People*, 36 Mich. 203, 1878; *Whittaker v. State*, 50 Wis. 518, 1880.

³ *Supra*, § 550, 559; *R. v. Case*, 4 Cox C. C. 220, 1850; 1 Den. C. C. 580; *R. v. Lock*, 27 L. T. (N. S.) 661; s. c. L. R. 2 C. C. R. 12, 1871; *R. v. Williams*, 8 C. & P. 286, 1838; *R. v. Jackson*, R. & R. 487, 1820; *R. v. Barrow*, L. R. 1 C. C. R. 156, 1868; *Walter v. People*, 50 Barb. 144, 1867; *Don Moran v. People*, 23 Mich. 356, 1872; *Pomeroy v. People*, 94 Ind. 96, 1883; *Com. v. Fields*, 4 Leigh, 648, 1832; *Stephen v. State*, 11 Ga. 225, 1825; and other cases cited *supra*, §§ 146, 550, 559.

Quære whether in England this qualification is now to be insisted on. *R. v. Flattery*, *ut supra*; *R. v. Young*, *ut supra*.

⁴ *Supra*, § 559.

⁵ *Supra*, § 559.

⁶ *Infra*, § 568; 1 Hale, 629; Arch. by Jerv. 453; *R. v. Parker*, 3 C. & P. 589, 1829; *Higgins v. People*, 1 Hun, 307, 1874; *Pratt v. State*, 19 Ohio St. 277, 1869. See *Pleasant v. State*, 8 Eng. (13 Ark.) 360, 1854; *Pleasant v. State*, 15 Ark. 624, 1855; *Wright v. State*, 4 Humph. 194, 1843; *Barnes v. State*, 88 Ala. 204, 1889; *Holton v. State*, 28 Fla. 303, 1891; *Shields v. State*, 32 Tex. Cr. 498, 1893. And see *Anderson v. State*, 104 Ind. 467, 1885; *People v. Hartman*, (Cal.) 37 Pac. Rep. 153, 1894. For Iowa statute defining offence of "defiling a woman," see *State v. Fernald*, (Iowa) 55 N. W. Rep. 534, 1893; and cases cited *infra*, § 568.

⁷ Whart. Cr. Ev. §§ 393, 394. And if testimony of prosecutrix involves evidence of an offence to a second woman at the same time it is still admissible. *Parkinson v. People*, (Ill.)

band, for assisting another man in ravishing B.'s wife, she was admitted as a witness against the husband.¹ If the witness be of good character; if she presently discovered the offence, and made search for the offender; if the party accused fled for it, these and the like are concurring circumstances, which give greater probability to her evidence.² But on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry, these and the like circumstances justify strong, but not conclusive, inferences that her testimony is false.³ Under ordinary circumstances it is the duty of the woman injured in this way, or of her friends, to obtain prompt medical advice; and the omission to do so, in cases of alleged rape, is a fact which subjects the prosecution to discredit.⁴ The *corpus delicti* includes

Testimony of prosecutrix should be corroborated.

24 N. E. Rep. 772, 1890. Though evidence of two acts of rape to prosecutrix on different days is inadmissible. Ibid. 135 Ill. 401, 1890. But in New York her evidence must always be corroborated to convict. *People v. Morris*, 12 N. Y. Sup. 492, 1890; *People v. McKeon*, 19 N. Y. Sup. 486, 1892; *People v. Terwilliger*, 26 N. Y. Sup. 674, 1893. That medical testimony is evidence to corroborate the prosecutrix. Corroboration of particular acts constituting the offence is not necessary, but of other material circumstances. *Hammond v. State*, (Nebr.) 58 N. W. Rep. 92, 1894. As to Iowa, see *State v. Chapman*, (Iowa) 55 N. W. Rep. 489, 1893.

¹ Lord Audley's Case, Hutt. 115; 1 St. Tr. 387; 1 Stra. 633; 1 Hale, 630; 12 Mod. 340, 354.

² See *Chambers v. People*, 105 Ill. 409, 1883; *Eyler v. State*, 71 Ind. 49, 1880. Evidence of the chastity of the prosecutrix is not admissible where there is no doubt that consent was absent and force was used. *Steinkie v. State*, (Tex.) 24 S. W. Rep. 909,

1894. See *State v. Bedard*, 65 Vt. 278, 1892; *Anderson v. State*, 104 Ind. 467, 1885. Her physical condition after the offence is corroborative evidence. *People v. Stewart*, 97 Cal. 238, 1893; *State v. Sigg*, 86 Iowa, 746, 1892; *Proper v. State*, 85 Wis. 615, 1893; *State v. Sandford*, (Mo.) 27 S. W. Rep. 1099, 1894; *State v. Houx*, 109 Mo. 654, 1891; *Rodgers v. State*, 30 Tex. App. 510, 1891; *State v. Murphy*, 118 Mo. 7, 1893.

³ 4 Bl. Com. 213; 3 Whart. & St. Med. Jur. §§ 607 *et seq.* See *Thompson v. State*, (Tex.) 26 S. W. Rep. 987, 1894; *State v. Witten*, 100 Mo. 525, 1890; *State v. Patrick*, (Mo.) 15 S. W. Rep. 290, 1891 (see dissenting opinion also); and Ibid. 107 Mo. 147, 1891; *Rhea v. State*, 30 Tex. App. 483, 1891; *People v. O'Sullivan*, 104 N. Y. 481, 1887; *People v. Loftus*, 11 N. Y. Sup. 905, 1890; *Bueno v. People*, 1 Colo. App. 232, 1891; *Johnson v. State*, 27 Nebr. 687, 1889.

⁴ *People v. Hulse*, 3 Hill, (N. Y.) 309, 1842; *State v. Hagerman*, 47 Iowa, 151, 1877; *supra*, § 555.

violence done to the woman; and if this could be shown by proof aside from her testimony, and such proof be not produced, a conviction ought not to be permitted to stand. Such is the general rule at common law.¹ It is true that convictions have been sustained when resting exclusively on the testimony of a young child,² and of a woman who, at the time of the alleged act, was under the influence of ether;³ but these are dangerous precedents; and when corroborative testimony can be procured, its non-production should tell seriously against the prosecution.⁴

§ 566. In prosecutions for rape, when the party injured is a witness, it is admissible to prove that she made complaint of the injury while it was recent;⁵ but the particulars of her complaint have been

¹ 1 Hale, 628, 681; 1 Hawk. c. 41, s. 2; *State v. Patrick*, 107 Mo. 147, 1891; *ple v. Wessel*, 98 Cal. 352, 1893. See also *Ibid.* 15 S. W. Rep. 290, 1891. 1 Russ. on Cr. by Greaves, 695.

Thus where the prosecutrix did not disclose the offence till interrogated, and continued her intercourse with defendant after the act, this was held to preclude conviction. *Whitney v. State*, 35 Ind. 503, 1871; see 4 Bl. Com. 218; *Cro. Car.* 435. But where the *corpus delicti* is clearly proved a verdict of guilty will not be disturbed, the defence being an alibi. *Ackerson v. People*, 124 Ill. 563, 1888.

In Iowa there can by statute be no conviction on the sole testimony of the prosecutrix. *State v. McLaughlin*, 44 Iowa, 82, 1876. And in California the Supreme Court has held that no rape case should ever go to the jury on the sole testimony of the prosecutrix, unsustained by facts and circumstances, them of the such testi- 6 Cal. 221, a, 46 *Ibid.* ga, 51 *Ibid.* lie v. State, 18 S. W. less, but seduction the more. *Wilcox*, 111 *zler*, 1 East P. C. 444; *R. v. Clarke*, 2

² *Com. v. Beale*, *supra*, § 555; 3 Whart. & St. Med. Jur. §§ 245, 596; *State v. Green*, *Ibid.* § 597.

³ *Supra*, § 555; and see *Barney v. People*, 22 Ill. 160, 1859. See on this subject *State v. Cassidy*, 85 Iowa, 145, 1892; *State v. Connelly*, (Minn.) 59 N. W. Rep. 479, 1894; *State v. Pilkington*, (Iowa) 60 N. W. Rep. 502, 1894; *Rhea v. State*, 30 Tex. App. 483, 1891.

⁴ *Berner* (9th ed. p. 430) remarks, that although rape involves a brutal oblivion of human rights, and a fearful destiny to the injured woman, there are sometimes palliating circumstances to be kept in mind. The offence is usually committed under the influence of stimulants; temptation and crime are coincident; and the reports of prison inspectors tell us that with men convicted of rape the criminal intent is far less persistent and ob-

⁵ *Whart. Cr. Ev.* § 278; *R. v. Brando*, *State v.*

held not to be evidence,¹ except to corroborate her testimony when attacked.² And in any view, such statements cannot be received as independent evidence to show who committed the offence. They are admitted simply as part of the proof of the *corpus delicti*,³ and in this view the reply, May be corroborated by her own statements.

Stark. 241, 1819; *R. v. Guttridge*, 9 C. & P. 471, 1840; *R. v. Megson*, 9 Ibid. 420, 1840; *R. v. Walker*, 2 M. & Rob. 212, 1840; *R. v. Osborne*, C. & M. 622, 1842; *R. v. Mercer*, 6 Jurist, 243, 1860; *R. v. Wood*, 14 Cox C. C. 46, 1877; *State v. Niles*, 47 Vt. 82, 1874; *People v. Croucher*, 2 Wheel. C. C. 42, 1823; *People v. McGee*, 1 Denio, 19, 1845; *Baccio v. People*, 41 N. Y. 265, 1869; *Johnson v. State*, 17 Ohio, 593, 1848; *Laughlin v. State*, 18 Ibid. 99, 1849; *Burt v. State*, 23 Ohio St. 394, 1872; *Stephen v. State*, 11 Ga. 225, 1852; *McMath v. State*, 55 Ga. 303, 1875; *Lacy v. State*, 45 Ala. 80, 1871; *Nugent v. State*, 18 Ibid. 521, 1850; *State v. Jones*, 61 Mo. 232, 1875; *Oleson v. State*, 11 Nebr. 276, 1881; *U. S. v. Snowden*, 22 Wash. Law Rep. 74, 1893; *State v. Langford*, 45 La. An. 1177, 1893; *Barnes v. State*, 88 Ala. 204, 1889. But when the complaint is involuntary, proof of it is inadmissible. *Parker v. State*, 67 Md. 329, 1887. Complaint when pregnant seven months after offence is admissible. *Richards v. State*, 36 Nebr. 17, 1893. That the witness proving the complaint may be asked whether the prosecutrix named the offender, but not what name she gave, see *R. v. Osborne*, C. & M. 622, 1842; *R. v. Alexander*, 2 Craw. & Dix. 126, 1841; *R. v. McLean*, Ibid. 350, 1843; *People v. McGee*, 1 Denio, 19, 1845. See Whart. Cr. Ev. § 492.

¹ Ibid.; *State v. Knapp*, 45 N. H. 148, 1864; *State v. Ivins*, 36 N. J. L. 233, 1873; *State v. Jones*, 61 Mo. 232, 1875; *Pefferling v. State*, 40 Tex. 486, 1874; *State v. Gruso*, 28 La. An. 952, 1876; *State v. Bedard*, 65 Vt. 278, 1892; *Kirby v. Territory*, (Ariz.) 28 Pac. Rep. 1134, 1891; *People v. Stewart*, 97 Cal. 238, 1893; *Candle v. State*, (Tex.) 28 S. W. Rep. 810, 1894. ² *Pleasant v. State*, 15 Ark. 624, 1855; *State v. Langford*, 45 La. An. 1177, 1893; *Johnson v. State*, 21 Tex. App. 368, 1886; *contra*, *Phillips v. State*, 9 Humph. 246, 1848; *Territory v. Godfrey*, 6 Dak. 46, 1888; *Lights v. State*, 21 Tex. App. 308, 1886; *Rhea v. State*, 30 Tex. App. 483, 1891, where greater latitude is allowed. In *State v. De Wolf*, 8 Conn. 93, 1830, after an attempt to discredit her story on cross-examination, it was held admissible, as part of the evidence in chief, to corroborate her by proving she told the story in the same way, after the event; *S. P.*, *State v. Laxton*, 78 N. C. 564, 1877; and see *Conkey v. People*, 5 Parker C. R. 31, 1860, where the rule was extended, under peculiar circumstances, to the *husband's* declarations.

In *State v. Kinney*, 44 Conn. 153, 1876, *State v. De Wolf* was affirmed. See, also, *State v. Byrne*, 47 Conn. 465, 1878. In Ohio and Michigan the prosecution is permitted to give the details of what the prosecutrix said immediately after the event. *Johnson v. State*, 17 Ohio, 593, 1848; *Burt v. State*, 23 Ohio St. 394, 1878; *Brown v. People*, 36 Mich. 203, 1872. In *R. v. Walker*, 2 M. & R. 212, 1840, Parke, B., said:

³ *R. v. Megson*, 9 C. & P. 420, 1840; *People v. Flynn*, 96 Mich. 276, 1893.

as well as the statement, when the two cannot be severed, is received.¹

Delay, when accounted for, does not exclude such statements,²

"The sense of the thing certainly is that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and all that she said; but for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct to her, leaving the counsel of the latter to bring before the jury the particulars of the complaint by cross-examination."

In Roscoe's *Crim. Ev.* p. 26, the following distinction is made:

"It thus appears that these cases are unanimous, that where the person who makes the complaint is called as a witness, and is competent, the fact that the complaint was made, and the bare nature of it, may be given in evidence. Where the person who makes the complaint is not called as a witness, or, on being called, is found to be incompetent, the decisions are somewhat conflicting. On the one hand, it has been sought in this case to introduce the whole statement; on the other, attempts have been made to exclude, under these circumstances, all evidence about the statement whatever. Both contentions have some countenance of authority, but it is conceived that neither is strictly accurate; the true rule being, as is submitted, to admit evidence of the *fact* of complaint in all cases, and in no case to admit anything more. The evidence, when restricted to this extent, is not hearsay, but, in the strictest sense, original evidence; when, however, these limits are exceeded, it becomes hearsay in a very objectionable form. There is every reason

therefore, why it should be admitted to the extent indicated, and none why it should be admitted any further."

See *People v. Graham*, 21 Cal. 261, 1862; and see *Whart. Crim. Ev.* § 492.

In *R. v. Wood*, 14 Cox C. C. 46, 1877, the particulars of the complaint were received.

¹ *R. v. Eyre*, 2 F. & F. 579, 1870.

² *State v. Knapp*, 45 N. H. 149, 1868; *State v. Niles*, 47 Vt. 82, 1874. See *State v. Marshall*, Phil. (N. C.) 49, 1866; *State v. Peter*, 8 Jones, (N. C.) 19, 1860; *Sutton v. People*, 145 Ill. 279, 1893; *People v. Terwilliger*, 26 N. Y. Sup. 674, 1893; *U. S. v. Snowden*, 22 Wash. Law Rep. 74, 1893.

In several American jurisdictions it has been said that "the substance of what the prosecutrix said," or the "declarations" made by her immediately after the offence was committed, may be given in evidence, in the first instance, to corroborate her testimony. *State v. De Wolf*, 8 Conn. 93, 1830; *McCombs v. State*, 8 Ohio St. 643, 1858; *Laughlin v. State*, 18 Ohio, 99, 1849; *State v. Peter*, 14 La. An. 521, 1859; *Phillips v. State*, 9 Humph. 246, 1846.

Where the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which was blood; but neither the mistress nor the washerwoman was under recognizance to give evidence, nor were their names on the back of the indictment, but they were at the assizes attending as witnesses for the prisoner; the judge directed that both the mistress and the washerwoman should be called by the counsel for the prosecution, but said that he should allow the counsel

though when unaccounted for it throws suspicion on the case of the prosecution.¹ The prosecutrix may be cross-examined as to whether she had made any statements after the alleged assault.²

§ 567. Since such evidence is admissible merely as corroboration, it cannot be used to patch out the case of the prosecution by supplying new facts.³ Thus on a trial for rape, which came before the Virginia Court of Appeals, the main question was as to the identity of the prisoner.

Such evidence is to be confined to corroboration.

The female was examined, and although she swore positively that the prisoner was the person who committed the outrage upon her, she declined to give a description of him as at the time of the outrage. The Commonwealth then introduced a witness to prove the particulars of the description of the person who committed the outrage, given by the prosecutrix to the witness on the morning after the rape was committed. This, for the reason just given, was properly held inadmissible.⁴

§ 568. Whether in a prosecution for rape the prosecutrix can be compelled to answer as to prior sexual relations with other persons than the defendant has been the subject of conflicting rulings. In England, and in several of our

Prosecutrix may be impeached

for the prosecution every latitude in to questions put to her by her parents their examination. *R. v. Stroner*, 1 C. & K. 650. immediately after the alleged act, are not admissible as independent evidence of the crime. *Weldon v. State*, 32 Ind. 81, 1870.

Where, on an indictment for rape, the judge trying the case admitted evidence of the declarations of the injured party immediately after the event, though she herself had not been brought as a witness, being at the time incapable of testifying, such admission was held error by the Supreme Court of New York. *People v. McGee*, 1 Denio, 19, 1845, (see *Com. v. Sallager*, 4 Penn. L. J. 511; 2 Clark, 127, 1839); and such is the general rule. *R. v. Nicholas*, 2 C. & K. 246, 1846; 2 Cox C. C. 139; *R. v. Guttridge*, 9 C. & P. 471, 1840; *People v. Graham*, 21 Cal. 261, 1862. See *State v. Emigh*, 18 Iowa, 122, 1865. Hence, when the prosecutrix is incapable of testifying on account of her immature age, her statements made in the defendant's absence, in answer

to questions put to her by her parents immediately after the alleged act, are not admissible as independent evidence of the crime. *Weldon v. State*, 32 Ind. 81, 1870. ¹ *Higgins v. People*, 58 N. Y. 377, 1874; *State v. Peter*, 8 Jones, (N. C.) 19, 1860; *Topolanck v. State*, 40 Tex. 160, 1874. But see *State v. Mulkern*, 85 Me. 106, 1892; *People v. O'Sullivan*, 104 N. Y. 481, 1887; *Dunn v. State*, 45 Ohio, 249, 1887; to the effect that unless reasonable explanation be made for the delay, it is error to admit evidence of prosecutrix's witness' statements.

² *Maillet v. People*, 42 Mich. 262, 1879.

³ *Scott v. State*, 48 Ala. 420, 1872; *State v. Shettleworth*, 18 Minn. 208, 1872.

⁴ *Brogy v. Com.*, 10 Gratt. 722, 1858.

The admissibility of such declarations is not affected by the fact that on

by proof of bad character, and in some States, by proof of immoral acts. own courts, the conclusion is that while such questions may be asked, answers to them will not be compelled;¹ and in Massachusetts it has been held that in such cases proof of the prosecutrix having had prior connection with others than the defendant is inadmissible.² On the other hand, in New York and other States the prosecutrix will be compelled to answer questions as to such acts of illicit intercourse with others than the defendant.³ As to whether, upon denying such intercourse, she can be contradicted, there is also a difference of opinion.⁴ The real question in such cases is, Is it material to the issue whether the prosecutrix had previously such illicit intercourse? That it is no defence to an indictment for rape that the prosecutrix was a woman of loose character there can be no question; and if the fact of a forcible connection against the prosecutrix's will be established, her prior looseness would have nothing to do with the issue. On the other hand, when the issue is consent on part of the

a prior occasion a rape had been committed by the defendant on the prosecutrix. *Strang v. People*, 24 Mich. 1, 1871.

¹ *R. v. Clarke*, 2 Stark. R. 241, 1819; *R. v. Hodson*, R. & R. 211, 1819; aff. in *R. v. Holmes*, 12 Cox C. C. 137, 1871; L. R. 1 C. C. 334; *contra*, *R. v. Clay*, 5 Cox C. C. 146; *State v. Knapp*, 45 N. H. 148, 1863; *Com. v. Reagan*, 105 Mass. 593, 1870; *Pleasant v. State*, 15 Ark. 624, 1854; *Dorsey v. State*, 1 Tex. App. 33, 1876; *People v. Benson*, 6 Cal. 221, 1856. See *Com. v. Kendall*, 113 Mass. 210, 1873; and see *Whart. Crim. Ev.* § 473.

² *Com. v. Harris*, 131 Mass. 336, 1881.

³ *State v. Johnson*, 28 Vt. 510, 1852; *State v. Reed*, 39 Ibid. 417, 1867; *People v. Abbott*, 19 Wend. 192, 1838; *Bedgood v. State*, 115 Ind. 275, 1888; *People v. Betsinger*, 11 N. Y. Sup. 916, 1890 (though see *People v. Jackson*, 3 Parker C. R. 391, 1857; and see question left open in *Woods v. People*, 55 N. Y. 515, 1874); *Brennan v. People*, 7 Hun, (14 N. Y. Sup. Ct.) 171, 1876; *State v. Murray*, 63 N. C. 31,

1868; overruling *State v. Jefferson*, 6 Ired. 305, 1846; *Rogers v. People*, 34 Mich. 345, 1877.

In *Sherwin v. People*, 69 Ill. 55, 1873, it was held admissible for the defendant to prove that the prosecutrix, prior to the alleged rape, had carnal intercourse with other men, the case resting mainly on the testimony of her medical attendant that her person showed marks of recent sexual intercourse, she swearing that she was unconscious at the time of the alleged rape.

⁴ As holding her answers to be final, see *R. v. Cockcroft*, 11 Cox C. C. 410, 1870; *R. v. Holmes*, 12 Ibid. 137, 1871; L. R. 1 C. C. 334; overruling *R. v. Robins*, 2 M. & R. 512; *People v. Jackson*, 3 Parker C. R. 391, 1857; *Queen v. Riley*, 18 Q. B. D. 481, 1887. As permitting such contradiction, see *Brennan v. People*, 7 Hun, 171, 1876; *Strang v. People*, 24 Mich. 1, 1871; *People v. Benson*, 6 Cal. 221, 1856; and see *R. v. Robins*, 2 M. & R. 512, 1842, overruled by *R. v. Holmes*, *supra*.

prosecutrix, her prior history as to chastity is logically material, and if so she should be compelled to answer such questions, and be exposed to contradiction should she answer the questions in the negative.¹ In any view, evidence may be received as to the woman's prior connection with the defendant, which is regarded as material to the question of consent,² and she may be compelled to answer questions as to such connection.³ And aside from the woman's testimony, the defendant has a right to prove assent by any circumstances from which assent can be inferred; and among these circumstances is the fact that the prosecutrix was a woman of loose character,⁴ in the habit of receiving the embraces of men promiscuously.⁵ It has also been held that to show her loose character her reputation for chastity may be attacked,⁶ though this reputation must have been acquired *before* the act on trial.⁷ It is therefore relevant to prove that the prosecutrix was a woman of drunken,⁸

¹ See *supra*, § 484. That prior friendly relations between the parties may be proved, see *Hall v. People*, 47 Mich. 636, 1882.

² *R. v. Martin*, 6 C. & P. 562, 1834, adopted by Kelly, C. B., in *R. v. Holmes*, *supra*; *R. v. Clarke*, 2 Stark. N. P. 241, 1819; *Queen v. Riley*, 18 Q. B. D. 481, 1887. But evidence of prior connection when not tending to show consent of prosecutrix, but to impeach the character of defendant and charge him with other felonies than the one at trial, is inadmissible. *State v. Bonsor*, 49 Kans. 758, 1892.

³ *Ibid.*; *People v. Abbott*, 19 Wend. 192, 1838; *State v. Forshner*, 43 N. H. 89, 1869; *State v. Knapp*, 45 *Ibid.* 148, 1863; *State v. Jefferson*, 6 Ired. 305, 1846; *Pleasant v. State*, 15 Ark. 624, 1855; *People v. Benson*, 6 Cal. 221, 1856.

⁴ Evidence of the immodesty of the prosecutrix admissible as bearing on question of consent. *State v. Cassidy*, 85 Iowa, 145, 1892; *State v. Pilkington*, (Iowa) 60 N. W. Rep. 502, 1894.

⁵ *R. v. Martin*, 6 C. & P. 562; *Hall v. People*, 47 Mich. 636, 1882; but see *Richie v. State*, 58 Ind. 355, 1877.

⁶ *R. v. Barker*, 3 C. & P. 589, 1829; *R. v. Hodgson*, R. & R. 211, 1814; *State v. Forshner*, 43 N. H. 89, 1861; *State v. Knapp*, 45 *Ibid.* 148, 1863; *Com. v. Kendall*, 113 Mass. 210, 1873; *People v. Abbott*, 19 Wend. 192, 1838; *Woods v. People*, 55 N. Y. 515, 1874, (but see *People v. Jackson*, 3 Parker C. R. 391, 1861); *McCombs v. State*, 8 Ohio St. 643, 1858; *McDermott v. State*, 13 *Ibid.* 332, 1862; *Pratt v. State*, 19 *Ibid.* 277, 1869; *State v. Jefferson*, 6 Ired. 305, 1846; *State v. Henry*, 5 Jones, (N. C.) 65, 1857; *State v. Daniel*, 87 N. C. 507, 1882; *Camp v. State*, 3 Kelly, 417, 1847; *Sherwin v. People*, 69 Ill. 56, 1873; *Pleasant v. State*, 15 Ark. 624, 1855. This course was taken in *R. v. St. Leonards*, London (London Law Times, May 24, 31, 1844), where this defence was unsuccessfully, as a matter of fact, set up by Lord St. Leonards to an indictment for assault with an intent to commit a rape. *State v. Eberline*, 47 Kans. 155, 1891.

⁷ *State v. Forshner*, *supra*.

⁸ *Brennan v. People*, 7 Hun, 171, 1876.

dissipated habits, and that she was in the habit of receiving men at her dwelling-house for the purpose of promiscuous intercourse.¹

V. PLEADING.²

§ 569. *Two defendants may be joined as principals in rape;*³ and an indictment has been sustained which in one count charges G. as principal in the first degree, and W. as present, aiding and abetting, and in another count charges W. as principal in the first degree, and G. as aiding and abetting.⁴

§ 570. It is the practice to join a count for an assault with an intent to commit the rape with a count for rape itself,⁵ and a

¹ Woods v. People, *ut supra*.

That for the purpose of identification prior sexual assaults by defendant may be put in evidence for the prosecution, see State v. Walters, 45 Iowa, 889, 1877; and see Whart. Crim. Ev. § 47.

The prosecution may of course introduce rebutting evidence to sustain the prosecutrix's character for chastity. People v. Tyler, 36 Cal. 522, 1868; McCain v. State, 57 Ga. 390, 1876; and see Turney v. State, 8 S. & M. 104, 1847, where this was permitted as evidence in chief.

That the prosecutrix's husband's declarations are inadmissible to impeach her, see McCombs v. State, 8 Ohio St. 643, 1858; and so as to evidence of the bad character of her parents, State v. Anderson, 19 Mo. 241, 1853.

Evidence is not admissible, however, to show the bad character of the place where the rape was committed. State v. Duffy, (Mo.) 27 S. W. Rep. 358, 1894.

As has been already seen, the inference arising from a long silence on the part of the prosecutrix is a presumption not of law, but of fact, to be passed on by the jury. *Supra*, § 566; Whart. Crim. Ev. §§ 376-384.

It has been ruled that the prosecutrix may be asked whether the accused, prior to the act, had not made improper propositions to her. People v. Manahan, 32 Cal. 68, 1867; R. v. Rearden, 4 F. & F. 76, 1864.

² See Whart. Prec. 186 *et seq.*, 258 *et seq.*, for Forms.

³ R. v. Burgess, 1 Russ. on Cr. 687; Strang v. People, 24 Mich. 1, 1871. See R. v. Crisham, 1 C. & M. 187, 1841; Kessler v. Com., 12 Bush, 18, 1876; Ackerson v. People, 124 Ill. 563, 1888; State v. Duffy, (Mo.) 27 S. W. Rep. 358, 1894. That the acts constituting the offence charged must be set out, see State v. Vorey, 41 Minn. 134, 1889; State v. Fernald, (Iowa) 55 N. W. Rep. 534, 1893.

⁴ R. v. Gray, 7 C. & P. 164, 1835. See Folke's Case, 1 Mood. C. C. 354, 1831; State v. Jordan, 110 N. C. 491, 1892.

⁵ Whart. Cr. Pl. & Pr. §§ 285-90; Harman v. Com., 12 S. & R. 69, 1824; Burk v. State, 2 Har. & John. 426, 1809; Steph. v. State, 11 Ga. 225, 1855; People v. Taylor, 36 Cal. 253, 1868; Stevens v. State, 66 Md. 202, 1886.

In Pennsylvania an indictment may properly charge in three counts, assault and battery, assault with intent to ravish, and statutory rape and bas-

general verdict of guilty carries the greater offence.¹ But the allegation of an assault is usually made in the count for rape.

Rape may be joined with assault.

§ 571. The allegation of "assault" is said to be unnecessary;² but without it there cannot be a conviction for the assault. When it is inserted there may be, under the present practice, a conviction of the assault.³

Allegation of "assault" not necessary.

§ 572. Age need not be averred, either in respect to the woman,⁴ nor to the man, so as to exclude impuberty,⁵ unless, in the former case, the proceeding be on a statute relative to abuse of female children under a specified age.⁶ Hence, as will be seen, in the statutory offence of abusing infant children, age is an essential averment,⁷ though it is not necessary in an indictment for rape, under such a statute, to aver age.⁸ When improperly used, the limitation may be rejected as surplusage.⁹ Nor,

Age need not be averred.

tardy. *Com. v. Lewis*, 140 Pa. 561, 1891; *Com. v. Parker*, 146 Pa. 343, 1892; *Farrell v. State*, 54 N. J. L. 416, 1892.

attempt may be charged directly without charging rape in the indictment. *West v. State*, (Tex.) 21 S. W. Rep. 686, 1893. See further as to attempt, *Proctor v. Com.*, (Ky.) 20 S. W. Rep. 213, 1892.

A count charging that the prisoner, a slave, "with force and arms, in the county aforesaid, in and upon one A. (then and there being a free white woman) feloniously did make an assault, and her, the said A., then and there feloniously did attempt to ravish and carnally know, by force and against her will, and in said attempt did forcibly choke and throw down the said A.," is not bad for duplicity or uncertainty. *Green v. State*, 28 Miss. 509, 1852. *Whart. Cr. Pl. & Pr.* § 907.

¹ *R. v. Allen*, 2 Mood. 179; 9 C. & P. 521, 1840; *O'Connell v. State*, 6 Minn. 279, 1861.

² *Infra*, § 575.

⁴ *Whart. Prec.* 186; *State v. Storkey*, 63 N. C. 7, 1868; *State v. Jackson*, 76 Ibid. 209, 1877; *State v. Staton*, 88 Ibid. 654, 1883.

As to joining other counts, see *Thompson v. State*, (Tex.) 26 S. W. Rep. 987, 1894; *McGuff v. State*, 88 Ala. 147, 1889; *State v. Houx*, 109 Mo. 654, 1892; *State v. Wray*, 109 Mo. 594, 1892.

⁵ *Com. v. Scannal*, 11 Cush. 547, 1853; *Com. v. Sugland*, 4 Gray, 7, 1855; *People v. Ah Yek*, 29 Cal. 575, 1866; *Wood v. State*, 12 Tex. App. 174, 1882; *Cornelius v. State*, 13 Ibid. 349, 1883; *People v. Wessel*, 98 Cal. 352, 1893; *Whart. Prec.* 186.

⁶ *State v. Erickson*, 45 Wis. 86, 1878.

¹ *Cook v. State*, 4 Zab. (N. J.) 845, 1855. And where an indictment would seem to charge a mere assault, but substantially charges rape under a statute, it will be held good after conviction for the graver offence. *State v. Horne*, 20 Oreg. 485, 1891. An

⁷ *Whart. Prec.* 187, 190. *Infra*, § 578. And where age is not averred proof of consent is a defence. *State v. Wheat*, 22 Atl. Rep. 720, (Vt.) 1891.

⁸ *Com. v. Sugland*, 4 Gray, 7, 1855; *State v. Houx*, 109 Mo. 654, 1892.

⁹ *Infra*, § 598; *Mobley v. State*, 46 Miss. 501, 1872.

when there is a statute fixing a specific penalty on the abuse of a woman under a certain age, is it necessary, in the indictment for rape, to aver that the woman was above that age.¹

§ 573. The words "ravish,"² and "forcibly and against the will,"³ have been held necessary in the indictment; though in Pennsylvania it was held that the omission of the latter words was not fatal when it was charged that the defendant "feloniously did ravish and carnally know her;"⁴ and it would seem that "ravish" implies force.⁵ *Unlawfully* may be dispensed with.⁶

§ 574. *Sex* need not be specifically averred.⁷ Thus, in a case where an indictment for a rape charged that the defendant, "with force and arms, etc., the said Mary Ann Taylor, etc. etc., then and there violently and against

Sex need
not be
averred.

¹ *State v. Gaul*, 50 Conn. 578, 1888. 1880, it was held that "violently" could be substituted for "forcibly." See *Com. v. Sugland*, *supra*; *Sutton v. People*, (Ill.) 34 N. E. Rep. 420, 1893. "Did rape" is not equivalent to "ravish."

² *Gongleman v. People*, 3 Parker C. R. 15, 1855; *Christian v. Com.*, 28 Gratt. 954, 1873; *Davis v. State*, 42 Tex. 226, 1875. See, however, under Missouri statute, *State v. Meinhardt*, 78 Mo. 562, 1881. And under Nebraska statute, *Palin v. State*, (Nebr.) 57 N. W. Rep. 743, 1894. *Hewitt v. State*, 15 Tex. App. 80, 1883. It is not necessary to aver in the indictment that it was without the consent of the infant. *Farrell v. State*, 54 N. J. L. 416, 1892. As to Indiana, see *Polson v. State*, (Ind.) 35 N. E. Rep. 907, 1893. As to Wisconsin, *State v. Mueller*, (Wis.) 55 N. W. Rep. 165, 1893. "Against her will and consent" is equivalent to "without her consent." *State v. Jackson*, (La.) 15 So. Rep. 402, 1894.

³ Whart. Cr. Pl. & Pr. § 263; *State v. Jim*, 1 Dev. 142, 1845. See *Elschlep v. State*, 11 Tex. App. 301, 1881; *Cornelius v. State*, 13 Ibid. 349, 1888. Under the laws of Maine, the act necessary to constitute the crime of rape must be done "by force," and these words, or something equally significant, cannot be dispensed with in an indictment. The word "violently" does not fulfil the demands of the statute. *State v. Blake*, 39 Me. (4 Heath) 322, 1855. Otherwise as to carnal knowledge of child. *State v. Black*, 63 Me. 210, 1874. For Georgia practice, see *McMath v. State*, 55 Ga. 303, 1875. As to Texas, see *Williams v. State*, 1 Tex. App. 90, 1876; *Gutierrez v. State*, 44 Tex. 587, 1876. In *State v. Williams*, 32 La. An. 335, 1882; *Greer v. State*, 50 Ind. 267, 1882.

⁴ *Harman v. Com.*, 12 S. & R. 69, 1824. See *Com. v. Bennett*, 2 Va. Cas. 235, 1820; Whart. Cr. Pl. & Pr. § 261.

⁵ *Com. v. Fogerty*, 8 Gray, 489, 1857; S. P., *State v. Johnson*, 67 N. C. 55, 1872.

⁶ *Weinzorpfli v. State*, 7 Blackf. 186, 1844. See Whart. Cr. Pl. & Pr. § 269. And in Dakota feloniously may be omitted. *Territory v. Godfrey*, 6 Dak. 46, 1888. That "feloniously" is necessary, see *Hall v. Com.*, (Ky.) 26 S. W. Rep. 8, 1894.

⁷ See *Com. v. Sullivan*, 6 Gray, 477, 1856; *State v. Hammond*, 77 Mo. 157, 1882; *Greer v. State*, 50 Ind. 267, 1882.

her will, feloniously did ravish and carnally know," the court will infer that Mary Ann Taylor was a female.¹

An indictment for rape need not allege that the female was not the wife of the defendant.² Without such averment, however, there can be no conviction under the count for adultery or fornication.³

§ 575. How far the defendant may be convicted of minor offences in a count for rape is elsewhere considered.⁴ At common law, in consequence of the differences between felonies and misdemeanors as to both procedure and punishment, there could be no conviction of assault on an indictment for

May be conviction of minor offence.

1875; *Anderson v. State*, 34 Ark. 257, an indictment for rape, see *Com. v. 1879; Tillson v. State*, 29 Kans. 452, *Goodhue*, 2 Metc. 93, 1841. Such, 1883; *People v. Wessel*, 98 Cal. 352, however, is not the view generally 1893; *Warner v. State*, 54 Ark. 660, accepted. *Infra*, § 1751. See *State v. 1891. Thomas*, 53 Iowa, 214, 1880. But

¹ *State v. Farmer*, 4 Ired. 224, 1844; there can be no conviction, under the S. P., *State v. Hussey*, 7 Iowa, 409, 1858; Wisconsin statute, of fornication on *Taylor v. Com.*, 20 Gratt. 825, 1871. an indictment for rape. *State v.*

² *Com. v. Scannal*, 11 Cush. 547, *Shear*, 51 Wis. 460, 1881; and so in 1853; *Com. v. Fogerty*, 8 Gray, 489, Georgia, *Speer v. State*, 60 Ga. 381, 1857; *People v. Estrada*, 53 Cal. 600, 1878. In Kansas, though information 1879; *State v. Williams*, 9 Mont. 179, charges rape and an unsuccessful at- 1890; *State v. White*, 44 Kans. 514, tempt is proved, there may be a con- 1890. Under the Ohio statute, which viction for the attempt. *In re Lloyd*, (Kans.) 33 Pac. Rep. 307, 1893; and *State v. Frazier*, (Kans.) 36 Pac. Rep. 58, 1894; *State v. Brown*, (Kans.) 37 Pac. Rep. 996, 1894. See, also, *West v. State*, (Tex.) 21 S. W. Rep. 686, 1893. In Minnesota there can be a conviction for assault. *State v. Bagan*, 41 Minn. 285, 1889. Similarly in Texas, *Russell v. State*, (Tex.) 26 S. W. Rep. 990, 1894.

³ *Com. v. Murphy*, 2 Allen, 163, 1861. But see *Com. v. Parker*, 146 Pa. 343, 1892.

⁴ *Whart. Cr. Pl. & Pr.* § 249. *Infra*, § 641 a; *R. v. Dawson*, 3 Stark. 62, 1820; *Com. v. Fischblatt*, 4 Metc. 354, 1842; *State v. Perkins*, 82 N. C. 681, 1880. Under the Michigan and Iowa statutes there can be convictions of assault. *State v. Pennell*, 56 Iowa, 29, 1881; *State v. Jay*, 57 Ibid. 164, 1881; *Hall v. People*, 47 Mich. 636, 1882. That in Massachusetts a defendant may be convicted of incest on

In Iowa, for assault and battery on an indictment for rape. *State v. Kyne*, 86 Iowa, 616, 1892.

In Virginia, under an indictment for rape, the jury may convict for an attempt. *Glover v. Com.*, 86 Va. 382, 1889.

As to burglary with intent to rape, see *Harvey v. State*, 53 Ark. 425, 1890; *Walton v. State*, 29 Tex. App. 163, 1890; *Fields v. State*, (Tex.) 24 S. W. Rep. 907, 1894.

rape;¹ but this rule is no longer sustainable on principle in jurisdictions in which the distinction between felonies and misdemeanors has ceased to exist, and in many jurisdictions is abolished by statute.² And the general practice now is to sustain a verdict for assault on such an indictment.³

VI. ASSAULT WITH INTENT TO RAVISH.⁴

§ 576. A conviction on an indictment for assault with intent to ravish will be sustained when there was an assault with intent to ravish, but the offence was not consummated;⁵ though at common law, if it should appear that the offence was rape, the defendant is entitled to be acquitted of the assault.⁶ If there be an assault without an intent to ravish by force, then it has been held that a conviction for

Assault
may be
sustained
when
rape is not
consum-
mated.

¹ *Com. v. Roby*, 12 Pick. 496, 1832; 978, 1898; *Proctor v. Com.*, (Ky.) 20 Braddee *v. Com.*, 6 Watts, 530, S. W. Rep. 213, 1892. See *infra*, § 612; and see *Com. v. Thompson*, 116 1887.

² *Com. v. Drum*, 19 Pick. 479, 1877; Mass. 346, 1874; *State v. Vadnais*, 21 Com. *v. Dean*, 109 Mass. 349, 1872; Minn. 382, 1874; *People v. Kirwan*, Stewart *v. State*, 5 Ohio, 241, 1831; 22 N. Y. Sup. 160, 1893; *People v. Richie v. State*, 58 Ind. 355, 1877; Mesa, 98 Cal. 580, 1892; *People v. Richardson v. State*, 54 Ala. 158, 1875. Goulette, 82 Mich. 36, 1890; *State v. See People v. Jackson*, 3 Hill, 92, Mueller, 85 Wis. 203, 1893. As to New 1842; *State v. Johnson*, 1 Vroom, (N. York, see *People v. O'Connell*, 12 N. J.) 185, 1864. *Supra*, § 27.

³ *Ibid.*; *R. v. Allen*, 9 C. & P. 521, 20 N. Y. Sup. 455, 1892. 1840; *R. v. Guthrie*, L. R. 1 C. C. 241, 1867. *Infra*, § 255.

It may be reversible error not to charge as to a lesser offence. *Shields v. State*, 32 Tex. Cr. 498, 1893; *Robertson v. State*, 30 Tex. App. 498, 1891; *State v. Dalton*, 106 Mo. 463, 1891.

⁴ As to joinder of counts, see Whart. Cr. Pl. & Pr. §§ 245, 287, 293. As to conviction of minor offence, see *Ibid.* § 742.

⁵ *R. v. Stanton*, 1 C. & K. 415, 1844; *Hays v. People*, 1 Hill, 351, 1841. See *Porter v. State*, (Tex.) 26 S. W. Rep. 626, 1894; *Blannett v. State*, 8 Ohio Cir. Ct. 313, 1894; *Miles v. State*, (Ga.) 19 S. E. Rep. 805, 1894; *Crew v. State*, (Tex.) 22 S. W. Rep. 978, 1898; *Proctor v. Com.*, (Ky.) 20 S. W. Rep. 213, 1892. See *infra*, § 612; and see *Com. v. Thompson*, 116 Mass. 346, 1874; *State v. Vadnais*, 21 Com. *v. Dean*, 109 Mass. 349, 1872; Minn. 382, 1874; *People v. Kirwan*, Stewart *v. State*, 5 Ohio, 241, 1831; 22 N. Y. Sup. 160, 1893; *People v. Richie v. State*, 58 Ind. 355, 1877; Mesa, 98 Cal. 580, 1892; *People v. Richardson v. State*, 54 Ala. 158, 1875. Goulette, 82 Mich. 36, 1890; *State v. See People v. Jackson*, 3 Hill, 92, Mueller, 85 Wis. 203, 1893. As to New 1842; *State v. Johnson*, 1 Vroom, (N. York, see *People v. O'Connell*, 12 N. J.) 185, 1864. *Supra*, § 27.

assault with intent to ravish cannot be sustained.¹ In such case, however, if the indictment contain the allegation, there can be a conviction for an assault with intent to have an improper connection;² or in any view, there may be a conviction for assault.³ The form of the indictment is elsewhere considered.⁴

§ 576 a. *Touching* is not necessary to sustain such an indictment.⁵ The intent to use force, however, may be inferred from the circumstances.⁶ Thus, in a case where, when the prosecutrix awoke, she found the defendant in bed with her, holding her by the wrist, and he escaped when she called on the family for help, it was held that he might be con-

Force to be
inferred
from
circum-
stances.

there may be a conviction of the minor on an indictment for the major, there can be no conviction on proof establishing the major on an indictment for the minor. The answer to the last point is that while the prosecution cannot try for one offence an indictment charging another, it can elect to prosecute for a minor offence, by discharging aggravating incidents. See *infra*, §§ 641 a, 1344; *supra*, § 27; Whart. Cr. Pl. & Pr. § 464. And see *DeGroat v. People*, 39 Mich. 124, 1878.

As to merger of carnal knowledge of infant in rape, see *State v. Woolaver*, 77 Mo. 103, 1882; *State v. Ellis*, 74 Ibid. 385, 1881.

¹ *R. v. Stanton*, 1 C. & K. 415, 1844; *R. v. Case*, *ut supra*; *R. v. Lloyd*, 7 C. & P. 318, 1836; *Com. v. Merrill*, 14 Gray, 415, 1860; *Smith v. State*, 12 Ohio St. 466, 1861; *Hull v. State*, 22 Wis. 580, 1868; *Garrison v. People*, 6 Nebr. 274, 1877; *State v. Priestly*, 74 Mo. 24, 1881. See *Preisker v. People*, 47 Ill. 382, 1868; *State v. Kirwan*, 22 N. Y. Sup. 160, 1893; and see *Whitcher v. State*, 2 Wash. 286, 1891; *Moore v. State*, 79 Wis. 546, 1891; *Lewellen v. State*, (Tex.) 26 S. W. Rep. 832, 1894; *Toullee v. State*, (Ala.) 14 So. Rep. 403, 1893; *State v. Owsley*, 102 Mo. 678, 1891; *Passmore v. State*, 29 Tex. App. 241, 1890; *State v. Harney*, 101 Mo. 470, 1890;

Shields v. State, 32 Tex. Cr. 498, 1893; *Robertson v. State*, 30 Tex. App. 498, 1891; and cases cited *infra*, § 576 a.

² Whart. Cr. Pl. & Pr. § 247; *R. v. Stanton*, 1 C. & K. 415, 1844; *R. v. Saunders*, 8 C. & P. 265, 1838; *R. v. Williams*, Ibid. 286; *R. v. Case*, 1 Den C.C. 580, 1850; 4 Cox C. C. 220; 1 Eng. Law & Eq. 544; *Newell v. Whitcher*, 53 Vt. 589, 1880. *Infra*, § 603.

³ See *R. v. Dungey*, 4 F. & F. 99, 1864. *Infra*, § 641 a. Simple assault is included in assault with intent to ravish. *Porter v. State*, (Tex.) 26 S. W. Rep. 626, 1894.

⁴ *Infra*, § 644. See *People v. Girr*, 53 Cal. 629, 1879.

⁵ *Hays v. People*, 1 Hill, 851, 1841; *Jackson v. State*, 91 Ga. 322, 1893.

⁶ See *State v. Michell*, 89 N. C. 521, 1883; *Ware v. State*, 67 Ga. 348, 1881; *House v. State*, 9 Tex. App. 53, 1880; *Peterson v. State*, 14 Ibid. 162, 1883; *Crew v. State*, (Tex.) 22 S. W. Rep. 973, 1893; *State v. Shroyer*, 104 Mo. 441, 1891; *State v. Whitsett*, 111 Mo. 202, 1892; *Massey v. State*, 31 Tex. Cr. 371, 1892. But evidence of lewd conduct with other women is not admissible to prove likelihood of his committing the offence in question. *People v. Stewart*, 85 Cal. 174, 1890.

victed of an assault with intent to commit a rape.¹ But unless it appear that the intent was to ravish by force, the defendant must be acquitted of the aggravated offence.² It has been said that there can be no conviction of assault in such case if the object was to obtain the woman's consent.³ But an attack does not cease to be an assault because its object is to obtain consent to something after the assault.⁴

Administering drugs with intent to inflame the passions has been held in this country to be an assault,⁵ though in England otherwise at common law.⁶

The complaints of the party injured, made after the assault, are inadmissible, unless part of the *res gestae*.⁷

¹ Carter v. State, 35 Ga. 263, 1866; v. State, 12 Ohio St. 466, 1861; State also Glover v. Com., 86 Va. 382, 1889; v. Priestly, 74 Mo. 24, 1881; Hull v. and see People v. Stewart, 97 Cal. 238, State, 22 Wis. 580, 1883; Garrison v. 1893. See State v. Neely, 74 N. C. People, 6 Nebr. 274, 1877; State v. 425, 1876, where it was held that an Massey, 86 N. C. 658, 1882; State v. intent to use force might be inferred Donovan, 61 Iowa, 369, 1883; House from an apparently violent pursuit, v. State, 9 Tex. App. 53, 567, 1880; which, however, was overruled in Irving v. State, Ibid. 66, 1880; People State v. Massey, 86 Ibid. 658, 1882. v. Fleming, 94 Cal. 308, 1892; State v. As sustaining State v. Massey, see Jerome, 82 Iowa, 749, 1891; Lewellen Saddler v. State, 12 Tex. App. 194, v. State, (Tex.) 26 S. W. Rep. 832, 1882; Sanford v. State, Ibid. 196, 1882. 1894; Elam v. State (Tex.) 20 S. W. See Whart. Crim. Ev. (9th ed.) § 734. Rep. 710, 1892; Fields v. State, (Tex.) 24 S. W. Rep. 907, 1894.

A prisoner may be convicted of an assault with intent to commit a rape, without the testimony of the party injured. People v. Bates, 2 Parker C. R. 27, 1823. *Supra*, § 555.

An indictment charging an assault and an "attempt to ravish," etc., has been held insufficient to support a charge of an assault with intent to commit rape. State v. Ross, 25 Mo. 426, 1857. See People v. O'Neil, 48 Cal. 257, 1870. As to indictment, see, further, Green v. State, 50 Ind. 267, 1875; Joice v. State, 53 Ga. 50, 1874.

That an attempt to ravish is indictable though the attempt was abandoned on resistance, see *supra*, § 187; Lewis v. State, 35 Ala. 380, 1857; Glover v. Com., 86 Va. 382, 1889.

² R. v. Stanton, 1 C. & K. 415, 1844; R. v. Lloyd, 7 C. & P. 318, 1836; Com. v. Merrill, 14 Gray, 415, 1860; Smith

³ R. v. Cockburn, 3 Cox C. C. 543, 1849; People v. Fleming, 94 Cal. 308, 1892.

⁴ *Infra*, § 577.

In Com. v. Shaw, 134 Mass. 221, 1883, it was held that it was no defence to an indictment for an assault with intent to ravish a child, that the child was put in a position in which a rape was impossible. See *supra*, § 185.

⁵ Com. v. Stratton, 114 Mass. 303, 1873. See People v. Carmichael, 5 Mich. 10, 1858. But where the drug is incapable of producing the effect of destroying either mental or physical resistance, it is otherwise. State v. Lung, (Nev.) 28 Pac. Rep. 235, 1891.

⁶ See *infra*, § 610.

⁷ Veal v. State, 8 Tex. App. 474, 1880; U. S. v. Snowden, 22 Wash.

§ 577. The question of consent of the party injured as a defence has been already discussed in its general bearings,¹ and it will be sufficient now to state the conclusions already reached, blended with the decisions of the courts on the particular issue now before us. *Volenti non fit injuria* is the maxim generally applicable; but in this relation with qualifications which will now be detailed.

Assent bars prosecution if knowingly given by person capable of assenting.

(a) In rape itself, of which an essential element is the want of consent of the woman, proof of consent necessarily, as has been seen, destroys one of the conditions of the offence. Hence, there can be no assault with intent to commit a rape in cases where consent, by a person capable of consenting is given.²

(b) In the statutory crime of sexual abuse of a child under ten years, non-consent is not an essential element, and hence consent is no defence to an indictment for this offence.³ And at common law, to an indictment for rape of a child of such tender years as to be incapable of consenting, consent, or even assistance, is no defence.⁴

Law Rep. 74, 1898; *supra*, § 566; and in *Hornbeck v. State*, 35 Ohio St. 277, 1879, where the woman was an imbecile, and could not be examined as a witness, but made certain declarations shortly after the commission of the offence, it was held that such declarations could not by themselves prove the commission of the offence.

¹ *Supra*, 146.

² *R. v. Martin*, 9 C. & P. 215, 1840; 2 Mood. C. C. 123; *R. v. Johnston*, L. & C. 632, 1865; 10 Cox C. C. 114; *R. v. Wollaston*, 12 Ibid. 180, 1872; *People v. Bransby*, 32 N. Y. 525, 1868; *State v. Picket*, 11 Nev. 255, 1876. But the failure of prosecutrix's witness to appear, or of prosecution to account for her absence when she was equally accessible to the defendant as a witness, is no evidence that no assault had been committed. *Coleman v. State*, 111 Ind. 563, 1887. See, however, *Stephens v. State*, 107 Ind. 185, 1886; also, *Whitcher v. State*, 2 Wash. 286, 1891. *Supra*, § 188.

³ *R. v. Beale*, 10 Cox C. C. 157, 1865; L. R. 1 C. C. 10; *R. v. Con-*

nolly, 26 Up. Can. Q. B. 323, 1870; *Cliver v. State*, 45 N. J. L. 46, 1883; *Com. v. Roosnell*, 143 Mass. 32, 1886; *Comer v. State*, (Tex.) 20 S. W. Rep. 547, 1892; *State v. Lacey*, 111 Mo. 513, 1892; *Rodgers v. State*, 30 Tex. App. 510, 1891. *Supra*, §§ 146-188, 562. Ignorance by the defendant that the prosecutrix was under the statutory age is no defence. *Supra*, § 88. Under Stat. 33 & 34 Vict. consent of a person under thirteen to an indecent assault is no defence. *Infra*, § 578.

⁴ *Hays v. People*, 1 Hill, (N. Y.) 351, 1841; *O'Meara v. State*, 17 Ohio St. 515, 1867; *Stephen v. State*, 11 Ga. 225, 1855; *State v. Johnston*, 76 N. C. 209, 1877; *Pound v. State*, (Ga.) 20 S. E. Rep. 247, 1894; but see, as qualifying this, *R. v. Read*, 1 Den. C. C. 377, 1848; 3 Cox C. C. 266; *R. v. Cockburn*, 3 Ibid. 543, 1849; *People v. McDonald*, 9 Mich. 150, 1861; and *R. v. Martin*; *R. v. Johnston*, *supra*, as to children not positively incapable of assent.

But a child of over seven years is not to be arbitrarily ruled to be incapable of consent.¹

(c) An indictment for assault with intent to ravish may be sustained, when the object of the assault was incapable of assent. And this applies to cases where such incapacity arises from extreme infancy,² or from idiocy or mania,³ or from intoxication, whether by alcoholic liquor or by opiates.⁴ With young girls it is for the jury to consider whether the supposed assent was not the result of fear, or, in cases of assault, of confusion.⁵

(d) It seems, also, that consent is no defence to assault if the act is perpetrated with unnecessary violence,⁶ or if the woman does not know that what is proposed to her is the sexual act;⁷ as in the case of the patient who supposed that the act was one simply of medical treatment.⁸ In such cases there can be a conviction for the *assault*; but there can be no conviction of the *assault with intent to ravish*, if there were intelligent submission, unless the jury believe that the intent was to use force if persuasion failed.⁹

(e) If the defendant intended to use force to the end, and the woman, who for a time resisted, ultimately assented, the defendant may be convicted of an assault with intent to commit a rape, or of an attempt.¹⁰

¹ *R. v. Read*, *ut supra*; *R. v. Roadley*, 14 Cox C. C. 463, 1880; 45 L. T. (N. S.) 515.

² *Supra*, § 562; and see, particularly, *R. v. Lock*, L. R. 2 C. C. 10, 1871; *State v. Johnston*, 76 N. C. 209, 1877; though see *State v. Pickett*, 11 Nev. 255, 1876.

³ *Supra*, § 560. See *R. v. Connelly*, 26 Up. Can. Q. B. 323, 1870, where Hagarty, J., argues that mere animal consent in such case defeats prosecution.

⁴ *Supra*, §§ 150, 562.

⁵ *R. v. Day*, 9 C. & P. 722, 1841; *R. v. McGavaran*, 6 Cox C. C. 64, 1852; *R. v. Fick*, 16 Up. Can. C. P. 379, 1860.

⁶ *Infra*, § 636.

⁷ *Supra*, §§ 559, 561. See *State v. Brooks*, 76 N. C. 1, 1877, where it was held that an attempt to induce a woman to consent to sexual inter-

course, under the belief that the defendant was her husband, was not an assault with intent to commit a rape.

But see *supra*, § 561.

⁸ *R. v. Case*, 4 Cox C. C. 220, 1850; 1 Den. C. C. 580; *R. v. Flattery*, 13 Cox C. C. 388, 1877; *R. v. Stanton*, 1 C. & K. 415, 1844; *Eberhart v. State*, 134 Ind. 651, 1893. *Supra*, § 559.

⁹ *Ibid. Supra*, § 550; *Walter v. People*, 50 Barb. 144, 1867; *Com. v. Fields*, 4 Leigh, 648, 1832; *Pleasant v. State*, 8 Eng. (18 Ark.) 360, 1853; *Clark v. State*, 30 Tex. 448, 1867. As to fraud, see *R. v. Bennett*, 4 F. & F. 1105, 1866.

¹⁰ *Supra*, §§ 141, 181, 188; *State v. Hartigan*, 32 Vt. 607, 1860; *People v. Bransby*, 32 N. Y. 525, 1868; *State v. Cross*, 12 Iowa, 66, 1861. See *R. v. Hallett*, 9 C. & P. 748, 1841, and cases cited *supra*, § 187; *Proctor v. Com.*, (Ky.) 20 S. W. Rep. 213, 1892.

(f) And so, also, where the defendant, before consummating his purpose, was driven or frightened off.¹

VII. CARNAL KNOWLEDGE OF CHILDREN.

§ 578. By statutes in England and in this country the carnal knowledge, even with the consent, of children,² is made, with varying limits, a statutory offence. At common law the following positions may be laid down:

This is a statutory offence.

(1) When the child is incapable of consenting, or when the consent is to something else than sexual intercourse, the offence is rape.³

(2) When the child intelligently consents, this is a misdemeanor at common law, when not so by statute; while by statute in some jurisdictions it is a felony.⁴

In many jurisdictions the question of consent is settled by the adoption of statutes providing that carnally knowing a female under the age of (ten), or carnally knowing a woman over that age *against her will*, shall be, etc.⁵ As has been already seen,⁶

¹ See *supra*, §§ 141, 181, 188; *State v. Elick*, 7 Jones, (N. C.) 68, 1859; *Tilman*, 30 La. An. Pt. ii. 1249, 1878; *Lewis v. State*, 35 Ala. 380, 1862. See *Stephen v. State*, 11 Ga. 225, 1855; *R. v. Wright*, 4 F. & F. 967.

² See *McGuff v. State*, 88 Ala. 147, 1889; *Holton v. State*, 28 Fla. 303, 1891; *State v. Harney*, 101 Mo. 470, 1890; *State v. Houx*, 109 Mo. 654, 1892; *State v. Wilcox*, 111 Mo. 569, 1892.

That "child under the age of fourteen years" includes every female child under fourteen years, whether or not she has reached a state of puberty, see *People v. Miller*, 96 Mich. 119, 1893.

As to indictment under Alabama statute, see *Toullee v. State*, (Ala.) 14 So. Rep. 403, 1893.

³ *Supra*, § 558.

⁴ *Com. v. Bennett*, 2 Va. Cas. 235, 1820; *Lawrence v. Com.*, 30 Gratt. 845, 1878, (where it was also held that under the Virginia statute, making consent no defence with girls under twelve, mistake as to the girl's age

was no defence; *supra*, § 88); *State v. Elick*, 7 Jones, (N. C.) 68, 1859; *Tilman*, 30 La. An. Pt. ii. 1249, 1878; *Lewis v. State*, 35 Ala. 380, 1862. See *Stephen v. State*, 11 Ga. 225, 1855; *R. v. Wright*, 4 F. & F. 967. (holding that not only infancy, but feeble-mindedness, makes consent inoperative); *Cliver v. State*, 45 N. J. L. 46, 1883, where the limit is ten years; *Territory v. Potter*, 1 Ariz. 421, 1883. Consent and bad repute of child under sixteen years a defence to charge of rape. *Com. v. Allen*, 185 Pa. 483, 1890; *People v. Mills*, 94 Mich. 630, 1893. See, as to consent of infants, *supra*, § 558.

⁵ *Supra*, § 572.

⁶ But see *Com. v. Roosnell*, 143 Mass. 32, 1886. As to distinction between rape and enticing female child for purposes of prostitution in Pennsylvania, see *Com. v. Fowler and Adler*, 44 Leg. Int. 482, 1887. On the question of consent of female under statutory age in Kansas, see *State v. Woods*, 49 Kans. 237, 1892. That whether she consented or resisted is immaterial, see *Davis v. State*, 31

where a severer penalty is assigned in cases where the person ravished is under a certain age, the indictment in order to sustain the severer penalty must specify the age.¹ Without such specification, however, the conviction can be for the offence of rape,² and as has been seen, the limitations as to age may be rejected as surplusage,³ and so may terms which, though descriptive of rape (*e. g.*, “force,” “against the will,” etc.), are not necessary ingredients of the statutory offence.⁴

“Carnal knowledge,” under the statute, is to be construed in the same sense as the same words are construed in reference to rape. The male organ must be introduced to some extent within the lips of the female, though the slightest degree of penetration will be sufficient.⁵

Nebr. 247, 1891; *Hall v. State*, (Nebr.) 58 N. W. Rep. 929, 1894; *Toullee v. State*, (Ala.) 14 So. Rep. 403, 1893. Miss. 501, 1871; *Hall v. State*, (Nebr.) 58 N. W. Rep. 929, 1894.

¹ *State v. Black*, 63 Me. 210, 1874; *McComas v. State*, 11 Mo. 116, 1847; *State v. Jaeger*, 66 Ibid. 173, 1877. As to distinction between rape and carnal knowledge of a female child under the age of puberty, see *Warner v. State*, 54 Ark. 660, 1891. That it is enough to aver “did have carnal knowledge of,” etc., see *People v. Mills*, 17 Cal. 276, 1861.

² *State v. Worden*, 46 Conn. 349, 1878; *Hall v. State*, (Nebr.) 58 N. W. Rep. 929, 1894, and cases cited in next note. ³ *R. v. Lines*, 1 C. & K. 398, 1844; *Brauer v. State*, 25 Wis. 418, 1870; *People v. Courier*, 79 Mich. 366, 1890.

⁴ *R. v. Martin*, 9 C. & P. 215, 1840; *R. v. Nichols*, 10 Cox C. C. 476, 1867; *R. v. Dicken*, 14 Ibid. 8, 1877; *Com. v. Sugland*, 4 Gray, 7, 1855; *State v. Gaul*, 50 Conn. 579, 1888; *O'Meara v. State*, 17 Ohio St. 515, 1867; *State v. Storkey*, 63 N. C. 7, 1868; *State v. Jackson*, 76 Ibid. 209, 1877; *State v. Staton*, 88 Ibid. 654, 1883; *Vasser v. State*, 55 Ala. 264, 1876. As to admissibility of medical testimony, see *State v. Watson*, 81 Iowa, 380, 1890. As to lesser offence of taking indecent liberties with child, see *People v. Hicks*, 98 Mich. 86, 1898, and other cases cited *supra*, § 555. That mistake as to the girl's age is no defence has been already seen, *supra*, § 88. The statutory limitations as to age of consent have also been previously noticed, *supra*, § 558.

⁵ *Supra*, § 572; *Mobley v. State*, 46

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

Failure to Instruct as to Character of Force Necessary.

It was held error for the court to fail to instruct the jury as to the character of the force necessary to be used to accomplish rape. *Walton v. State*, 29 Tex. App. 163, 1890; *Shields v. State*, 32 Tex. Cr. 498, 1893.

Failure to make Immediate Outcry an Important Circumstance.

The defendant requested the court to charge: "If the jury believe from the evidence that, at the time the offence is alleged to have been committed, the prosecuting witness made no outcry, and did not, as soon as an opportunity offered, complain of the offence to others, but concealed it for a considerable length of time thereafter, then the jury should take this circumstance into consideration with all the other evidence in determining the guilt or innocence of the defendant, and whether in fact a rape was committed or not." Refused. Held error. *State v. Witten*, 100 Mo. 525, 1890.

Defendant requested the court to charge: "That in case of rape it devolves upon the State to show, before a conviction can be had, that the party ravished made complaint thereof immediately after being ravished, or as soon thereafter as such party had opportunity so to do. Now the court instructs the jury that no such complaint by the prosecutrix has been proven in this case." Refused. Held error under the evidence of the case. *State v. Patrick*, 107 Mo. 147, 1891.

Instruction as to Penetration in Case of Infant.

The court charged the jury: "If they have a reasonable doubt as to whether or not the defendant is guilty of rape as above defined, but believe to the exclusion of reasonable doubt that he had carnal knowledge of said female with her consent, they will find him not guilty of rape, but guilty of having carnal knowledge of an infant female under twelve years of age, and fix his confinement in the penitentiary from ten to twenty years, in their discretion. To have carnal knowledge with the infant's consent there must have been some penetration, however slight, if the parts of the infant were sufficiently developed to admit it; but if not so developed, then the pressing or rubbing his private part against her private parts for the purpose of producing an emission, was sufficient to constitute carnal knowledge." Held error. *White v. Com.*, (Ky.) 28 S. W. Rep. 340, 1894.

Erroneous Instruction on Credibility of Witnesses.

The court instructed the jury that they might "disregard the evidence of such witnesses as have been successfully impeached by direct contradiction, or by proof of having made different statements at other times, or by proof of bad moral character, or by proof of bad general reputation for truth, except in so far as such witnesses have been corroborated by other credible evidence or facts and circumstances proven on the trial." Held error, as it left the jury to determine whether a witness had been impeached.

Erroneous Charge on the Subject of Fraud as a Substitute for Force.

Where the evidence tended to show that the defendant had carnal intercourse with the prosecutrix while in bed with her husband, and the testimony was conflicting as to whether she was asleep or not, it was held error for the court to charge the jury that if they believed from the evidence that the defendant "by either force or fraud" had carnal knowledge of the prosecu-

trix, they should convict; as there was no fraud such as is required by the statute. *Mooney v. State*, 29 Tex. App. 257, 1890.

The defendant asked the court to charge: "In order to find the prisoner guilty of an assault with intent to commit rape, you must be satisfied beyond a reasonable doubt that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part." Refused. Held error. *Porter v. State*, (Tex.) 26 S. W. Rep. 626, 1894.

CHAPTER III.

SODOMY.

In sodomy proof of penetration is required, § 579.

Consent is no defence; but accomplice alone not sufficient to convict, § 580.

POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)

§ 579. SODOMY consists in sexual connection with any brute animal, or in sexual connection, *per anum*, by a man, with any man or woman. Penetration of the body is essential to the offence,¹ and so, according to a preponderance of authority, is emission.² The act committed in a child's mouth is not enough.³ The term "sodomy" has been held to be a sufficient description of the offence,⁴ and so of the "infamous crime against nature."⁵

In sodomy proof of penetration required.

§ 580. Consent is no defence;⁶ but the evidence of a party consenting to the act is not sufficient to procure a conviction without confirmation; it being held that such party is an accomplice, upon whose unsupported testimony a conviction would not be sustained.⁷ In any view, con-

Consent no defence; but accomplice alone not sufficient to convict.

¹ Steph. Dig. Crim. Law, art. 168; 2 Russ. on Cr. 698; R. v. Jacobs, R. & R. 831. See R. v. Jellyman, 8 C. & P. 604. In Iowa, it has been ruled not to be indictable at common law. *Estes v. Carter*, 10 Iowa, 400, 1860. It is now indictable in Texas by statute. *Ex parte Bergen*, 14 Tex. App. 52, 1883; *Prindle v. State*, 31 Tex. Cr. 551, 1893. As to prior law, see *Frazier v. State*, 39 Tex. 390, 1873.

² *Stafford's Case*, 12 Co. Rep. 37; *People v. Hodgkin*, 94 Mich. 27, 1892, and cases cited therein; see, however, 3 Inst. 59, 1 Hale P. C. 629; and see *contra*, *Com. v. Thomas*, 1 Va. Cas. 307.

³ *Ibid.* See, generally, 1 Hale, 669; 2 Inst. 58, 59; 1 Hawk. P. C. 4; *Com.*

v. Thomas, 1 Va. Cas. 307, 1812; *Prindle v. State*, 31 Tex. Cr. 551, 1893.

⁴ *State v. Williams*, 34 La. An. 87, 1882; *Ex parte Bergen*, *ut supra*.

⁵ *People v. Williams*, 59 Cal. 397, 1881; *State v. Williams*, 34 La. An. 87, 1882; *Bradford v. State*, (Ala.) 16 So. Rep. 107, 1894; *Com. v. Dill*, 160 Mass. 536, 1894; see *supra*, § 15 a.

⁶ *R. v. Jellyman*, 8 C. & P. 604; *R. v. Allen*, 1 Den. C. C. 364; 2 C. & K. 369; 3 Cox C. C. 270; *Com. v. Smith*, (Pa.) 14 Luz. Leg. Reg. 362, 1885.

⁷ 2 Russ. on Cr. (6th Am. ed.) 698. As to corroboration, see *Com. v. Snow*, 111 Mass. 411, 1873; *Com. v. Smith*, (Pa.) 14 Luz. Leg. Reg. 362, 1885.

sent cannot be regarded as given by a child who, by reason of infancy, is incapable of understanding the nature of the act.¹

Attempts to commit the offence, and assaults with intent,² are indictable at common law.³

¹ *Mascolo v. Montesanto*, 61 Conn. 50, 1891. See *R. v. Lock*, *supra*, §§ 556, 577. lawfully meet together, with the intent of committing with each other, openly, lewdly, and indecently in that public

Where an adult and a boy of twelve years of age commit an unnatural offence, the adult, being the pathic, may be convicted. *R. v. Allen*, 1 Den. C. C. 864; T. & M. 55; 2 C. & K. 869; 3 Cox C. C. 270; *Mascolo v. Montesanto*, 61 Conn. 50, 1891. place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly, and indecently did commit with the other, in the sight and view of divers of the liege subjects, in the said public

The allegation, "had a venereal affair," is not essential. *Lambertson v. People*, 5 Parker C. R. 200, 1861. tices as aforesaid. *R. v. Rowed*, 2 G. & D. 518; 3 Q. B. 180; 6 Jur. 396.

It is said in Texas not to be enough to charge the offence in general terms. The acts constituting the offence should be charged. *State v. Campbell*, 29 Tex. 44, 1867. See *Davis v. State*, 3 H. & J. 154, 1810. ² See *R. v. Lock*, L. R. 2 C. C. 12; 12 Cox C. C. 244; *R. v. Eaton*, 8 C. & P. 417; *R. v. Hickman*, 1 Mood. C. C. 84; *R. v. Rowed*, *ut supra*; *People v. Williams*, 59 Cal. 397, 1881; *State v. Frank*, 103 Mo. 120, 1891; *State v. Place*, 5 Wash. 773, 1898.

An indictment was held bad in England for uncertainty which charged that the two defendants being persons of wicked and unnatural dispositions, did in an open and a public place un- ³ See *supra*, §§ 173 *et seq.*

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

Penetration alone Insufficient.

The court charged that the evidence of the offence was complete upon proof of penetration only. Held error. *People v. Hodgkin*, 94 Mich. 27, 1892.

CHAPTER IV.

MAYHEM.¹

Mayhem is inflicting wound diminishing capacity for self-defence, § 581.

Intent to be inferred from facts, § 582.

Offence is felony, § 583.

May be conviction of lesser offence, § 584.

POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)

§ 581. MAYHEM, at common law, says Mr. East, is such a bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem.² Upon this distinction, the cutting off, disabling, or weakening the man's hand, or finger, or striking out an eye, or fore-tooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his ear or nose are not such at common law. By statutes, however, in England and in some of the United States, the offence has been extended, so as to cover all malicious disabling injuries to the person.³

Mayhem is inflicting wound diminishing capacity for self-defence.

¹ For indictments in mayhem, see 30, 1854; U. S. v. Gunther, 5 Dak. 234, 1888; R. v. Latimer, 54 L. T. 768, 1888; R. v. Hagan, 1886; Kitchens v. State, 80 Ga. 810, 1888; State v. Ma Foo, 110 Mo. 7, 1892; Davis v. State, 22 Tex. App. 45, 1886; State v. Cody, 18 Oreg. 506, 1890.

² 1 East P. C. 393. See R. v. Hagan, 1886; Kitchens v. State, 80 Ga. 810, 1888; State v. Ma Foo, 110 Mo. 7, 1892; Davis v. State, 22 Tex. App. 45, 1886; State v. Cody, 18 Oreg. 506, 1890.

³ 1 East P. C. 393; Co. Lit. 126, 288; 3 Inst. 62, 118; Staundf. 38 b; 1 Hawk. c. 44, ss. 1, 2; 2 Hawk. c. 23, s. 16; 3 Bl. Com. 121; 4 Ibid. 205; State v. Danforth, 3 Conn. 112, 1819; Foster v. People, 50 N. Y. 598, 1872; Godfrey v. People, 63 Ibid. 207, 1875; Scott v. Com., 6 S. & R. 224, 1820; Riflemaker v. State, 25 Ohio St. 395, 1874; Com. v. Hawkins, 11 Bush, 603, 1871; State v. Vowels, 4 Oreg. 324, 1873; Bohannon v. State, 21 Mo. 490, 1855; State v. Brown, 60 Ibid. 141, 1875; Eskridge v. State, 25 Ala. 30, 1854; U. S. v. Gunther, 5 Dak. 234, 1888; R. v. Latimer, 54 L. T. 768, 1888; Kitchens v. State, 80 Ga. 810, 1888; State v. Ma Foo, 110 Mo. 7, 1892; Davis v. State, 22 Tex. App. 45, 1886; State v. Cody, 18 Oreg. 506, 1890.

The distinction between the English and the New York statute is given in Tully v. People, 67 N. Y. 15, 1876. By § 209 of the New York Penal Code of 1882, the offence includes all kinds of mutilation, and § 207 prohibits its self-mutilation. To constitute a mayhem, under the North Carolina statute, by biting off an ear, it is not necessary that the whole ear should be bitten off. It is sufficient if a part only is taken off, provided enough is taken off to alter

§ 582. Where maiming is proved to have been done, the inference from facts indicating design is that the act was done on purpose, and with an intent to maim;¹ and no sudden rencontre shall be deemed sufficient to excuse the party maiming, unless it be done in necessary self-defence against some great bodily harm attempted by the person maimed, and where there are no other means of preventing it;² which facts must be shown by the defence.³ And under the statutes, while a specific intent to inflict the particular injury must be shown, the duration of this intent is not material, if such antecedent specific intent be

and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. State v. Girkin, 1 Ired. 121, 1840. In an indictment for cutting off an ear in that State, it need not be alleged whether it was the right or the left ear. State v. Green, 7 Ibid. 39, 1846. In an indictment under the same statute, an intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. State v. Girkin, 1 Ibid. 121, 1840; State v. Jones, 70 Iowa, 505, 1886; Terrell v. State, 86 Tenn. 523, 1888; State v. Hair, 37 Minn. 351, 1887. It is not necessary in such case to prove malice aforethought, or a preconceived intention to commit the mayhem. Ibid.; People v. Wright, 93 Cal. 564, 1892.

The putting out an eye is a mayhem at common law. Chick v. State, 7 Humph. 161, 1846; Com. v. Reed, 3 Amer. Law Jour. 140, 1850. And an indictment under the 55th section of the Tennessee Penal Code, for putting out an eye, must aver that the party was thereby "maimed." Chick v. State, 7 Humph. 161, 1846.

The biting off a small portion of the

ear, which does not disfigure the person, and could only be discovered on close inspection or examination, when attention is directed to it, is not mayhem under the statute of Alabama; State v. Abram, 10 Ala. 928, 1847; and so substantially in Louisiana; State v. Harrison, 30 La. An. Pt. ii. 1329, 1878. See Bowers v. State, 24 Tex. App. 542, 1888. For the statutory offence of inflicting a wound less than mayhem, see State v. Watson, 41 La. An. 598, 1889.

¹ State v. Simmons, 3 Ala. 497, 1842; State v. Girkin, 1 Ired. 121, 1840; U. S. v. Gunther, 5 Dak. 234, 1888; Davis v. State, 22 Tex. App. 45, 1886. Specific intent to maim is not necessary. Terrell v. State, 86 Tenn. 523, 1888.

² State v. Danforth, 3 Conn. 112, 1819; State v. Evans, 1 Hayw. 325, 1796; State v. Crawford, 2 Dev. 425, 1830; People v. Wright, 93 Cal. 564, 1892; Crane v. Com., (Ky.) 1 S. W. Rep. 880, 1886. In New York, however, lying in wait, or some other act showing premeditation, must be proved. Godfrey v. People, 63 N. Y. 207, 1875. As to New York, see, also, State v. Hair, 37 Minn. 351, 1887.

³ State v. Skidmore, 87 N. C. 509, 1882. See State v. Hair, 37 Minn. 351, 1887.

proved.¹ Consent of the party injured is no defence to an indictment for mayhem.²

§ 583. All mayhems in England are felony, because anciently the offender had judgment of the loss of the same member which he had occasioned to the sufferer; but now the only judgment which remains at common law is of fine and imprisonment; from whence the offence seems to have been considered more in the nature of an aggravated trespass. Lord Coke accordingly classes it as an offence "under felonies deserving death, and above all other inferior offences."³

§ 584. On an indictment for mayhem, there may be a conviction of any lesser offence (*e. g.*, assault and battery) which the indictment includes.⁴

Offence is felony.

May be conviction of lesser offence.

¹ See *Foster v. People*, 50 N. Y. 598, 1872; *Godfrey v. People*, 63 Ibid. 207, 1875; s. c. 5 Hun, 369; *Burke v. People*, 4 Ibid. 481, 1875; *Molette v. State*, 49 Ala. 18, 1873; *Slattery v. State*, 41 Tex. 619, 1874; *State v. Jones*, 70 Iowa, 505, 1886; *State v. Cody*, 18 Oreg. 506, 1890.

In Georgia, mayhem is said not to be felony at common law, except when by castration. *Adams v. Barrett*, 5 Ga. 404, 1848.

In indictments for attempt, the particular part of the body aimed at need not be specified. *Ridenour v. State*, 38 Ohio St. 272, 1882. See *supra*, § 192; *Clark's Case*, 6 Gratt. 675, 1849.

In Pennsylvania, the practice is to charge it as a felony. *Com. v. Reed*, 3 Am. Law Jour. 140, 1850; *Whart. Prec.* 162. See *Scott v. Com.*, 6 S. & R. 224, 1820; and see *Whart. Cr. Pl. & Pr.* § 260.

To same effect see *Canada v. Com.*, 22 Gratt. 899, 1872; *State v. Thompson*, 30 Mo. 470, 1860; *State v. Brown*, 60 Ibid. 141, 1875.

² *Supra*, § 142.

³ Co. Lit. 127: 1 Hawk. c. 44, s. 3; 2 Hawk. c. 23, s. 18; 4 Bl. Com. 205, 206.

As to New York practice, see *Foster v. People*, 50 N. Y. 598, 1872. The indictment in New York must aver premeditated design. *Tully v. People*, 67 N. Y. 15, 1876. See *State v. Hair*, 37 Minn. 351, 1887.

That mayhem is punishable under the federal crimes act, see *U. S. v. Scroggins*, Hempt. 478.

The technical offence of mayhem has never, in Massachusetts, been considered a felony, either by statute or at common law. *Com. v. Newell*, 7 Mass. 245, 1810. The words "felonious assaulter," in the statute, do not make it felony. *Ibid.*; *State v. Danforth*, 3 Conn. 112, 1819.

⁴ *Com. v. Blaney*, 133 Mass. 571, 1882; *People v. Wright*, 93 Cal. 564, 1892; *State v. Cody*, 18 Oreg. 506, 1890; *State v. Fisher*, 103 Ind. 530, 1885. See *State v. Ma Foo*, 110 Mo. 7, 1892. *Infra*, § 640.

**POINTS REQUESTED FOR THE DEFENCE IMPROPERLY
REFUSED, AND ERRONEOUS CHARGES.**

Failure to Instruct as to Assault and Battery.

The defendant asked the court to instruct the jury that the defendant could not be convicted of the crime of mayhem, for the evidence was insufficient to justify the same. The court refused, and instructed the jury that it was a question of fact for them to determine whether or not the defendant was guilty of mayhem. Held, on appeal, that where the offence charged necessarily includes a lesser offence, it is the duty of the trial court to instruct the jury that they have a right to find the accused guilty of the latter where there is doubt of his guilt of the former; and for this reason the charge of the court below was erroneous. *State v. Cody*, 18 Oreg. 506, 1890.

CHAPTER V.

ABDUCTION AND KIDNAPPING.

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| Indictment must conform to statutory conditions, § 586. | Kidnapping and "inveiglement" specifically indictable, § 590. |
| Woman in such case may be a witness, § 587. | False imprisonment necessarily involved, § 591. |
| Indictment must be in county of offence, § 588. | POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.) |
| Original actors are all principals, § 589. | |

§ 586. AT common law the abduction of a woman, either by force or fraud, for the purpose of defilement, has been held not to be indictable as an abduction;¹ but when involving force, it is indictable as an assault, and in any view it may be indictable as an attempt to ravish or to have illicit connection. Under the statute of 3 Hen. VII. cap. 3,² from which several of the American statutes of abduction are taken, and which in some States is said to be part of the com-

Indict-
ment must
conform to
statutory
conditions.

¹ State v. Sullivan, 85 N. C. 506, 1881, where it is said that the statement in 2 Archbold C. P. 301, that abduction is so indictable is unsustainable by 1 East P. C. 458; 1 Russ. on Cr. 569, which are the authorities cited.

² That whereas women, as well maidens as widows and wives, having substances, some in goods movable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, have been oftentimes taken by misdoers contrary to their will, and afterwards married to such misdoers, or to others by their consent, or defiled:" "That whatsoever person or persons shall take any woman so against her will, unlawfully, that is to say maid, widow, or wife, such taking and the procuring and abetting to the

same, and also receiving wittingly the same woman, so taken against her will, shall be felony; and that such misdoers, takers, and procurers to the same, and receivers knowing the said offence in form aforesaid, shall be reputed and judged as principal felons; and upon conviction thereof shall be sentenced to undergo a confinement in the penitentiary not less than two nor more than ten years; provided always that this act shall not extend to any person taking any woman, only claiming her as his ward or bond-woman." 3 H. 7 cap. 2; 1 Hale, 660. As to seduction, see *infra*, § 1756.

That under the English statute there may be a conviction of detention, on proof of non-return of a child, coupled with evasive answers, see R. v. Johnson, 50 L. T. (N. S.) 759.

mon law, the indictment must allege that the taking was for lucre, in order to show which, it must be proved that the woman had substance, either real or personal, or was heir apparent; and it must be further alleged and proved that she was taken against her will, and afterward married to the misdoer, or to some other by his assent, or that she was defiled, that is, carnally known; because no other case is within the preamble of the statute, to which the enacting clause clearly refers, for it does not say that "whatsoever person or persons shall take any woman against her will," but, "whatsoever person or persons shall take any woman so against her will."¹ If the "defiling" were by force, it is no defence that the abduction was by fraud.²

The statute of 4 & 5 Phil. & M. c. 8, makes it indictable "to take and convey away," etc., "any maid or woman child unmarried, being under the age of sixteen years, out or from the possession, custody, and governance, and against the will of the father of such maid or woman child," etc. This was reënacted and modified by stat. 24 & 55 Vict. c. 100.³ It has been held that it is abduc-

¹ Davis Crim. Law, 137; 1 Hale, 660.

It need not be alleged or shown that the taking was with an intention to marry or defile her, for the words of the statute do not require such an intent, nor does the want of it in any way lessen the injury. 1 Hawk. c. 16, ss. 4, 5, 6; 1 East P. C. 453. As to Indiana statute, see Lyons v. State, 52 Ind. 426, 1876; Osborn v. State, 52 Ibid. 526, 1876.

For Kentucky statute, see Cargill v. Com., (Ky.) 13 S. W. Rep. 916, 1890; Malone v. Com., 91 Ky. 307, 1891; Higgins v. Com., (Ky.) 21 S. W. Rep. 231, 1893; Payner v. Com., (Ky.) 19 S. W. Rep. 927, 1892.

As to statute in Missouri, see State v. Maloney, 105 Mo. 10, 1891.

² Beyer v. People, 86 N. Y. 369, 1881; Schnicker v. People, 88 Ibid. 192, 1882.

³ For the Illinois statute, see Henderson v. People, 124 Ill. 607, 1888; Herman v. People, 131 Ill. 594, 1889.

For Indiana statute, see Nichols v. State, 127 Ind. 406, 1890; Stevens v. State, 112 Ind. 433, 1887.

As to the New York statute, where the taking must be for purposes of sexual intercourse, etc., see People v. Wah Lee Mon, 13 N. Y. Sup. 767, 1891; People v. Betsinger, 21 N. Y. Sup. 136, 1892; People v. Powell, 24 N. Y. Week. Dig. 159, 1886.

Under the California statute the taking away must be without the consent of parent or guardian, and must be for purposes of prostitution or concubinage. People v. Dolan, 96 Cal. 315, 1892; People v. Fowler, 88 Cal. 136, 1891; *Ex parte Estrado*, 88 Cal. 316, 1891; People v. Demousset, 71 Cal. 611, 1887.

The Kansas statute is in nearly the same terms. State v. Overstreet, 43 Kans. 299, 1890.

As to a similar statute in Missouri, see State v. Wilkinson, (Mo.) 26 S. W. Rep. 366, 1894; State v. Stone, 106 Mo. 1, 1891; State v. Johnson, 115

tion, under the English statutes, for A. to persuade B. to permit C. to go away by falsely pretending that he (A.) had a place for C.¹ It is no defence that the elopement took place at the girl's request, she having been seduced by the defendant.² A temporary enticement of the girl from the father's house for the purpose of illicit intercourse is within the statutes.³ But when two girls run away together, neither abducts the other.⁴

Mo. 480, 1893; *State v. Gibson*, 108 Mo. 575, 1891; 111 Mo. 92, 1892. In Missouri it is necessary that the specific intent or purpose shall be present; the consent of the girl, either to the taking or the illicit intercourse is immaterial; the taking need not be by force.

As to what constitutes abduction under Minnesota statute, see *State v. Jamison*, 38 Minn. 21, 1887; *State v. Keith*, 47 Minn. 559, 1891.

For Michigan statute, see *People v. Congdon*, 77 Mich. 351, 1889.

For North Carolina statute, *State v. Chisenhall*, 106 N. C. 676, 1890.

Under Alabama statute, *Haygood v. State*, 98 Ala. 61, 1893; *U. S. v. Zes Cloya*, 35 Fed. Rep. 493, 1888.

As to Tennessee, see *Scruggs v. State*, 90 Tenn. 81, 1891.

As to Texas, see *Mason v. State*, 29 Tex. App. 24, 1890.

For the Maryland statute, see *Brown v. State*, 72 Md. 468, 1890.

¹ *R. v. Hopkins*, C. & M. 254; *Ex parte Estrado*, 88 Cal. 316, 1891; *People v. De Leon*, 109 N. Y. 226, 1888. *Infra*, § 1756.

For a discussion (under the American statutes) as to whether a single act of sexual intercourse may constitute concubinage, see *State v. Feasel*, 74 Mo. 524, 1881; *State v. Stone*, 106 Mo. 1, 1891; *State v. Gibson*, 108 Mo. 575, 1891; 111 Mo. 92, 1892; *State v. Overstreet*, 43 Kans. 299, 1890; *Henderson v. People*, 124 Ill. 607, 1888.

See, also, *State v. Wilkinson*, (Mo.) 26 S. W. Rep. 366, 1894; disapproving *State v. Feasel*, *supra*. For distinction between prostitution and concubinage, see *State v. Goodwin*, 33 Kans. 538, 1885; *State v. Gibson*, 108 Mo. 575, 1891; 111 Mo. 92, 1892; *U. S. v. Zes Cloya*, 35 Fed. Rep. 493, 1888. That prostitution and concubinage cannot be charged in the same count as being the purposes of the alleged abduction, see *Slocum v. People*, 90 Ill. 274, 1878; *Henderson v. People*, 124 Ill. 607, 1888.

² *R. v. Biswell*, 2 Cox C. C. 259.

It is no defence that the girl was unchaste. *People v. Demousset*, 71 Cal. 611, 1887; *State v. Johnson*, 115 Mo. 480, 1893; *State v. Gibson*, 108 Mo. 575, 1891; *People v. Cook*, 61 Cal. 478, 1882; *State v. Gibson*, 111 Mo. 92, 1892. But see *contra*, *Jenkins v. State*, 15 Lea, 674, 1885; *Scruggs v. State*, 90 Tenn. 81, 1891; *Brown v. State*, 72 Md. 468, 1890.

³ *R. v. Timmins*, Bell, 276. See *State v. Johnson*, 115 Mo. 480, 1893; *People v. Demousset*, 71 Cal. 611, 1887; *State v. Jamison*, 38 Minn. 21, 1887; *contra*, *State v. Keith*, 47 Minn. 559, 1891. *Aliter*, when the girl paid the man a visit of only a few hours, he not knowing whether she had a home or parents. *R. v. Hibbert*, L. R. 1 C. C. 144. But see *R. v. Baillie*, 8 Cox C. C. 238. As to who has charge of the girl under the Iowa statute, see *State v. Ruhl*, 8 Iowa, 447, 1859, cited *infra*,

⁴ *R. v. Meadows*, 1 C. & K. 399; explained in *R. v. Kipps*, 4 Cox C. C. 168.

The statutory offences of seduction and of "enticing" for purpose of prostitution will be hereafter further considered.¹

§ 587. A woman thus taken against her will and married may be a witness against the offender, if the force were continued upon her till the marriage; because then he is no husband *de jure*, or of right, and she may herself prove such continuing force. It has been doubted whether, in cases in which the actual marriage is good by the consent of the inveigled woman, obtained after her forcible abduction, her evidence should be allowed. But the opinion appears to have prevailed, that it should even then be admitted; because otherwise the offender would be permitted to take advantage of his own wrong; and the very act of marriage, which is a principal ingredient of his crime, would, by a forced construction of the law, be made use of to stop the mouth of the most material witness against him.² There can be no doubt of her competency where the marriage was against her will at the time, notwithstanding her subsequent assent. For if she were a competent witness at any time after the crime committed, no subsequent assent can incapacitate her, much less can any mere lapse of time; though these circumstances may affect the credit of her testimony.³

§ 588. If a woman be forcibly taken in one county, and afterward go voluntarily into another county, and be there married or defiled with her own consent, it has been argued that the captor is not indictable in either; for the offence, which consists in the forcible taking and subsequent marriage or defilement, is not complete in either. But if the force is continued upon her at all in the county into which she was so taken, the offender, so it is said, may be indicted there, although the actual marriage or defilement afterward took place with her own consent.⁴

§§ 1756, 1761. That *bond fide* ignorance as to the girl's age is no defence, see *R. v. Prince*, L. R. 2 C. C. 154; *State v. Johnson*, 115 Mo. 480, 1893; *People v. Fowler*, 88 Cal. 136, 1891; *People v. Dolan*, 96 Cal. 315, 1892. But see *Mason v. State*, 29 Tex. App. 24, 1890. *Supra*, § 88.

¹ *Infra*, § 1756.

² 4 Bl. Com. 209; 1 East P. C. 454. 1893.

See Whart. Cr. Ev. § 394.

³ 1 East P. C. 454. *Infra*, § 1710.

That there may be conviction of abduction upon the uncorroborated testimony of the woman, see *State v. Stone*, 106 Mo. 1, 1891.

⁴ 1 Hawk. c. 16, s. 11; 1 East P. C. 453; 1 Russ. on Cr. (9th Am. ed.) 945. But see *supra*, § 288.

See *State v. Johnson*, 115 Mo. 480,

§ 589. Though not only the misdoers themselves, but the procurers and any who wittingly receive the woman so taken against her will, are made principals by this statute, yet he who only receives the offender himself is but an accessory after the fact. And those who are only privy to the marriage, and not to the forcible taking, she consenting thereto (which must be inferred where the woman is under no constraint at the time of the marriage), are not within the statute.¹ It is no excuse that the man who marries her was not the author of the original force.²

Original actors are all principals.

§ 590. Kidnapping, which is seizure and removal for the purpose of transportation, enslavement, or involuntary service, has been held to be an offence at common law,³ and is punished by fine and imprisonment.⁴ As kidnapping is to be considered the procuring the intoxication of a sailor

Kidnaping and "inveiglement" specifically indictable.

¹ 1 Hawk. c. 16, ss. 9, 10; 1 East P. C. 452-53. *v. Blodgett*, 12 Metc. 56, 1846, *supra*, § 411; *Com. v. Nickerson*, 5 Allen,

² Hawk. c. 16, ss. 7, 8; 1 East P. C. 454. *Infra*, § 1710.

³ *State v. Rollins*, 8 N. H. 550, 1837; 1 East P. C. 430. See *Com. v. Westervelt*, 11 Phila. 461, 1876.

⁴ 4 Bl. Com. 219.

Where a person having in his custody a mulatto boy, six years of age, who had been placed with him by the overseers of the poor of a town, sold him to a person residing in another State with the intention that he should be carried into that State, and held in servitude until he arrived at the age of twenty-one years, and he carried the boy into another town and delivered him there, it was held that he was guilty of kidnapping. *Moody v. People*, 20 Ill. 315, 1858. See *State v. Whaley*, 2 Harring. 538, 1837.

For New York Code, see *People v. Camp*, 21 N. Y. Sup. 741, 1893; *People v. De Leon*, 109 N. Y. 226, 1888.

As to Pennsylvania statute, see *Burns v. Com.*, 129 Pa. 138, 1889; *Hamilton v. Com.*, 3 Penrose & W. 142, 1831.

For Massachusetts statute, see *Com.*

v. Blodgett, 12 Metc. 56, 1846, *supra*, § 411; *Com. v. Nickerson*, 5 Allen,

518, 1862.

As to Indiana statute, see *State v. Kimmerling*, 124 Ind. 382, 1890; *Eberling v. State*, (Ind.) 35 N. E. Rep. 1023, 1894.

Under the California statute there must be removal at least into another county. *People v. Fick*, 89 Cal. 144, 1891; *Ex parte Keil*, 85 Cal. 309, 1890.

For Oregon statute, see *In re Kelly*, 46 Fed. Rep. 653, 1890.

As to Ohio, see *Mayo v. State*, 43 Ohio, 567, 1885.

As to Virginia, see *Thomas v. Com.*, 2 Leigh, 741, 1830.

For Georgia statute, see *Cochran v. State*, 91 Ga. 763, 1893.

The requisites in an indictment would seem to be, an averment of an assault, and the carrying away, or transporting the party injured, from his own country into another, unlawfully and against his will. *Click v. State*, 3 Tex. 282, 1847. It is not sufficient to charge the defendant with kidnapping generally; the indictment should state specifically the facts and

and his surreptitious removal to a ship, even though the destiny of the ship be not to another State or country.¹

Consent is no defence to the indictment when not given voluntarily and intelligently by a person of sufficient age to exercise an intelligent and free choice.² And under the New York statute consent will be no defence when fraudulently obtained.³

Statutes exist in several jurisdictions making the abduction of children indictable. Under these statutes it has been held that neither transportation to a foreign country,⁴ nor actual violence and force⁵ need be proved. When by a decree of divorce a child is given to the mother's custody, it is abduction under the statute for the father to carry the child away from such custody.⁶

Under a federal statute the "inveiglement" of children for the purpose of involuntary service in the United States is made specifically indictable,⁷ nor is consent by such child a defence.⁸

Inveiglement as an element of seduction will be hereafter considered.⁹

§ 591. False imprisonment, which is an unlawful physical restriction of corporal liberty, and which will be hereafter discussed in its relations to assault,¹⁰ is to be viewed, also, in its relations to abduction. There can be no abduction without false imprisonment, under which term is included all corporal detention by force.¹¹ The force, however, need not be

circumstances which constitute the offence. *Click v. State*, 3 Tex. 282, 1847. For other Texas cases on kidnapping, see *Mason v. State*, 29 Tex. App. 24, 1890; *Castillo v. State*, 29 Tex. App. 127, 1890.

¹ *Hadden v. People*, 25 N. Y. 372, 1862; *People v. Chu Quong*, 15 Cal. 332, 1860; *Ex parte Keil*, 85 Cal. 309, 1890; *In re Kelly*, 46 Fed. Rep. 653, 1890.

By the New York Penal Code of 1882, kidnapping, in § 211, includes wilful confining of another against his will without authority of law.

² *Supra*, §§ 146, 150. *Hadden v. People*, *ut supra*. *Com. v. Davenport*, 1 Leigh, 588, 1829.

³ *Schnicker v. People*, 88 N. Y. 192, 1882; *People v. De Leon*, 109 N. Y. 226, 1888.

⁴ *State v. Rollins*, 8 N. H. 550, 1837; *People v. Chu Quong*, 15 Cal. 332, 1862.

⁵ *Com. v. Nickerson*, 5 Allen, 518, 1862; *Moody v. People*, 20 Ill. 315, 1858; *Redfield v. State*, 24 Tex. 133, 1859; *In re Kelly*, (Oreg.) 46 Fed. Rep. 653, 1890.

⁶ *State v. Farrar*, 41 N. H. 53, 1860.

⁷ *U. S. v. Aucarola*, 17 Blatch. C. 423, 1880.

⁸ *Ibid. Supra*, § 146.

⁹ *Infra*, § 1765.

¹⁰ *Infra*, § 609.

¹¹ *R. v. Webb*, 1 W. Bl. 19, 1746; *State v. Rollins*, 8 N. H. 550, 1837; *Smith v. State*, 7 Humph. 43, 1846; *State v. Lunsford*, 81 N. C. 528, 1879; *State v. Dineen*, 10 Minn. 407, 1865; *State v. Edge*, 1 Strob. 91, 1846; *State v. Guest*, 6 Ala. 778, 1844; *Barber v.*

tactual. It is enough if, by fear of a greater evil, the party coerced submit to the detention.¹ It is false imprisonment, also, to unlawfully prevent a traveller from proceeding on his errand on a public road, even though he is not precluded from going back.² Excessive discipline, also, may be a false imprisonment, as where a father confined a son in a damp, dark cellar.³ Arrest and detention, also, by an officer, real or pretended, acting without authority, constitute false imprisonment.⁴ An unlawful imprisonment in itself involves an assault.⁵

State, 13 Fla. 675, 1869; *Harkins v. Pr.* § 3; *Johnson v. Tompkins*, Bald. State, 6 Tex. App. 452, 1819; *Malone* 571, 1833; *Herring v. State*, 3 Tex. v. Com., 91 Ky. 307, 1891; *Regina v. App.* 108, 1877.

Johnson, 50 Law Times, 759, 1884; That unavoidable delay in taking *Higgins v. Com.*, (Ky.) 21 S. W. Rep. bail is not false imprisonment, see 231, 1893; *Cargill v. Com.*, (Ky.) 13 *Cargill v. State*, 8 Ibid. 431, 1880.

S. W. Rep. 916, 1890; *State v. Maloney*, 105 Mo. 10, 1891; *Ex parte Keil*, 1855; *Smith v. State*, 7 Humph. 43, 85 Cal. 309, 1890. See *infra*, § 613. 1846; *Harkins v. State*, 6 Tex. App. 452, 1879.

That the place of detention has jurisdiction, see *Lavina v. State*, 63 Ga. 513, 1879. ³ *Fletcher v. People*, 52 Ill. 395, 1869.

The manner of detention need not be averred in the indictment under Kentucky statute. *Cargill v. Com.*, (Ky.) 13 S. W. Rep. 916, 1890; *Payner v. Com.*, (Ky.) 19 S. W. Rep. 927, 1892. ⁴ *Francisco v. State*, 24 N. J. L. (4 Zab.) 30, 1803; *Vanderpool v. State*, 34 Ark. 174, 1880; *People v. Fick*, 89 Cal. 144, 1891; *State v. Kimmerling*, 124 Ind. 382, 1890. See *Ex parte Sternes*, 82 Cal. 245, 1889.

¹ Ibid. That an arrest need not be by tactual force, see Whart. Cr. Pl. & ⁵ *Infra*, § 609.

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

At the request of the State the court instructed the jury as follows: "The jury are instructed that by the word 'concubinage,' as used in the indictment and instructions, is meant the act or practice of a man cohabiting in sexual intercourse with a woman to whom he is not married. If the jury should believe from the evidence that the defendant alone, or in connection with another, did take the witness, A. E. D., away from her father without his consent, and that A. E. D. was at this time a female under the age of eighteen years, for the purpose of cohabiting with her as man and woman in sexual intercourse, either for himself or for another, for any length of time, even for a single act of sexual intercourse, without the authority of a marriage, it would be sufficient to constitute the offence charged in the second count of

the indictment ;" *i. e.*, taking away for the purpose of concubinage. Held error. *State v. Gibson*, 111 Mo. 92, 1892. *Supra*, p. 544.

It was held error for the court not to charge that, if the defendant, at the time he took the girl away from her home, was mistaken as to her age, believing her to be over seventeen years of age, and if such mistake did not arise from a want of proper care on his part, and if the girl went with him voluntarily, he would not be guilty of either of the offences charged in the indictment, viz., kidnapping and abduction of a female for the purpose of prostitution. *Mason v. State*, (Tex.) 14 S. W. Rep. 71, 1890.

CHAPTER VI.

ABORTION.

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| Producing an abortion is an offence at common law, § 592. | Indictment must be special, § 597. |
| Woman a witness for the prosecution, § 593. | Evidence inferential, § 598. |
| Consent no defence, § 594. | All parties concerned indictable, § 599. |
| Otherwise as to necessity, § 595. | POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.) |
| Non-pregnancy no defence to indictment for attempt, nor ineffectiveness of means, § 596. | |

§ 592. AT common law the destruction of an infant unborn is a misdemeanor, supposing the child to have been born dead;¹ though if the child die subsequently to birth from wounds received in the womb, it is homicide,² even though the child is still attached to the mother by the umbilical cord.³ Destruction of the infant after quickening is agreed on all sides to be an offence at common law; though whether it is so before the infant has quickened has been doubted at common law.⁴ In determining this question we must remember that the civil rights of an infant in *ventra sa mere* are equally respected at every period of gestation; and it is clear that, no matter at how early a stage, he may be appointed executor;⁵ is capable of taking as legatee,⁶ or under a marriage settlement;⁷ may take specifically under a general devise as a "child;"⁸ and may obtain an injunction to stay waste.⁹ That the destruction of an infant before quickening

Abortion
an offence
at com-
mon law.

¹ 1 Russ. on Cr. 671; 1 Vesey, 86; 3 ABORTION; 1 Beck, 172, 192; Lewis Coke's Inst. 50; 1 Hawk. c. 13, s. 16; C. L. 10. See 1 Russ. on Cr. 661; 1 3 Chitty C. L. 798. See 3 Whart. & Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. St. Med. Jur. 84-107; and Elwell's c. 13, s. 16; Bracton, l. 3, c. 21. Med. Jur. § 243, etc.

⁵ Bac. Ab. tit. INFANTS.

² R. v. Senior, 1 Mood. C. C. 346, 1831; 3 Inst. 50. See *supra*, § 445.

⁶ 2 Vernon, 710.

³ R. v. Trilloe, 2 Mood. C. C. 260; 1 C. & M. 650, 1842.

⁷ Swift v. Duffield, 5 S. & R. 38, 1818; Doe v. Clark, 2 H. Bl. 399, 1792; 2 Ves. Jr. 673; Thellusson v.

⁴ Com. v. Bangs, 9 Mass. 387, 1812; Com. v. Jackson, 15 Gray, 187, 1860; 3 Whart. & St. Med. Jur. §§ 84 *et seq.*, §§ 861 *et seq.*; Guy's Med. Juris. tit.

Woodford, 4 Ibid. 340, 1794.

⁸ Fearne, 429.

⁹ 2 Vernon, 710.

is a misdemeanor at common law, has been held in Pennsylvania and North Carolina.¹ A contrary view, at common law, has been expressed in Massachusetts,² in New Jersey,³ in Iowa,⁴ in Kentucky,⁵ and in Missouri.⁶ The questions that arise when the child, wounded before birth, dies after birth, have been already distinctively considered.⁷ The common law offence, it should be added, is in several jurisdictions absorbed in or modified by statute.⁸

¹ *Com. v. Demain, etc.*, 6 Penn. Wood, 11 Gray, 85, 1858; *Com. v. Law Jour.* 29, 1846; Brightly, 441; *Jackson*, 15 Ibid. 187, 1860. *Mills v. Com.*, 13 Pa. 631, 1850; *Lewis C. L.* 18; *State v. Slagle*, 83 N. C. 630, 1880.

The weight of medical authority is that quickening is a mere circumstance in the physiological history of the foetus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another; that it is uncertain in its periods, sometimes coming at three months, sometimes at five, sometimes not at all; and that it is dependent so entirely upon foreign influences as even to make it a very incorrect index, and one on which no practitioner can depend, of the progress of pregnancy. See *R. v. Wycherly*, 8 C. & P. 265.

It is remarkable that both in Massachusetts and New Jersey a leading English case on this point was not referred to, where, in an investigation before a jury of matrons, Gurney, B., said, after taking medical counsel, "Quick with child is having conceived; with *quick* child is when the child is quickened." *R. v. Wycherly*, 8 C. & P. 265. This view modifies the common law authorities against the indictability of the offence.

That "quickness" means activity perceptible to the mother, see *R. v. Phillips*, 3 Camp. 73, 76; *Com. v. Reid*, 8 Phila. 385, 1871, Paxson, J.

² *Com. v. Bangs*, 9 Mass. 387, 1812; *Com. v. Parker*, 9 Metc. 263, 1845. Otherwise by statute, see *Com. v.*

Wood, 11 Gray, 85, 1858; *Com. v. Jackson*, 15 Ibid. 187, 1860.

³ *State v. Cooper*, 2 Zab. 52, 1849.

⁴ *Abrams v. Foshee*, 3 Iowa, 274, 1856; and see *Hatfield v. Gano*, 15 Iowa, 177, 1863; *Evans v. People*, 49 N. Y. 86, 1872. For a discussion of term "miscarriage," see *Smith v. State*, 33 Me. 48, 1851. For a notice of medical authorities, see 7th edition of this work, §§ 1223 *et seq.*

⁵ *Mitchell v. Com.*, 78 Ky. 204, 1879.

⁶ *State v. Emerich*, 18 Mo. App. 492, 1883.

⁷ *Supra*, § 445.

⁸ For statutory cases, see, as to Maryland, *Lamb v. State*, 66 Md. 285, 1886. As to Vermont, see *State v. Fiske*, (Vt.) 29 Atl. Rep. 633, 1894. As to Massachusetts, see *Com. v. Wood*, 11 Gray, 86, 1858; *Com. v. Brown*, 14 Gray, 419, 1860; *Com. v. Jackson*, 15 Gray, 187, 1860; *Com. v. Homer*, 153 Mass. 343, 1891; *Com. v. Tibbetts*, 157 Mass. 519, 1893; *Com. v. Thompson*, 159 Mass. 56, 1893; *Com. v. Leach*, 156 Mass. 99, 1892. As to New York, see *People v. Lohman*, 2 Barb. 216, 1848; *People v. Davis*, 56 N. Y. 95, 1874; *Weed v. People*, 56 N. Y. 628, 1874; *People v. Phelps*, 15 N. Y. Sup. 440, 1891; also, 30 N. E. Rep. 1012, 1892; *People v. Murphy*, 22 N. Y. Weekly Dig. 145, 1885; *People v. Van Zile*, (N. Y.) 38 N. E. Rep. 380, 1894. As to Ohio, see *Robins v. State*, 8 Ohio St. 132, 1857. As to Illinois, see *Scott v. People*, 141 Ill. 195, 1892. As to Texas, see *Navarro v. State*, 24 Tex. App.

§ 593. The woman on whom the abortion has been performed is a competent witness against the defendant, even though she be

378, 1887; *Williams v. State*, (Tex.) 19 S. W. Rep. 897, 1892; *Cave v. State*, (Tex.) 26 S. W. Rep. 503, 1894. As to New Jersey, see *Powe v. State*, (N. J.) 4 Eastern Rep. 76, 1885. As to Iowa, see *State v. Forsythe*, 78 Iowa, 595, 1889. As to Wisconsin, see *Hatchard v. State*, 79 Wis. 357, 1891. As to Indiana, see *Rhodes v. State*, 128 Ind. 189, 1890.

In New York, where one statute makes it a misdemeanor to administer drugs, etc., to a pregnant female, with intent to produce a miscarriage; and another statute declares it manslaughter to use the same means with intent to destroy the child, in case the death of such child should be thereby produced; an indictment charging all the facts necessary to constitute manslaughter under the latter statute, except the intent to destroy the child, and alleging only an intent to produce miscarriage, is fatally defective as an indictment for manslaughter, but is good as an indictment for a misdemeanor. *Lohman v. People*, 1 Comst. 379, 1848; *People v. Lohman*, 2 Barb. 216, 1848. See *People v. Stockham*, 1 Parker C. R. 424, 1853. A conviction for a misdemeanor, for administering drugs to a pregnant woman with intent to produce miscarriage, would, it seems, be a bar to a subsequent indictment for manslaughter for administering the same drugs to the same female, with intent to destroy the child, by which means the death of the child was produced. *Ibid.*

If the mother dies in consequence of the operation, the offence is murder or manslaughter. If the intent was to kill or to do grievous bodily harm, the offence is murder. If otherwise, it is manslaughter. See *supra*, § 325.

By the Pennsylvania Revised Statutes, § 134, the attempt to produce abortion by drugs or instruments is indictable, though no abortion ensues, and the woman survives. 1 Bright. Purd. 341. As to indictment under section 87, Criminal Code, see *Com. v. Railing*, 34 Pittsburgh Leg. J. 65, 1886.

Under 1 Vict. c. 85, it is immaterial whether or not the woman was pregnant at the time. *R. v. Goodhall*, 1 Den. C. C. 187.

For forms of indictments in abortion, see Wharton Prec. tit. ABORTION.

In *Com. v. Leigh*, 15 Phila. 376, 1881, it was held that the sale of instruments to prevent conception is not indictable at common law; but this may be questioned.

"Causing," under the statute, is satisfied if the noxious injurious drug was supplied knowingly by the prisoner, though he was not present at the time it was taken. *R. v. Wilson*, 87 Eng. Law and Eq. 605; *Dears. & B. C. C.* 127; 7 Cox C. C. 190; *R. v. Farrow*, *Dears. & B. C. C.* 164; 40 Eng. Law & Eq. 550. See *Davis v. People*, 56 N. Y. 95, 1874; *Weed v. People*, *Ibid.* 628, 1874; *State v. Morrow*, 40 S. C. 221, 1893.

It is necessary to prove that the thing supplied is "noxious." The supplying "an innoxious" drug, whatever may be the intent of the persons supplying it, is not an offence against the statute. *R. v. Isaacs*, L. & C. 220; 9 Cox C. C. 228. But see *infra*, §§ 596, 1831. Noxiousness may be inferred from the effects. *R. v. Hollis*, 12 Cox. C. C. 463.

It is not necessary that the intention of employing a noxious drug should exist in the mind of any other

regarded as an accomplice.¹ But in cases of force or undue influence the law regards her rather as a victim than an accomplice,² though if she encourage the attempt this may tend to weaken the moral effect of her evidence.³ It is not admissible to cross-examine her, when a witness, as to illicit intercourse with third parties.⁴ A wife, on this charge, may be examined against her husband.⁵ Unless made in anticipation of death, subsequently occurring, the woman's dying declarations are inadmissible.⁶

Woman a witness for the prosecution. § 564. Consent of the woman, to apply a rule already fully illustrated,⁷ is no defence.⁸

Consent no defence. § 595. It is a defence that the destruction of the child's life was necessary to save that of the mother.⁹

§ 596. Whether if the child were dead at the time of the attempt at the abortion, the offence is indictable, depends in part on the construction of the statutes. We have already seen that it is no defence to an indictment for an attempt that the object in view did not exist, if such object were apparently within reach. This position applies peculiarly to attempts to produce miscarriage, since in such cases we have, in addition to the intended injury to the supposed child, the real injury to the mother. Hence it has been held that an attempt to produce miscarriage is indictable, though the

person than the person supplying it. 1864; *State v. Hyer*, 39 N. J. L. 598, R. v. Hillman, L. & C. 343; 9 Cox C. 1877; *Rafferty v. People*, 72 Ill. 37, C. 386. 1874.

Pregnancy ceases after the child has come forth from the womb of the mother, though still attached by the umbilical cord. *Com. v. Brown*, 14 Gray, 419, 1860. ³ *Watson v. State*, 9 Tex. App. 237, 1880. See *Fraser v. People*, 54 Barb. 306, 1863; *People v. Josselyn*, 39 Cal. 393, 1870; *Whart. Crim. Ev.* § 441.

The instrument or drug when unknown need not be described. *State v. Wood*, 53 N. H. 484, 1879; *State v. Vawter*, 7 Blackf. 592, 1845; *Com. v. Thompson*, 159 Mass. 56, 1893. See *Whart. Cr. Pl. & Pr.* § 156. ⁴ *Com. v. Wood*, 11 Gray, 86, 1858.

⁵ *State v. Dyer*, 59 Me. 303, 1871; *Navarro v. State*, 24 Tex. App. 378, 1887. ⁶ *Whart. Crim. Ev.* § 288.

⁷ *Supra*, §§ 142-3-4. ⁸ *Crichton v. People*, 6 Parker C. R. 363, 1865; see *Smith v. State*, 33 Me. 48, 1851; *People v. McGonegal*, 17 N. Y. Sup. 147, 1891.

⁹ See *supra*, §§ 95, 510. As to indictment averring exception in such case, see *infra*, § 597.

² *Com. v. Boynton*, 116 Mass. 343, 1874; *Dunn v. People*, 29 N. Y. 523,

woman was not pregnant at the time.¹ Nor is it essential that the agency used should be shown to have been likely to be efficient in the production of the illegal result.²

§ 597. The indictment must conform to the statute limiting the offence.³ It is enough if the offence is described with substantial accuracy.⁴

Indictment must be special.

¹ *R. v. Goodhall*, 2 Cox C. C. 441, 1876. Under New York statute, see 1846; 1 Den. C. C. 187; s. c. under name of *R. v. Goodchild*, 2 C. & K. 293, 1846; *State v. Howard*, 32 Vt. 380, 1859. See *Com. v. Wood*, 11 Gray, 86, 1858; *Com. v. Taylor*, 132 Mass. 261, 1882; *Wilson v. State*, 2 Ohio St. 319, 1853; *State v. Fitzgerald*, 49 Iowa, 260, 1878; *Powe v. State*, 4 Eastern Rep. 76, 1885; *People v. Phelps*, 15 N. Y. Sup. 440, 1891. See *State v. Slagle*, 82 N. C. 653, 1880; *supra*, §§ 185-6.

² *Supra*, § 182; *infra*, § 1831. See *People v. Van Deleer*, 53 Cal. 147, 1878; *Williams v. State*, (Tex.) 19 S. W. Rep. 897, 1892. As to the meaning of "noxious thing" in English statutes see *R. v. Isaacs*, L. & C. 220, 1862; 9 Cox C. C. 228; *R. v. Perry*, 2 Ibid. 223, 1847; *R. v. Cramp*, L. R. 5 Q. B. D. 309; 14 Cox C. C. 401, 1880, where it was held that though an innoxious drug was not within the statute, yet it was not necessary that the drug should be noxious if taken in small quantities. See *R. v. Titley*, Ibid. 500, 1880. Under the New Jersey statute a drug must be noxious, but its effectiveness to produce miscarriage need not be shown. *State v. Gedicke*, 43 N. J. L. 86, 1881. But see as to Texas statute, *Cave v. State*, (Tex.) 26 S. W. Rep. 503, 1894. See *supra*, §§ 182, 592; *Com. v. W.*, 3 Pitts. 462, 1871.

³ *U. S. v. May*, 2 McArthur, 512, 1876; *Dougherty v. People*, 1 Colo. 514,

1876. Under New York statute, see *Davis v. People*, 2 Th. & C. 212, 1873; *Mongeon v. People*, 54 N. Y. 613, 1873; *People v. Van Zile*, (N. Y.) 38 N. E. Rep. 380, 1894; *People v. Phelps*, 15 N. Y. Sup. 440, 1891; also 30 N. E. Rep. 1012, 1892, and other cases cited § 592, *note*. Under Wisconsin statute, see *State v. Dickinson*, 41 Wis. 299, 1877; *Hatchard v. State*, 79 Wis. 357, 1891. Under Maryland statute, see *Lamb v. State*, 66 Md. 285, 1886. Under Texas statute, see *Cave v. State*, (Tex.) 26 S. W. Rep. 503, 1894; As to Massachusetts, see *Com. v. Snow*, 116 Mass. 47, 1874; *Com. v. Brown*, 121 Mass. 69, 1876; *Com. v. Follansbee*, 155 Mass. 274, 1892; *Com. v. Thompson*, 159 Mass. 56, 1893. As to Illinois, see *Beasley v. People*, 89 Ill. 571, 1878; *Baker v. People*, 105 Illinois, 452, 1883; *Scott v. People*, 141 Ill. 195, 1892. As to Vermont, see *State v. Fiske*, (Vt.) 29 Atl. Rep. 633, 1894. As to South Carolina, see *State v. Morrow*, 40 S. C. 221, 1893. As to Minnesota, see *State v. Owens*, 22 Minn. 238, 1875; *State v. McIntyre*, 19 Minn. 93, 1872. As to Indiana, see *Willey v. State*, 52 Ind. 246, 1875; *State v. Sherwood*, 75 Ind. 15, 1881; *Holland v. State*, 131 Ind. 568, 1891; *Rhodes v. State*, 128 Ind. 189, 1890. That indictment need not negative exceptions of statute, see *State v. Rupe*, 41 Tex. 33, 1874. See *contra* as to necessity, *State v. Stokes*, 54 Vt. 179, 1881; *State v. Meek*, 70 Mo. 355, 1879; *Bassett v. State*, 41

⁴ *Baker v. People*, 105 Ill. 452, 1883; see *Com. v. Corkin*, 136 Mass. 429, 1884.

§ 598. The evidence of the offence is usually drawn from the circumstances of the case;¹ and eminently so when the person on whom the offence was perpetrated was an accomplice, or is dead.² It has consequently been held admissible to prove that the defendant had in his possession instruments which he admitted were suitable for the purpose, and that the body of the woman operated on showed the effects of such instruments.³ There must be a causal relation established between the act charged and the miscarriage.⁴ The character of the house where the offence was committed may be shown in order to throw light on the intent,⁵ and so may the defendant's solicitation or profession of this kind of business.⁶

Ind. 303, 1872; see *Willey v. State*, "cause *and* procure," the indictment must couple both. *State v. Drake*, 30 Ind. 246, 1875; *Beasley v. People*, *ut supra*; *State v. Hollenbeck*, N. J. L. (1 Vroom) 422, 1864. Several instrumentalities (*i. e.*, drug and instrument) may be averred in one count. *Com. v. Brown*, 14 Gray, 419, 1859; *People v. Davis*, 56 N. Y. 95, 1874; or in separate counts which are not repugnant; *Tabler v. State*, 34 Ohio St. 127, 1877.

An indictment under the Gen. Sts. c. 165, § 9, which alleged that A. B., at a time and place named, "with force and arms, did unlawfully use a certain instrument, a more particular description of which is to said jurors unknown, by then and there forcing and thrusting said instrument into the body and womb of one C. D., being then and there pregnant with child, with the intent of him, said A. B., thereby then and there to procure the miscarriage of the said C. D.," was sustained in *Com. v. Brown*, 121 Mass. 81, 1876.

In *Eckhardt v. People*, 83 N. Y. 462, 1881; s. c. 22 Hun, 525, 1880, under a statute making it indictable to administer medicine to a "pregnant woman," with intent to produce miscarriage, an indictment averring the offence to have been committed, on a "woman with child," was held sufficient.

When the statutory words are

When the statute does not include "quickness," it need not be averred or proved. *Wilson v. State*, 2 Ohio St. 319, 1853; *supra*, § 592. Nor is it any defence that the child was at the time dead. *State v. Howard*, cited *supra*, § 596.

¹ *Com. v. Blair*, 126 Mass. 40, 1879; *Com. v. Adams*, 127 Ibid. 15, 1879; see *State v. Howard*, 32 Vt. 380, 1859; *Earll v. People*, 99 Ill. 123, 1881; *Scott v. People*, 141 Ill. 195, 1892.

² *Com. v. Brown*, 121 Mass. 81, 1876; see *R. v. Hollis*, 12 Cox C. C. 463, 1873.

³ *R. v. Hollis*, *ut sup.*; *Com. v. Brown*, *ut sup.*; *Com. v. Blair*, 123 Mass. 242, 1877; s. c. 126 Ibid. 40, 1878; see *Com. v. Corkin*, 136 Ibid. 429, 1874.

⁴ *Slattery v. People*, 76 Ill. 217, 1875.

⁵ *Hays v. State*, 40 Md. 633, 1874.

⁶ *Com. v. Holmes*, 103 Mass. 440, 1869; *Weed v. People*, 56 N. Y. 628, 1874.

On an indictment under a statute for administering medicine to procure abortion, it is admissible to prove that ergot, a drug shown to have been administered to the deceased, was popularly supposed to produce abortion, the object being to prove intent.¹

§ 599. All parties concerned in the offence are responsible, whatever may be the part they take, subject to the distinction heretofore laid down in respect to principals. Hence a person who receives a woman into his house for the purpose of having an abortion performed on her, and who procures a physician for the operation, is indictable for the offence as principal, if it be a misdemeanor ; or, if it be a felony, and the common law distinctions obtain, as accessory before the fact, supposing he rendered no immediate aid in the operation.²

All parties
concerned
are indict-
able.

¹ Carter v. State, 2 Ind. 617, 1851. 1875 ; People v. McGonegal, 17 N. Y. Sup. 147, 1891 ; People v. Murphy, 22 N. Y. Week Dig. 145, 1885 ; People v. the same purpose by different means. Vedder, 20 N. Y. Week. Dig. 487, 1885 ; Com. v. Follansbee, 155 Mass. Lamb v. State, 66 Md. 285, 1886.

² Com. v. Adams, 127 Mass. 15, 1879 ; 274, 1892.
see R. v. Hollis, 12 Cox C. C. 463,

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

Erroneous Instruction in the Evidence.

The defendant asked the court to charge that "there was no evidence before the jury of what transpired in Dr. Van Zile's house on the 8th day of November, 1889, except what is furnished by the testimony of Dr. Van Zile himself, and that, so far as that testimony is concerned, he utterly disproved that any criminal operation was performed or attempted at that time." Refused. Held error, as there was no other evidence of the occurrence. And held further that where the indictment, as in this case, charged in one count that the abortion was procured by the use of instruments, and in the other by the use of drugs, an error in refusing to charge that there was no evidence to support the former count is not rendered harmless by the fact that there was evidence to support the latter count, the jury having rendered a verdict of guilty on both counts. People v. Van Zile, 143 N. Y. 368, 1894.

CHAPTER VII.

CONCEALING DEATH OF BASTARD CHILD.

Concealment to be inferentially shown,
 § 600.
 Indictment must conform to statute,
 § 601.

Persons aiding may be principals, § 602.
 POINTS FOR DEFENCE IMPROPERLY
 REFUSED, AND ERRONEOUS
 CHARGES. (See end of chapter.)

§ 600. UNDER English and American statutes, imposing severe penalties on concealing the death of a bastard child, the question of concealment is one of fact, to be determined by the jury, under the guidance of the court, from all the circumstances of the case.¹ Communication under promise of secrecy to one person does not negative concealment.² But the endeavor to conceal must be as a rule secret,³ and the woman herself must be a *particeps*.⁴

The *corpus delicti*, in such case, which involves the intent and endeavor to conceal the death of the child, its bastardy, and the mother's guilty agency must be substantively proved by the prosecution.⁵ It must appear that the child was born alive, and that its death was concealed;⁶ but the age of the foetus is immaterial, if

¹ *R. v. Cornwall*, R. & R. 336; *R. v. Coxhead*, 1 C. & K. 623; *R. v. Higley*, 4 C. & P. 366; *R. v. Opie*, 8 Cox C. C. 332; *R. v. Berriman*, 6 Ibid. 388; *R. v. Sleep*, 9 Ibid. 559; *State v. Ihrig*, 106 Mo. 267, 1891. The statute of 21 Jac. I. c. 27, which made the concealment absolute proof of murder, was modified by 43 Geo. III. c. 58, by which the same rules of evidence were held to obtain in this as in other criminal cases. It was provided that in such prosecutions the defendant might be convicted of the misdemeanor of concealing. In New York, by § 296 of the Penal Code of 1882, the offence is made a misdemeanor, and includes all persons concerned.

² *State v. Hill*, 58 N. H. 475, 1878.

³ *R. v. May*, 10 Cox C. C. 448; *R. v. George*, 11 Ibid. 41; *R. v. Brown*, L. R. 1 C. C. 244; *Boyd v. Bird*, 27 Ind. 429, 1867.

⁴ *R. v. Bate*, 11 Cox C. C. 686. See *R. v. Higley*, 4 C. & P. 366.

⁵ *R. v. Douglas*, 1 Mood. C. C. 480; *R. v. Williams*, 11 Cox C. C. 684; *R. v. Turner*, 8 C. & P. 755; *R. v. Clarke*, 4 F. & F. 1040; *R. v. Morris*, 2 Cox C. C. 489; *Douglass v. Com.*, 8 Watts, 535, 1839.

As to Missouri statute, see *State v. Ihrig*, 106 Mo. 267, 1891.

As to evidence admissible in a prosecution for bastardy, see *Walker v. State*, 92 Ind. 474, 1883.

⁶ *State v. Kirby*, 57 Me. 30, 1861; *State v. Conover*, (N. J.) 4 Crim. Law

it were capable of being born alive.¹ Concealment, as has been seen, means general, but not absolute secrecy.²

§ 601. The indictment need not state the time of death,³ though the death must appear.⁴ It is sufficient if it conform to the statute.⁵ But it must be special as to the facts,⁶ and must aver the concealing or secreting, as the statute may require.⁷ But the mode of concealing need not be specified.⁸ Exceptions in the body of the statute must be negatived, but this is not required when they are matter of defence and are not part of the enacting clause.⁹

Indictment must conform to statute.

§ 602. When the statute is so framed as to make the mother necessarily, in case of concealment, principal in the first degree, those actually aiding her in the concealment may be charged as principals in the second degree.¹⁰

Persons aiding may be principals in second degree.

Mag. 233; *State v. McKee*, Addis. 1, 1791; *Com. v. Clark*, 2 Ashm. 105, 1840; *State v. Joiner*, 4 Hawks. 350, 1826; *State v. Love*, 1 Bay, 167, 1791. But *aliter* under earlier English statute; *R. v. Cornwall*, R. & R. 336. See *R. v. Berriman*, 6 Cox C. C. 388; *R. v. Hewitt*, 4 F. & F. 1101.

⁴ *Ibid.*; *Perkin's Case*, 1 Lew. 41; *State v. Ellis*, 43 Ark. 93, 1884.

⁵ *Ibid.* See *Boyles v. Com.*, 2 S. & R. 40, 1815; *State v. Ihrig*, 106 Mo. 267, 1891.

⁶ *Foster v. Com.*, 12 Bush, 373, 1876.

⁷ *Douglass v. Com.*, 8 Watts, 535, 1839. In *Foster v. Com.*, 12 Bush, 373, 1876, it was held that "secrete" was not enough, being a mere conclusion of law.

⁸ *Boyles v. Com.*, 2 S. & R. 40, 1815; *State v. Ellis*, 43 Ark. 93, 1884.

⁹ *Whart. Crim. Pl. & Pr.* § 238; *State v. Rupe*, 41 Tex. 33, 1874, cited *supra*, § 597.

A special verdict must aver the fact of bastardy. "Concealment" is not enough. *Boyles v. Com.*, 2 S. & R. 40, *Tilghman*, C. J.

¹⁰ *R. v. Douglass*, 7 C. & P. 644; *State v. Sprague*, 4 R. I. 257, 1856, cited *supra*, § 211 a.

¹ *R. v. Sleep*, 9 Cox C. C. 559. In *R. v. Colmer*, *Ibid.* 506, it was held by *Martin, B.*, that an embryo without the capacity of life was under the statute; but this cannot be sustained.

² *State v. Hill*, 58 N. H. 475, 1878.

Where a statute, such as that of 9 Geo. IV., specifies "secret burying or otherwise disposing of the dead body," hiding by the woman under her bolster has been held a sufficient concealing. *R. v. Perry*, 6 Cox C. C. 531 (C. C. P.). See *R. v. Farnham*, 1 *Ibid.* 349, *Patteson*, J.

³ *R. v. Coxhead*, 1 C. & K. 623.

**POINTS REQUESTED FOR THE DEFENCE IMPROPERLY
REFUSED, AND ERRONEOUS CHARGES.**

Error to Throw Doubt in Charge on Defendant's Testimony.

The court charged the jury: "The defendant is a competent witness in her own behalf, and you should take her testimony with consideration, and give it such weight as you may believe it entitled to, and in passing upon her testimony and weighing her statements you may take into consideration the fact that she is the defendant, and her interest in the result of the case." Held, on appeal, not to be error. *State v. Ihrig*, 106 Mo. 267, 1891.

CHAPTER VIII.

ASSAULTS.

I. ASSAULTS GENERALLY.

1. *Incidents of Prosecution.*

An assault is an apparent violent attempt to do corporal hurt to another, § 603.

There must be some movement toward physical violence, § 604.

Frustration no defence, § 605.

Apparent ability to hurt sufficient, § 606.

Conditional threat of force may be an assault, § 607.

Assault on a mass of people is assault on the individuals, § 608.

Intent not necessary, § 608 *a*.

Assault may be inferred from facts, § 609.

Administering poison may be an assault, § 610.

Violence provocative of a breach of the peace may be an assault, § 611.

And so of injurious physical attempts on persons ignorant of act, § 612.

Wrongful abuses of authority may be assaults, § 613.

Apparent effect must be injurious, § 614.

No defence that act was secret, § 615.

All concerned are principals, § 616.

Any tactual application of force is a battery, § 617.

2. *Defence.*

Pendency of civil prosecution no defence, § 618.

Nor are words of provocation, § 619.

Otherwise as to misadventure and *casus*, § 620.

Attacks on property may be forcibly repelled, § 621.

Intruders may be expelled from depot, § 622.

Passenger disobeying rules may be expelled from car, § 623.

Persons refusing to leave may be expelled from house, § 624.

Inn-keeper has this right as to visitors, § 625.

And so has person controlling cemetery, § 626.

Agent may eject trespassers, § 627.

Prior assault a defence, § 628.

Defence of relative is in like manner justifiable, § 629.

Exercise of legal right is no sufficient provocation, § 630.

Peace and other officers may use force, § 630 *a*.

Parents have right of proper correction, § 631.

And so have schoolmasters, § 632.

Husband at common law may coerce wife, § 633.

So of master as to servant, and so as to officer of justice, § 634.

Alms- and poor-house keepers may restrain inmates, § 635.

Assent a defence *volenti non fit injuria*, § 636.

3. *Indictment and Verdict.*

Enough to aver assault on designated party, § 637.

All concerned are principals,
§ 638.

When double blow is given both
parties struck may be joined,
§ 639.

Battery may be discharged as
surplusage, § 640.

II. ASSAULTS WITH FELONIOUS INTENT.

Such assaults classified by statute,
§ 640 *a*.

Intent to kill essential to indictments
for assault with intent to murder,
§ 641.

Defendant may be convicted of
minor offence if there be no
merger, § 641 *a*.

There must be apparent ability
to consummate attempt, § 642.

Touching not necessary to offence,
§ 643.

In indictment particularity of
specification is not required,
§ 644.

Right of self-defence same as
in homicide, § 645.

Indictment must conform to
statute, § 645 *a*.

Offence a misdemeanor and
divisible, § 645 *b*.

All parties indictable, § 645 *c*.

III. ASSAULTS WITH DANGEROUS WEAPONS.

Made indictable by statute,
§ 645 *d*.

IV. ASSAULTS ON OFFICERS WHEN IN EXECUTION OF DUTY.

Illegal official action may be
forcibly resisted, § 646.

Oppressed party in such case
not confined to a resort to
law, § 647.

To justify arrest process must
be legal, and must be notified,
§ 648.

Ignorance a defence to indictment
for resistance, § 649.

Indictment need not set forth
process in detail, § 650.

Municipal and police officers
under same sanctions, § 651.

And so of officers charged with
process, § 652.

Officers are entitled to call in
aid, § 652 *a*.

POINTS FOR DEFENCE IMPROPERLY
REFUSED, AND ERRONEOUS CHARGES.
(See end of chapter.)

I. ASSAULTS GENERALLY.

1. *Incidents and Offence.*

§ 603. An assault is an apparent attempt, by violence, to do corporal hurt to another.¹ It must be apparent; for if it can be col-

¹ Com. v. White, 110 Mass. 407, 1872; Hays v. People, 1 Hill, (N. Y.) 351, 1841; State v. Davis, 1 Ired. 128, 1840; Richels v. State, 1 Sneed, 606, 1854; 1 Hawk. 15, § 1; 1 East P. C. 406; U. S. v. Barnaby, 51 Fed. Rep. 20, 1892; People v. Ryan, 27 N. Y. St. Rep. 916; 8 N. Y. Sup. 241, 1889; Berkeley v. Com., 88 Va. 1017, 1892; Engelhardt v. State, 88 Ala. 100, 1889. Judge Gaston, in State v. Davis, *ut supra*, introduces "intentional" in the definition; and see Jarnigan v. State, 6 Tex. App. 465, 1879; People v. Yslas, 27 Cal. 630, 1865; People v. Terrell, 33 N. Y. St. Rep. 368; 11 N. Y. Sup. 364, 1890; People v. Hale, 18 N. Y. Weekly Dig. 213, 1888. But a *negligent* attack may be an assault. *Infra*, § 608 *a*. See cases cited *supra*, §§ 329 *et seq*. Compare Com. v. Adams, 114 Mass. 323, 1870; Johnson v. State, 48 Tex. 576, 1875.

According to Sir J. F. Stephen (Dig.

lected, notwithstanding indication to the contrary, that there is not an apparently real approaching injury, there is no assault.¹ Thus, where a man laid his hand on his sword, and said, "If it were not assize time, I would not take such language from you," the court agreed that it was not an assault, as intent to injure was disavowed.² The same conclusion was reached in a case in which it appeared that the defendant, as he raised his whip, and shook it at the prosecutor, though within striking distance, made use of the words, "Were you not an old man, I would knock you down."³ So if a man raise his hand against another, within striking distance, and at the same time say, "If it were not for your gray hairs I would tear your heart out," it is no assault, because the words explain the action, and take away the idea of an intention to strike.⁴ And so of the attempt to persuade a woman to sexual intercourse.⁵ But when the threat is to strike unless something is done, which thing is done, this is an assault.⁶

An assault is an apparent violent attempt to do corporal hurt to another.

An assault, even when the object is a felony, is at common law only a misdemeanor.⁷

§ 604. "It must also," to adopt the language of the late Judge Gaston,⁸ "amount to an attempt; for a purpose to commit violence,

Crim. Law, art. 241), "An assault is (a) an attempt unlawfully to apply any the least actual force to the person of another, directly or indirectly; (b) the act of using a gesture toward another, giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid; (c) the act of depriving another of his liberty; in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud."

For definition of battery, see *infra*, § 617.

¹ Com. v. Stoddard, 9 Allen, 280, 1864; State v. Mooney, Phil. Law, (N. C.) 434, 1868; Tarver v. State, 43 Ala. 354, 1868; Smith v. State, 39 Miss. 521, 1863; Rainbolt v. State, 34 Tex. 286, 1870; People v. Deitz, 86 Mich. 419,

1891; White v. State, 29 Tex. App. 530, 1891.

² Tuberville v. Savage, 1 Mod. 3, 1663.

³ State v. Crow, 1 Ired. 375, 1841.

⁴ Com. v. Eyre, 1 S. & R. 346, 1815.

⁵ People v. Bransby, 32 N. Y. 465, 525, 1865. See R. v. Wollaston, 12 Cox C. C. 180, 1872; Smith v. Com., 54 Pa. 209, 1867; Kiersey v. State, (Tex.) 22 S. W. Rep. 37, 1893. *Supra*, §§ 141, 576, 577; *infra*, § 636.

⁶ See U. S. v. Richardson, 5 Cranch C. C. 348, 1837; State v. Morgan, 3 Ired. 186, 1842, cited *infra*, § 607; People v. Morehouse, 6 N. Y. Sup. 763, 1889.

⁷ *Infra*, § 640 a.

⁸ State v. Davis, 1 Ired. 125, 1840. See State v. Church, 63 N. C. 15, 1868; Klein v. State, (Ind.) 36 N. E. Rep. 763, 1894; Berkeley v. Com., 88 Va.

however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault. Therefore it is that, notwithstanding many ancient opinions to the contrary, it is now settled that no words can, of themselves, amount to an assault.¹ It is difficult, in practice, to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution of it is begun there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted.”² Thus, riding after a person so as to compel him to run into a garden for shelter, to avoid being beaten, has been adjudged to be an assault.³ And so of threats of violence by an armed assailant apparently designing an attack.⁴ But there must be some hostile demonstration of violence which, if allowed its apparent course, would do hurt.⁵

§ 605. Nor does it matter that the attack was frustrated or intercepted by extrinsic means.⁶ Where the defendant was advancing in a threatening attitude, with intent to strike the plaintiff, so that his blow would in a second or two have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, it was held an assault was committed.⁷ A voluntary abandonment, however, be-

1017, 1892; *State v. Reavis*, 113 N. C. 677, 1893; *Beavers v. State*, 54 Ark. 836, 1891.

For distinction, under N. Y. Code, between an assault with intent to kill and an attempt to commit such an as-

sault, see *People v. O'Connell*, 60 Hun, 109; 14 N. Y. Sup. 485, 1891.

¹ 1 Hawk. c. 15, s. 1, p. 110; 2 Comyn, Bat. C. And see *Warren v. State*, 33 Tex. 517, 1870; *Hulse v. Tollman*, 49 Ill. App. 490, 1888.

² See, also, *supra*, §§ 181-187; *Cutler v. State*, 59 Ind. 300, 1877; *Watts v. State*, 30 Tex. App. 533, 1891; *Atteberry v. State*, (Tex.) 25 S. W. Rep. 125, 1894.

³ *Mortin v. Shoppe*, 3 C. & P. 373, 1828; 14 Eng. C. L. 355.

⁴ *State v. Martin*, 85 N. C. 508, 677, 1893; *Beavers v. State*, 54 Ark. 836, 1891.

⁵ *Cutler v. State*, 59 Ind. 300, 1877; *State v. Millsaps*, 82 N. C. 549, 1880; *State v. Painter*, 67 Mo. 84, 1877.

⁶ *State v. Vannoy*, 65 N. C. 532, 1875; *State v. Adams*, 20 Kans. 311, 1878; *People v. Ryan*, 27 N. Y. St. Rep. 916; 8 N. Y. Sup. 241, 1889; *State v. McAfee*, 107 N. C. 812, 1890; *State v. Reavis*, 113 N. C. 677, 1893; *People v. Lee Kong*, 95 Cal. 666, 1892.

⁷ *Stephens v. Myers*, 4 C. & P. 349, 1830; 19 Eng. C. L. 414; *State v. Dooley*, (Mo.) 26 S. W. Rep. 558, 1894. But see *People v. Lilly*, 43 Mich. 521, 1880. See, fully, *supra*,

fore any effect is produced, or there is an action taken by the defendant calculated to alarm the prosecutor, is a defence.¹

§ 606. An offer to strike by one person rushing upon another will be an assault, although the assailant be not near enough to reach his adversary, if the distance be such as to induce the latter, under the accompanying circumstances, to believe that he will instantly receive a blow, unless he strike in self-defence.² And one reason for this is, that an attack *apparently* likely to hurt is as provocative of a breach of the peace as one actually capable of hurting.³ Hence, drawing a gun or other dangerous weapon on another with threat to use it is an assault, although the weapon is not pointed.⁴ Whether, when the weapon is not loaded, there is an assault, has been doubted.⁵ But, as will be soon more fully seen, when the attitude is threatening, and the effect is to terrify, the offence is complete, the party assaulted believing in the reality of the attack.⁶ Where, however, there is wanting apparent or real ability to hurt in any way, there is, generally, no assault.⁷ Thus the mere pointing of an unloaded gun is said not to be an assault, without action indicating intention to attack.⁸ And it has been ruled not to constitute an assault if a

Apparent
ability to
hurt is
sufficient.

¹ *Supra*, § 187; *People v. Lilly*, 43 Mich. 521, 1880; *Bishop v. State*, 86 Ga. 329, 1890; *McSpatton v. State*, 30 Tex. App. 616, 1892.

² *State v. Davis*, 1 Ired. 128, 1840; *State v. Hampton*, 63 N. C. 13, 1873; *People v. Yslas*, 27 Cal. 630, 1865; *State v. Rigg*, 10 Nev. 284, 1875. *Supra*, §§ 182, 488. See *Com. v. Shaw*, 134 Mass. 221, 1883; *Lange v. State*, 95 Ind. 114, 1883. *Aliter* if the pistol be not presented or cocked. *Lawson v. State*, 30 Ala. 14, 1857.

³ See *West v. State*, 59 Ind. 113, 1877; *Cutler v. State*, *Ibid.* 300, 1877; *State v. Hampton*, 63 N. C. 13, 1863. *Contra*, under Indiana statute, *McCulley v. State*, 62 Ind. 428, 1878.

⁴ *People v. McMakin*, 8 Cal. 547, 1857; *State v. Epperson*, 27 Mo. 255, 1858; *State v. Church*, 63 N. C. 15, 1868; *State v. Marsteller*, 84 *Ibid.* 726, 1881; *Kief v. State*, 10 Tex. App. 286, 1881.

⁵ See *Blake v. Barnard*, 9 C. & P. 626, 1840; *People v. Anderson*, 44 Cal. 65, 1872; *Klein v. State*, (Ind.) 36 N. E. Rep. 763, 1894.

⁶ *Supra*, §§ 183-4, 488. *Infra*, § 642; *R. v. St. George*, 9 C. & P. 483, 1840; *Com. v. White*, 110 Mass. 407, 1872; *State v. Smith*, 2 Humph. 457, 1842; *State v. Shepherd*, 10 Iowa, 126, 1859; *State v. Myerfield*, Phil. Law, (N. C.) 108, 1867; *Crumbley v. State*, 61 Ga. 582, 1878; *State v. Mullen*, 45 Ala. 43, 1870; *Beach v. Hancock*, 7 Fost. 223, 1855; *Smith v. State*, 32 Tex. 593, 1870. See *Agitone v. State*, 41 *Ibid.* 501, 1874; *Kief v. State*, 10 Tex. App. 286, 1881; *People v. Morehouse*, 6 N. Y. Sup. 763, 1889; *State v. Herron*, 12 Mont. 230, 1892.

⁷ See *supra*, § 183. See 3 Crim. Law Mag. 557.

⁸ *Blake v. Barnard*, 9 C. & P. 626, 1840; *R. v. James*, 1 C. & K. 530, 1844; *Robinson v. State*, 31 Tex. 170,

gun or pistol be aimed at the party assaulted at a distance at which it cannot do execution.¹ The true rule is, that there must be some adaptation of the means to the end, and it is enough if this adaptation be apparent, so as to impress or alarm a person of ordinary reason.² Thus where the prosecutor was at a place where he had a right to be, and four other persons, having in their possession a manure fork, a hoe, and a gun, by following him, and by threatening and insulting language, put him in fear, and induced him to go home sooner than, or by a different way, from what he would otherwise have gone; it was held that these persons were guilty of an assault upon him, though they did not get nearer to him than seventy-five yards, and did not level the gun at him.³

§ 607. A conditional threat of force may be an assault. Thus where the appellant drew his pistol, cocked it, pointed it toward the breast of F., and said, "If you do not pay me my money I will have your life," the parties being close together, it was held that this was an assault.⁴ So when A., being within striking distance, raises a weapon for the purpose of striking B., and at the same time declares that if B. will perform a certain act he will not strike him, and B. does perform the required act, in consequence of which no blow is given, this is an assault in A;⁵ and while mere words do not constitute such an assault, it is otherwise with words which are explanatory of an impending attack.⁶

Assault on a mass of people is § 608. Recklessly shooting into a crowd is an assault,⁷ and an assault on several indiscriminately is an assault

1868; *McKay v. State*, 44 *Ibid.* 43, 1871; *State v. Sigman*, 106 N. C. 728, 1875; though see *contra*, *R. v. St.* 1890. *Supra*, §§ 183, 488.

George, 9 C. & P. 483, 1840; *R. v.* ⁴ *Keefe v. State*, 19 Ark. 190, 1857.

Baker, 1 C. & K. 254, 1843. ⁵ *U. S. v. Richardson*, 5 Cranch C.

¹ *Tarver v. State*, 43 Ala. 354, 1868; *C. 348*, 1837; *State v. Morgan*, 3 Ired. 186, 1842; *Crow v. State*, 41 Tex.

² *Kunkle v. State*, 32 Ind. 220, 1869; *468*, 1874; *Cato v. State*, 4 Tex. App. 87, 1878. *Infra*, § 612.

Crow v. State, 41 Tex. 468, 1874. And ⁶ *Supra*, § 604; see *State v. Baker*, 65 N. C. 332, 1871; *Reed v. State*, 29

1850; *Johnson v. State*, 26 Ga. 611, Tex. App. 449, 1892. *Infra*, §§ 609, 611.

1859; *Allen v. State*, 28 *Ibid.* 395, ⁷ *Supra*, § 112; *Smith v. Com.*, 100

1859; *Clark v. State*, 84 Ga. 577, 1890; Pa. 324, 1882; *State v. Myers*, 19

State v. Triplett, 52 Kans. 678, 1894. Iowa, 517, 1865; *State v. Murphy*, 14

See *supra*, § 182. Mo. App. 73, 1883; *People v. Raher*, 92 Mich. 165, 1892.

³ *State v. Rawles*, 65 N. C. 334, 92 Mich. 165, 1892.

on each individual.¹ So it is no defence to an indictment an assault on the individuals. for shooting into a house that the object was to hurt some one who it turned out was not actually in the house.²

§ 608 *a*. From what has been said in prior sections, it follows that intention to hurt is not necessary to constitute an assault. Hence a blow inflicted as a joke, there being Intent not necessary. no assent, is an assault and battery.³ A negligent attack, also, in which there is no intent, may be an assault;⁴ and so of an assault made negligently in drunkenness.⁵ A negligent exposure of a child or of an infirm person may also be indicted as an assault.⁶

§ 609. Striking at another with a cane, stick, or fist, although the party striking misses his aim;⁷ drawing a sword or bayonet, or throwing a bottle or glass with intent to Assault to be inferred from facts. wound or strike; presenting a gun at a man, and beginning to move toward him;⁸ presenting a gun within shooting distance;⁹ assuming a threatening attitude, and hurrying toward him; or any other act indicating an intention to use violence against the person of another, completes the offence.¹⁰ And, as we have seen, words may be received to indicate intent.¹¹

Evidence of false imprisonment and of riotous acts will sustain an indictment for assault and battery,¹² and so will detention in a particular place by threats;¹³ though it is said not to be so when the

¹ *Supra*, § 112; *State v. Merritt*, Phil. Law, (N. C.) 134, 1867; *State v. Nash*, 86 N. C. 650, 1882. That in such case malice is to be inferred, see *supra*, § 319.

⁷ *Rol. Abr.* 545, l. 45.

⁸ *Richels v. State*, 1 Sneed, 606, 1854.

² *Supra*, §§ 108 *et seq.* *Cowley v. State*, 10 Lea, 282, 1882; *Cooley v. State*, 88 Tenn. 250, 1889; *People v. Lee Kong*, 95 Cal. 666, 1892.

⁹ *Blake v. Barnard*, 9 C. & P. 626, 1840.

¹⁰ 1 Hawk. c. 62, s. 1; *Stevens v. Myers*, 4 C. & P. 349, 1830; *State v. Martin*, 85 N. C. 508, 1881.

³ *Hill v. State*, 63 Ga. 578, 1879. *Supra*, § 373 *a*.

¹¹ *State v. Rawles*, 65 N. C. 334, 1871. See *Com. v. Eyre*, 1 S. & R. 346, 1815; *Moore v. State*, 31 Tex. Cr. 234, 1892; *Sullivan v. State*, 31 Tex. Cr. 486, 1893; *Hall v. State*, 32 Tex. Cr. 594, 1894. *Infra*, § 611. *Supra*, § 607.

⁴ *Supra*, §§ 329 *et seq.* *Smith v. Com.*, 100 Pa. 324, 1882; *Com. v. Hawkins*, 157 Mass. 551, 1893. See, however, *contra*, *Rutherford v. State*, 13 Tex. App. 92, 1882, and cases in note to §§ 603 and 608 *a*.

¹² *Long v. Rogers*, 17 Ala. 540, 1850; *State v. Dineen*, 10 Minn. 407, 1865; *State v. Reavis*, 113 N. C. 677, 1893; *State v. Lunsford*, 81 N. C. 528, 1879. See *supra*, § 591.

⁵ *Com. v. Malone*, 114 Mass. 295, 1873; *Crosby v. People*, 137 Ill. 325, 1891. *Supra*, § 50.

⁶ *R. v. Mulroy*, 3 Cr. & Dix, 318, 1845; *R. v. Ridley*, 2 Camp. 650, 1814; and cases cited *supra*, §§ 318, 335, 359.

¹³ *Ibid.*; *Smith v. State*, 7 Humph. 43, 1846; *Bloomer v. State*, 3 Sneed, 66, 1855. *Supra*, § 591.

resistance is merely passive, there being no application of force made or threatened.¹

Whether it is an assault and battery on B. to strike a horse driven by B. was at one time doubted;² but the better opinion is that a blow is a battery irrespective of the number of mechanical agencies through which it is transmitted.³ It is clear that an assault on a horse on which B. is riding is an assault on B.;⁴ and there is no good reason why sending dynamite through an express agency which may occupy a month in the transmission should not be as much of an assault as putting the dynamite in person in the hands of the person assailed.⁵ Hence it is an assault for A. to push B. against C.;⁶ and it makes no difference whether B. is one person or a series of persons.⁷

§ 610. It is permissible to charge the administering of poison as an assault; and the same reasoning applies to the malicious application of injurious drugs.⁸ In England, it is true, the weight of authority now is that administering poison does not necessarily involve an assault;⁹ but this is open to doubt.¹⁰ There are cases of poisoning which clearly involve assaults—*e. g.*, throwing vitriol at another,¹¹ injecting poison by force. Here there can be no question. The difficulty arises

Adminis-
tering
poison
may be an
assault.

¹ *Innis v. Wylie*, 1 C. & K. 257, 1846; *R. v. Hanson*, 2 C. & K. 912, 1844; *People v. Lee*, 1 Wheeler C. C. 1849; 4 Cox C. C. 138; overruling *R. v. Button*, 8 C. & P. 660, 1838. *Contra*, 364, 1823.

² *Kikland v. State*, 43 Ind. 146, 1873. *Woolrych on Misdemeanors*, 176, 177. See *Bechtelheimer v. State*, 54 Ind.

³ *Infra*, § 617; *supra*, § 161; *Marentille v. Oliver*, 1 Pen. (N. J.) 275, 1808. 128, 1876. In Canada the same view is taken. *R. v. Smith*, 34 U. C. R.

⁴ *Clark v. Downing*, 55 Vt. 259, 1882; citing *Hopper v. Reeve*, 7 Taunt. 698, 1817; *State v. Martin*, 85 N. C. 508, 1881. And see *People v. Lee*, 1 Wheeler C. C. 364, 1823. 552, 1873.

⁵ *Supra*, §§ 161-7; *Crim. Law Mag.*, March, 1885, 155 *et seq.* ¹⁰ See *Com. v. Stratton*, 114 Mass. 303, 1873. In England the above ruling was corrected by statute. *R. v. Wilkins*, 9 Cox C. C. 20, 1861; *Leigh & C.* 89; *supra*, § 576 a; *R. v. Bennett*, 4 F. & F. 1105, 1866; *infra*, § 612. Under Michigan statute see

⁶ See *Kiland v. State*, *supra*.

⁷ *Supra*, §§ 161-7; 1 Russ. on Cr. 1021; *Com. v. Hawley*, 99 Mass. 433, 1868. *People v. Carmichael*, 5 Mich. 10, 1858; *People v. Adwards*, 5 Mich. 22, 1858. In Texas it is said that to

⁸ See *People v. Blake*, 1 Wheeler C. C. 490, 1823; *Com. v. Stratton*, 114 Mass. 303, 1873; *Johnson v. State*, 92 Ga. 36, 1893; *Whart. Prec. in loco*. *Garnet v. State*, 1 Tex. App. 605, 1875.

⁹ *R. v. Walkden*, 1 Cox C. C. 282, ¹¹ *People v. Bracco*, 69 Hun, 206; 23 N. Y. Sup. 505, 1893.

when we take into view those cases of poisoning in which the person poisoned voluntarily accepts the poison, supposing it to be something else. Can there be in such case an assault upon a consenting party, if such person be capable of consent? Does fraud, or mistake as to the nature of the act consented to, nullify such assent? If so, assent to administering poison, under the impression that it was something else, does not bar the prosecution.¹ It is otherwise if the assent was to the particular act, and the particular act did not go to deprive the party assenting of inalienable rights.²

Attempt to poison is discussed in a prior section.³

§ 611. Threats of great bodily harm, accompanied by acts showing a formed intention of putting them into execution, if intended to put the person threatened in fear of their execution, and if they have that effect and are calculated to produce that effect upon a person of ordinary firmness, constitute a breach of the peace punishable by indictment.⁴

Violence provocative of a breach of the peace may be an assault.

And provoking language, accompanied by acts whose tendency is to produce public disturbance, may be indictable as a breach of the peace.⁵

§ 612. It is no defence that the attack was made upon an unconscious person, or upon one ignorant of the nature of the act. Thus to expose an unconscious child may be an assault.⁶ The same rule applies where the party assaulted does not know what the act is. Thus one decoying a female under ten years of age, and detected standing before her in a state of indecent exposure, is properly convicted of an assault with an attempt to commit a rape, though there is no evidence of his actually touching her.⁷ And even non-resistance is no defence to an indictment for an assault with intent to take indecent liberties, when the defendant is a schoolmaster and the person assailed a female pupil, and there is no actual assent.⁸ But where

And so of injurious physical attempts on persons ignorant of act.

¹ *Supra*, §§ 141-150. See London Law Times, Nov. 5, 1881, p. 11.

² *Supra*, §§ 146, 559.

³ *Supra*, § 179.

⁴ *State v. Benedict*, 11 Vt. 236, 1839; *State v. Baker*, 65 N. C. 332, 1872; *State v. Marsteller*, 84 N. C. 726, 1881. *Supra*, § 197; *infra*, § 1553.

⁵ *R. v. King*, 14 Cox C. C. 434, 1880.

⁶ *R. v. March*, 1 C. & K. 496, 1844. See *supra*, § 359.

⁷ *Hayes v. People*, 1 Hill, (N. Y.) 351, 1841. See *R. v. Lock*, L. R. 2 C. C. 10, 1871, and cases cited *supra*, §§ 558-9, 576.

⁸ *R. v. Nichol*, R. & R. 130, 1807; *R. v. McGavaran*, 6 Cox C. C. 64, 1852; *Ridout v. State*, 6 Tex. App. 249, 1879. See *supra*, § 576; *infra*, § 636.

As to general defence of assent, see *supra*, § 141. As to special relations, *infra*, § 636.

there is actual intelligent assent, even by a child of seven years, an indictment for assault cannot be maintained at common law.¹

Where a medical practitioner had sexual connection with a female patient of the age of fourteen years, who had for some time been receiving medical treatment from him, it was held that he was guilty of an assault, the jury having found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bonâ fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure; and the intimation of the judges was, that he might have been indicted for rape.²

In England, under the statute, it has been held an assault for a man to communicate a syphilitic disease to a woman who consented to sexual intercourse with him, the consent not going to the communication of disease.³

§ 613. An assault has been held to be proved where a medical man unnecessarily stripped, with his own hands, a female naked, under the pretence of examining her;⁴ where a parish officer, against the will of a pauper, cut off her hair;⁵ where an almshouse keeper applied unnecessarily severe chastisement;⁶ and where the captain of a vessel compelled a seaman, in an exhausted state, to go aloft, to which the latter, in terror, assented.⁷ And, as we have seen, false imprisonment itself involves an assault.⁸ But where there is intelligent *consent*, by a person capable of consenting, there is no assault.⁹ And it has been held not an assault to arrest a person apparently drunk.¹⁰

Assaults by officers will be hereafter considered.¹¹

§ 614. Where a parent inadvertently exposes a young child to the inclemency of the weather, and no injury results, this is not an

¹ R. v. Roadley, 14 Cox C. C. 463, 1880; 42 L. T. (N. S.) 515, relying on R. v. Reed, 3 Cox C. C. 266, 1848; 1 Den. C. C. 377. But see *supra*, § 578.

² R. v. Case, 1 Eng. L. & Eq. R. 544, 1850; 1 Den. C. C. 580; 4 Cox C.

C. 220; R. v. Flattery, 13 Ibid. 388, 1877. *Supra*, §§ 141, 559, 597; *infra*, § 636. See, also, People v. Bransby, 32 N. Y. 525, 1865.

³ R. v. Bennett, 4 F. & F. 1105, 1866. See R. v. Sinclair, 18 Cox C. C. 28, 1867; and *contra*, Hegerty v. Shinn, cited *infra*, § 636.

⁴ R. v. Rosinski, 1 Mood. C. C. 19, 1824. See *supra*, § 576.

⁵ Ford v. Skinner, 4 C. & P. 239, 1830. See R. v. Miles, 6 Jur. 243, 1860. *Infra*, § 1633.

⁶ *Infra*, § 635.

⁷ U. S. v. Freeman, 4 Mason C. C. 505, 1827. *Supra*, § 360; *infra*, § 1585.

⁸ *Supra*, §§ 591, 609.

⁹ See *infra*, § 636; and particularly *supra*, §§ 141 *et seq.*

¹⁰ Com. v. Presby, 14 Gray, 63, 1859; Com. v. Coughlin, 123 Mass. 436, 1877.

¹¹ *Infra*, § 630 a.

assault;¹ and to constitute a neglect by the parent to supply shelter a misdemeanor at common law, there must be an injury to the health.² But this is not requisite when the assault is by strangers. Thus where C. was delivered of a child at the house at which A. and B. resided, and they, telling her that the child was to be taken to an institution to be nursed, put it into a bag, and hung it on some palings at the side of a foot-path, and there left it, it was held that this was an assault on the child.³

Apparent
effect must
be in-
jurious.

§ 615. No matter how private or secret the assault may be, it does not thereby cease to be an indictable offence if there be injury done, or even if the party assailed be reasonably, according to his lights, put in fear.⁴

No defence
that act
was secret.

§ 616. All concerned in any assault are principals.⁵ Hence, one who incites others to commit an assault is guilty, and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it; as whatsoever will make a man an accessory before the fact in felony will make him a principal in misdemeanor.⁶

All con-
cerned are
principals.

If two parties go out to strike one another and do so, it is an assault in both, and it is quite immaterial which strikes the first blow.⁷ And consequently, when a number of persons met together, and there is evidence tending to show a common design to commit an assault upon another, they may all be properly found guilty, though only one of them used threatening and insulting language to him.⁸

¹ R. v. Renshaw, 20 Eng. Law & Eq. 593; 2 Cox C. C. 285, 1847. See Whart. Prec. 916. *Infra*, §§ 631, 1564 *et seq.*

² R. v. Philpott, Dears. C. C. 179, 1853; 6 Cox C. C. 140; 20 Eng. Law & Eq. 591. *Infra*, §§ 1563-70.

³ R. v. March, 1 C. & K. 496—Tindal, 1844. *Infra*, §§ 1563-70.

⁴ Com. v. Simmons, 6 J. J. Marshall, 614, 1831. As to statutory offence of "secret assault," see State v. Telfair, 109 N. C. 878, 1891.

⁵ *Supra*, § 223. *Infra*, § 616; Dunman v. State, 1 Tex. App. 593, 1877. See Hilmes v. Stroebel, 59 Wis. 74, 1883.

⁶ Com. v. Hurley, 99 Mass. 433, 1868; State v. McClintock, 8 Iowa, 203, 1859; State v. Lymburn, 1 Brev. 397, 1804; State v. Merchant, (N. H.) 18 Atl. Rep. 654, 1889; State v. Gooch, 105 Mo. 392, 1891; Tanner v. State, 92 Ala. 1, 1890; Jolly v. State, 94 Ala. 19, 1891. All thus concerned may be charged jointly with the assault. Ibid. See Whart. Cr. Pl. & Pr. § 301. *Supra*, § 223.

⁷ R. v. Lewis, 1 C. & K. 419, 1844.

⁸ State v. Rawles, 65 N. C. 334, 1871. See *supra*, §§ 223 *et seq.*

§ 617. A battery is an assault in which force is applied, by material agencies, to the person of another, either mediately or immediately.¹ Thus it is a battery to spit at another;² to push a third person against him;³ to set a dog at him which bites him;⁴ to cut his dress while he is wearing it, though without touching or intending to touch his person;⁵ to shoot him;⁶ and to cause him to take poison.⁷ So it is a battery for a man to fondle against her will a woman not his wife.⁸ The force may be applied through conductors more or less close. Thus to strike the dress of the person assailed, or the horse on which he is riding, or the house in which he resides, may be as much a battery as to strike his face;⁹ and sending an explosive machine by express from New York to San Francisco may be as much a battery as taking it to San Francisco in person.¹⁰ It is not, however, a battery to lay hands on another to attract his attention, or in a party falling to seize another for support.¹¹ Sending a missile into a crowd, also, is a battery on any one whom the missile hits;¹² and so is the use, on the part of one who is excused in using force, of more force than is required.¹³

Any tactical application of force is a battery.

2. Defence.

§ 618. A prosecutor in an indictment for an assault and battery, who has commenced a civil suit for the injury, will not be compelled to abandon either the civil suit or the prosecution. Both may be sustained; the first for damages to the injured individual, the second to avenge the public wrong.¹⁴ The court, however, will not give a severe judgment upon the criminal conviction, unless the prosecutor will agree to relinquish his civil remedy.¹⁵

Pendency of civil prosecution no defence.

¹ State v. Philley, 68 Ind. 304, 1879; Young v. State, 31 Tex. Cr. 24, 1892. Steph. Dig. Crim. Law, art. 241 Engelhardt v. State, 88 Ala. 100, 1889. See *supra*, § 609.

² 6 Mod. 142, 1703.

³ Bul. N. P. 16. Whether striking horse is striking driver, see Kirland v. State, 43 Ind. 146, 1873. *Supra*, § 609.

⁴ 1 Russ. on Cr. 1021 (9th Am. ed.).

⁵ R. v. Day, 1 Cox C. C. 207, 1845.

⁶ State v. Prather, 54 Ind. 63, 1876.

⁷ *Supra*, § 610.

⁸ R. v. Dungey, 4 F. & F. 99, 1864; Goodrum v. State, 60 Ga. 509, 1878;

Supra, § 576.

⁹ *Supra*, §§ 167, 324, 609; State v. Davis, 1 Hill, (S. C.) 46, 1832.

¹⁰ *Supra*, §§ 161, 609. See Crim. Law Mag., March, 1885, 155.

¹¹ Steph. Dig. Crim. Law, art. 241.

¹² *Supra*, § 608.

¹³ *Infra*, §§ 624 *et seq.* *Supra*, § 612.

¹⁴ *Supra*, § 31 *b*; Whart. Cr. Pl. & Pr. § 453; State v. Blennerhasset, 1 Walk. 7, 1818; State v. Gibson, 10

Ired. 214, 1840.

¹⁵ Buckner v. Beek, Dudley, (S. C.)

§ 619. No words, no matter how irritating or opprobrious, will justify an assault.¹

§ 620. Whatever would be a defence on ground of misadventure to an indictment for homicide is equally a defence to a charge of battery.² Thus if a horse run away with his rider and run against a man, it is no battery,³ nor is it a battery if a soldier, in his ranks, discharge his gun, and a man unexpectedly passed before him at the time, and be hurt by it.⁴ It is also a good defence that the alleged battery was merely an amicable contest; as that the defendant wrestled with the prosecutor for a wager;⁵ or that it happened by accident whilst the defendant was engaged in some sport or game, which was neither unlawful nor dangerous.⁶ That misadventure when negligent is no defence has been already seen.⁷

Nor are words of provocation.

Misadventure or *casus* is a good defence.

§ 621. The owner of property, as we have seen, may by force resist an attempt to take it from him, and may rescue it from another's grasp.⁸ And it has been held that a mere snatching by the hand on claim of right is not an assault.⁹

Attacks on property may be forcibly repelled.

But a party thus vindicating his rights is guilty of an assault if he use an excess of force.¹⁰ Nor can he punish an assailant after the latter has retreated. He can *defend*, but not *punish*.¹¹

§ 622. A superintendent of a railroad depot has authority to

168, 1836; *Richardson v. Zuntz*, 26 La. An. 313, 1874. As to continuance, see Whart. Cr. Pl. & Pr. § 599 a. *Supra*, § 31 b.

¹ See *Stephens v. Myers*, 4 C. & P. 249; *Com. v. Eyre*, 1 S. & R. 347; *Mitchell v. State*, 41 Ga. 527; *State v. Workman*, (S. C.) 17 S. E. Rep. 694, 1893; *Crosby v. People*, 137 Ill. 325, 1891; *Jones v. State*, 96 Ala. 102, 1892; *supra*, § 455 a. But see *Baker v. State*, (Ga.) 19 S. E. Rep. 887, 1894; *Murphy v. State*, 92 Ga. 75, 1893; *Hodgkins v. State*, 89 Ga. 761, 1892.

² *Supra*, §§ 306, 340 *et seq.*

³ *Gibbons v. Pepper*, 2 Salk. 637, 1696; 4 Mod. 405. *Supra*, § 306.

⁴ *Weaver v. Ward*, Moor, 864, 1610; Hob. 134; and see *R. v. Gill*, 1 Stra. 190, 1721.

⁵ Com. Dig. Pleader, 3 M. 18. *Supra*, §§ 141 *et seq.*, 371.

⁶ See *supra*, §§ 141 *et seq.*, 371-73.

⁷ *Supra*, § 608 a.

⁸ *Supra*, §§ 100, 501; *infra*, § 1083; *State v. Elliott*, 11 N. H. 540, 1841; *State v. Miller*, 12 Vt. 437, 1840. See *Com. v. Lakeman*, 4 Cush. 597, 1849; *Filkins v. People*, 69 N. Y. 101, 1877; *Overdeer v. Lewis*, 1 Watts & S. 90, 1841; *Harrington v. People*, 6 Barb. 607, 1849; *Anderson v. State*, 6 Baxt. 608, 1872; *State v. Dooley*, (Mo.) 26 S. W. Rep. 558, 1894; *Filkins v. People*, 69 N. Y. 106, 1877.

⁹ *Com. v. Ordway*, 14 Gray, 65, 1859.

¹⁰ *Supra*, § 102. *Golden v. State*, 1 S. C. 292, 1869; *Wharton v. People*, 8 Ill. App. 232, 1881.

¹¹ *Supra*, § 98 *et seq.* But see *People v. Pearl*, 76 Mich. 207, 1889.

exclude therefrom persons who violate the reasonable regulations prescribed for their conduct, and annoy passengers or interrupt the officers and servants of the corporation in the discharge of their duties.¹ Hence an innkeeper may be ejected from a depot when his conduct, in soliciting passengers to go to his inn, is an annoyance to passengers, or a hindrance and interruption to the railroad officers in the performance of their duties, he having due notice that he is a trespasser, and there being no more force applied than is necessary to eject him.² The same distinctions apply to intruders on other grounds, if the intrusion is without color of right.³

§ 623. A passenger on a railway car, when guilty of improper conduct, or refusing to comply with the reasonable rules of the company, may be ejected without subjecting the officer who attempts it to an indictment, provided undue force be not used;⁴ and so where he refuses to pay his fare.⁵ And so where he refuses to surrender his ticket,⁶ though he is not required to so surrender before the journey's end, unless a check or other substitute is handed him.⁷

§ 624. Force is generally excusable where a person, after request, refuses to leave another's premises.⁸ Where there has been, however, a trespass in law merely, without actual force, the owner of the close must first request the trespasser to depart before he can justify laying his hands on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to

¹ See *Harris v. Stevens*, 31 Vt. 79, 279, 1865; *State v. Overton*, 4 Zab. 435, 1854; *State v. Campbell*, 32 N. J. 309, 1867; *State v. Chovin*, 7 Iowa, 207, 1854.

² *Supra*, § 197; *Com. v. Power*, 7 Metc. 596, 1844.

³ See *Com. v. Ruggles*, 6 Allen, 588, 1863; *Com. v. Ribert*, (Pa) 22 Atl. Rep. 1031, 1891.

⁴ *Supra*, § 437. See *Whart. on Neg.* § 646; *R. v. Mann*, 6 Cox C. C. 461, 1854; *People v. Caryl*, 3 Parker C. R. 326, 1857; *State v. Ross*, 2 Dutch. 224, 1857; *Ill. Cent. R. R. v. Sutton*, 53 Ill. 397, 1870; *State v. Chovin*, 7 Iowa, 204, 1858; *Robinson v. State*, 54 Ala. 86, 1858; *State v. Dennison*, 108 Mo. 541, 1891.

⁵ *People v. Jillson*, 3 Parker C. R. 234, 1856. See *State v. Goold*, 53 Me. 586, 1893; *Christian v. State*, 96

⁶ *People v. Caryl*, 3 Parker C. R. 326, 1857.

⁷ *State v. Thompson*, 26 N. H. 250, 1858. But spitting on the floor is not ground for expulsion. *People v. McKay*, 46 Mich. 439, 1880.

⁸ *Supra*, § 506; *Com. v. Clarke*, 2 Metc. 23, 1840; *Harrington v. People*, 6 Barb. 607, 1849; *Corey v. People*, 45 Barb. 262, 1865. See 2 Rol. Abr. 549, l. 7; *Com. v. Kennard*, 8 Pick. 133, 1829; *State v. Taylor*, 82 N. C. 554, 1880; *Circle v. State*, (Tex.) 22 S. W. Rep. 603, 1893; *Christian v. State*, 96

remove him.¹ But if the trespasser use force, then the owner may oppose force to force;² and in such a case if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer, however, to a justification of defence of his possession, the other party may prove that the battery was excessive;³ or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like.⁴ Peculiar sanctity being attached to a dwelling-house or mansion, the owner of such a house is entitled to use all the necessary force to compel an intruder to leave.⁵ But though a man may in such a case put out of his house another who persists in remaining after notice express or implied to leave, yet he is not entitled to inflict a wanton and unduly violent battery.⁶

§ 625. The proprietor of a public inn has a right to request a person who visits it, not as a guest, or on business with a guest, to depart; and if he refuse, the innkeeper has a right to lay his hands gently upon him, and lead him out, and if resistance be made, to employ sufficient force to put him out.⁷ And for so doing he can justify his conduct on a prosecution for assault and battery.⁸ But if from excess of violence the party expelled be killed, the offence is manslaughter.⁹

Innkeeper
has this
right as to
visitors.

§ 626. The sexton of a church cemetery, charged by its owners with its exclusive control, has a right to eject by force any trespasser who insists in interring a body contrary to the rules governing the cemetery.¹⁰

And so has
person
controlling
cemetery.

Ala. 89, 1892. *Supra*, §§ 97, 502
et seq.

See *People v. Foss*, 80 Mich. 559, 1890, where it was held that one who owns the fee of a public highway has an exclusive right to the grass which grows on the unused parts thereof; and may use sufficient force to oblige another to desist from driving unnecessarily and capriciously upon grass so growing.

¹ *Supra*, §§ 102, 506; *Weaver v. Bush*, 8 T. R. 78, 1799. See 2 Rol. Abr. 548, l. 35, 45; 2 Salk. 641; *Territory v. Drennan*, 1 Mont. 41, 1868; *Jones v. Jones*, 71 Ill. 562, 1874; *Abt v. Burgheim*, 80 Ill. 92, 1875; *State v. Burke*, 82 N. C. 551, 876, 1880. See *Low v. Elwell*, 121 Mass. 309, 1876.

² Salk. 641; 8 T. R. 78; *Tullay v. Beed*, 1 C. P. 1873. *Supra*, §§ 502, 506.

³ Skin. 387; Lutw. 1436.

⁴ *Clarke v. State*, 89 Ga. 768, 1892.

⁵ *Supra*, §§ 503, 506.

⁶ *Supra*, §§ 102, 506; *State v. Lazarus*, 1 Mill's Const. R. (S. C.) 34, 1817. See *Gregory v. Hill*, 8 T. R. 299, 1799.

⁷ See *Howell v. Jackson*, 6 C. & P. 723, 1834; *Burrell v. State*, 129 Ind. 290, 1891.

⁸ *Com. v. Mitchell*, 2 Pars. (Phil.) 431, 1847. As to duties of innkeepers, see *infra*, § 1587.

⁹ *State v. Murphey*, 61 Me. 56, 1872; *State v. Noeninger*, 108 Mo. 166, 1891. *Supra*, §§ 500, 506.

¹⁰ *Com. v. Dougherty*, 107 Mass. 243, 1871.

Agent may
eject tres-
passers.

§ 627. A person lawfully in possession of a building, as agent, may eject trespassers.¹

Prior as-
sault a
defence.

§ 628. It is a good defence in justification even of a wounding to prove that the prosecutor attacked and beat the defendant first, and that the defendant committed the alleged battery merely in his own defence;² though proof that the prosecutor struck the first blow will not justify an excessive battery or an attack with a dangerous weapon.³

A provoked assault is no defence.⁴

It is not the defendant's mere notion that he is about to be attacked that justifies; but there must be circumstances leading the defendant, according to his lights, to expect an attack.⁵

If the defendant prove an assault merely, as, for instance, that the prosecutor lifted up a cane or staff, and offered to strike him, this is sufficient to justify the defendant striking the prosecutor;

¹ Com. v. Clark, 2 Metc. 23, 1840; Com. v. Powers, 7 Metc. 596, 1844.

² 1 Sid. 246; 1 Co. Rep. 19; 2 Salk. 642; 3 Ibid. 46; Com. v. Mann, 116 Mass. 58, 1874; State v. Fraumberg, 40 Iowa, 555, 1875; State v. Fowler, 52 Iowa, 103, 1879; Pease v. State, 13 Tex. App. 18, 1882. That an assault embodying an apparent danger will excuse a battery, see Allen v. State, 28 Ga. 395, 1859. *Supra*, §§ 488, 619. *Infra*, § 645.

³ *Supra*, §§ 470 *et seq.*; Cushman v. Ryan, 1 Story, 91, 1840; Com. v. Ford, 5 Gray, 475, 1855; State v. Gibson, 10 Ired. 214, 1849; State v. Wood, 1 Bay, 351, 1815; State v. Quinn, 2 Brev. 515, 1815; Floyd v. State, 36 Ga. 91, 1866; Riddle v. State, 49 Ala. 389, 1873; Allen v. State, 52 Ibid. 391, 1875; Presser v. State, 77 Ind. 274, 1881; State v. Hays, 67 Mo. 692, 1878; State v. Newland, 27 Kans. 764, 1881; State v. Lawry, 4 Nev. 161, 1868; Cotton v. State, 4 Tex. 260, 1849; Baker v. State, (Ga.) 19 S. E. Rep. 887, 1894; Low v. State, (Tex.) 20 S. W. Rep. 366, 1892. See *supra*, §§ 456, 470. *Cf.* Allen v. State, 28 Ga. 395, 1859.

⁴ *Supra*, § 485; Page v. State, 69 Ala. 229, 1881; Johnson v. State, Ibid. 253, 1881; People v. Miller, 49 Mich. 23, 1882; State v. White, (R. I.) 28 Atl. Rep. 968, 1894; Hulse v. Tollman, 49 Ill. App. 490, 1893; Fussell v. State, (Ga.) 19 S. E. Rep. 891, 1894; Carter v. State, 28 Tex. App. 355, 1890; Crist v. State, 21 Tex. App. 361, 1886; Williams v. State, 30 Tex. App. 429, 1891; State v. Briggs, (Tex.) 21 S. W. Rep. 46, 1893; Escajeda v. State, (Tex.), 21 S. W. Rep. 361, 1893; Powell v. State, 32 Tex. Cr. 230, 1893. See Masters v. State, (Tex.) 13 S. W. Rep. 999, 1890; Felker v. State, 54 Ark. 489, 1891; McSpotton v. State, 30 Tex. App. 616, 1892.

⁵ *Supra*, § 491. See Whart. on Crim. Ev. §§ 69 *et seq.*; State v. Lull, 48 Vt. 581, 1876; State v. Bryson, 1 Winston, (N. C.) No. 2, 86, 1864; May v. State, 6 Tex. App. 191, 1879; White v. State, 29 Tex. App. 530, 1891; Martin v. State, 6 Ind. App. 453, 1892; State v. McKinley, 82 Iowa, 445, 1891. See State v. Nash, 88 N. C. 618, 1883.

for a party seriously threatened need not, in such a case, stay till the other has actually struck him.¹

Nor is a party in such case precluded from self-defence by the mere fact that he could have previously invoked the interposition of the public authorities for his protection.²

§ 629. A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child,³ a child in defence of his parent,⁴ a master in defence of his servant, and a servant in defence of his master, whenever this is necessary to protect from apparently superior force.⁵

Defence of relative in like manner justified.

It is otherwise, however, when the object of interference is merely to take part in a fight.⁶ And an assault by a husband in cool blood cannot be excused by an alleged prior assault on a wife.⁷

§ 630. Generally, the exercise of a legal right is not a provocation that excuses an assault.⁸ But it is no excuse for an assault that the party assailed was a vagrant and indebted to the assailant.⁹

Exercise of legal right no provocation.

§ 630 a. As is elsewhere seen, a officer whose duty it is to arrest, or to execute a writ committed to him, is entitled to use such force as is requisite to perform the duties with which he is charged.¹⁰ A commanding officer in the military and navy service also may use such force as the maintenance of discipline may require.¹¹

Peace or other officer may use force.

¹ Bull. N. P. 18; 2 Rol. Abr. 547, l. 87. See *supra*, §§ 455 *et seq.*

⁶ State v. Johnson, 75 N. C. 174, 1876; Waddell v. State, 1 Tex. App. 720, 1877.

² Evers v. People, 6 Thomp. & C. 156; 3 Hun, 716, 1875. *Supra*, § 97 a. relative is not justified if the relative

himself provoked the prior assault. State v. Melton, 102 Mo. 683, 1890.

A parent, however, seeking to recover control of a child under a divorce decree, may be convicted of an assault for forcing his way in face of resistance into the house of a third

⁷ *Supra*, § 429; Stewart v. State, 66 Ga. 90, 1880; Saxton v. State, 92 Ga. 452, 1893.

person for the purpose of seizing the child. Com. v. Beals, 133 Mass. 396, 1882.

⁸ State v. Lawry, 4 Nev. 161, 1868. See *supra*, §§ 95 *et seq.*

⁹ Ward v. State, 28 Ala. 52, 1856.

⁴ State v. Brittain, 89 N. C. 481, 1883; State v. Hickam, 95 Mo. 322, 1888.

¹⁰ *Supra*, §§ 401 *et seq.*; *infra*, § 647; Whart. Cr. Pl. & Pr. §§ 7 *et seq.*; State

⁵ 2 Rol. Abr. 546 (D.); 1 Hawk. c. 28, ss. 23, 24. As to Texas, see Moore v. State, (Tex.) 26 S. W. Rep. 404, 1894. *Supra*, §§ 97 *et seq.*, 494. One

v. McNinch, 89 N. C. 695, 1888; U. S. v. Fullhart, 47 Fed. Rep. 802, 1891; State v. Sigman, 106 N. C. 728, 1890; Patterson v. State, 91 Ala. 58, 1890.

brother may justify a battery in defence of the other. Territory v. Gatchiff, (Oklahoma) 37 Pac. Rep. 809, 1894.

¹¹ U. S. v. Ruggles, 5 Mason, 192, 1828; U. S. v. Taylor, 2 Sumn. 584, 1837

§ 631. It is admissible for the defendant to show that the battery was merely the correcting of a child by its parent;¹ but if the parent chastising the child exceed the bounds of moderation and inflict cruel, merciless, or unnecessary punishment, he is subject to indictment.² The same doctrine applies to persons standing *in loco parentis*.³ But a "child" in this sense is not merely a minor, but must be a minor under tutelage.⁴ A minor who is emancipated cannot be thus brought into subjugation.⁵

A forcible exposure of a child may be an assault.⁶

How far a parent is responsible for neglecting his child will be hereafter discussed.⁷

§ 632. The law confides to schoolmasters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible, unless the punishment be such as naturally to occasion permanent injury to the child, or be inflicted merely to gratify their own evil passions.⁸ The teacher must be governed, when chas-

(limiting this right to captain); U. S. v. Wickham, 1 Wash. C. C. 316, 1804.

As to maltreatment of seamen, see *infra*, §§ 1865, 1871, 1885, and as to responsibility of officers, see, further, § 431.

On the other hand, force in resisting an illegal or unduly violent assault is excusable. See *infra*, § 649.

¹ Com. Dig. Pleader, 3 M. 19; 1 Hawk. c. 60, s. 23; c. 62, s. 2; and see 2 B. & P. 224; Reeve's Dom. Rel. 288; 1 Kent Com. 204; State v. Alford, 68 N. C. 322, 1873; Neal v. State, 54 Ga. 281, 1875. See *supra*, § 359; *infra*, § 1563. As to guardian and ward, see Stanfield v. State, 43 Tex. 167, 1875.

² Com. v. Coffey, 121 Mass. 66, 1876; Com. v. Blaker, 1 Brewst. 311, 1867; Neal v. State, 54 Ga. 281, 1875; Johnson v. State, 2 Humph. 283, 1840; Anderson v. State, 3 Head, 455, 1859; Fletcher v. People, 52 Ill. 395, 1869; Smith v. Slocum, 62 Ibid. 354, 1871; State v. Bitman, 13 Iowa, 485, 1862. *Supra*, §§ 331, 359, 374; *infra*, § 1563.

³ R. v. Cheeseman, 7 C. & P. 455;

State v. Harris, 63 N. C. 1, 1868;

Ware v. State, 67 Ga. 349, 1881; Stan-

field v. State, 43 Tex. 167, 1875. *Supra*,

§ 374. The punishment must not only

be excessive, but it must also have

been inflicted with legal malice, or

there must have been some permanent

injury. See Dean v. State, 89 Ala. 46,

1889.

⁴ McGregor v. State, 4 Tex. App. 599, 1878.

⁵ Ibid.

⁶ R. v. Mulroy, 7 C. & P. 277. *Infra*,

§ 1564. *Supra*, § 614.

⁷ *Infra*, §§ 1563 *et seq.*

⁸ Com. v. Randall, 4 Gray, 362, 1855;

State v. Mizner, 45 Iowa, 248, 1876;

State v. Pendergrass, 2 Dev. & Bat.

365, 1837; Com. v. Seed, 5 Clark, 78,

1851; Com. v. Fell, 11 Haz. Pa. Reg.

179; State v. Alford, 68 N. C. 322,

1873; State v. Harris, 63 Ibid. 1, 1868;

Dowlen v. State, 14 Tex. App. 61, 1883;

Reeve's Dom. Rel. 288; Vanvactor

v. State, 113 Ind. 276, 1887; 27 Am.

tisement is proper, as to the mode and severity of the punishment, by the nature of the offence, the age, size, and apparent powers of endurance of the pupil. It is for the jury to decide whether the punishment is excessive.¹ But the better opinion is that chastisement is to be limited to cases of misconduct, and cannot be inflicted, unless where education is by law compulsory, to compel pursuance of any particular line of study.² And in any case the pupil must be duly informed of the offence, and the discipline must be humane.³

§ 633. By the common law, the husband possessed the power of chastising his wife, though the tendency of criminal courts in the present day is to regard the marital relation as no defence to a battery. "Perhaps, however," it has been argued by the Supreme Court of Mississippi, "the husband should still be permitted to exercise the right of moderate chastisement in cases of great emergency, and to use salutary restraints in every case of misbehavior, without subjecting himself to vexatious prosecutions, resulting in the discredit and shame of all parties concerned."⁴ And where a husband is indicted for an assault and battery on his wife, he may show in mitigation that he was provoked thereto by her immediate bad behavior and misconduct.⁵ Nor, it has been said, can he at common law be convicted of a battery on her, unless he inflicts permanent injury on her, or is guilty of malignant cruelty. Nor is this view modified by the fact that the two have agreed to live apart.⁶ But the better opinion is that while a husband has no right to inflict corporal punishment

Husband
at common
law may
coerce
wife.

Law Reg. 430, 1888; *State v. Stafford*, 113 N. C. 635, 1893. See *R. v. Hopley*, 2 F. & F. 202, 1860. That a teacher has a right judiciously to chastise a pupil is recognized also in 2 Kent, 265; 1 Bl. Com. 453; *Starr v. Liftchild*, 40 Barb. 541, 1863; *State v. Williams*, 27 Vt. 755, 1855; *Danenhoffer v. State*, 69 Ind. 295, 1879; *State v. Burton*, 45 Wis. 150, 1878; and *supra*, §§ 332, 374.

That a superintendent of a charitable institution is indictable for cruel treatment of children, see *Cowley v. People*, 83 N.Y. 464, 1881. *Infra*, § 1585.

¹ *Com. v. Randall*, 4 Gray, (Mass.) 36, 1855; *Danenhoffer v. State*, 69 Ind. 295, 1879; s. c. 79 Ibid. 75, 1881; *State v. Mizner*, 45 Iowa, 248, 1876; *Anderson v. State*, 3 Head. 455, 1859; *Spear v. State*, (Tex.) 25 S. W. Rep. 125, 1894. *Supra*, §§ 359, 360.

² *Rulison v. Post*, 79 Ill. 567, 1875; *State v. Mizner*, 50 Iowa, 145, 1878; *Morrow v. Wood*, 35 Wis. 59, 1874.

³ *State v. Mizner*, 45 Iowa, 248, 1876. See 2 Am. Law Jour. 72.

⁴ *Bradley v. State*, 1 Walker, 156, 1824.

⁵ *Robbins v. State*, 20 Ala. 36, 1852.

See *Fulgham v. State*, 46 Ala. 143, 1870; *Greta v. State*, 10 Tex. App. 36, 1881; *Gaugler v. State*, (Tex.) 22 S. W. Rep. 147, 1893.

⁶ *State v. Black*, 1 Winston Law, (N. C.) No. 1, 266, 1864. See Whart. Conf. of L. § 166.

on his wife,¹ he may defend himself against her, and restrain her from acts of violence toward himself or others.²

§ 634. A master, it is said, may chastise his apprentice moderately;³ and so may a master to whom a minor child is handed over with a cession of the parents' rights;⁴ though a master, not standing *in loco parentis*, cannot chastise a servant.⁵ The master of a vessel unless restrained by statute has the same power under the same checks.⁶ Where an officer of justice is charged with assault and battery, it is a good defence that the offence was committed in the discharge of his official duties.⁷ No greater force, however, can be used,⁸ nor any further duress imposed,⁹ than is necessary to effect the immediate object. So a man may justify laying his hands upon another to prevent his fighting, or committing a breach of the peace,¹⁰ or to prevent him from rescuing goods taken in execution;¹¹ or the like.¹² A coroner,¹³ and a magistrate, upon a private personal inquiry,¹⁴ may justify a forcible exclusion of a person from the justice room, even though he be the attorney of the party accused; but if the in-

¹ Com. v. McAfee, 108 Mass. 458, C. C. 155, 1823; Com. v. Conrow, 2 1871; People v. Winters, 2 Parker C. R. Barr, 402, 1845; Com. v. Baird, 1 10, 1823; State v. Rhodes, Phil. Law, Ashm. 267, 1820; Cooper v. State, 8 (N. C.) 453, 1868; Gholston v. Gholston, 31 Ga. 625, 1870; Pillar v. Pillar, Law, (N. C.) 91, 1868; Davis v. State, 22 Wis. 656, 1868; Fulgham v. State, 6 Tex. App. 133, 1879; 2 Kent Com. 46 Ala. 143, 1870; Oliver v. State, 70 64, 261. N. C. 60, 1874; Owen v. State, 7 Tex. App. 329, 1879.

² Com. v. McAfee, 108 Mass. 458, 1871; People v. Winters, 2 Parker C. R. 10, 1823; State v. Buckley, 2 Harring. 552; State v. Mabrey, 64 N. C. 592, 1870; Fulgham v. State, 46 Ala. 143, 1870. That he may be indicted for assaulting her even though he was prevented by a friend from striking, see State v. Mabrey, 64 N. C. 502, 1877.

³ R. v. Keller, 2 Show. 289, 1680.

⁴ 2 Kent Com. 261; Matthews v. Terry, 10 Conn. 455, 1831, and cases cited in next note. As to master's neglect of servant, see *infra*, §§ 1585 *et seq.*

⁵ See People v. Phillips, 1 Wheeler 1822.

⁶ *Supra*, § 374; *infra*, §§ 1871-85.

⁷ 2 Rol. Abr. 546 a; Whart. Cr. Pl. & Pr. §§ 1-20. As to homicide in such cases, see *supra*, §§ 333, 374.

⁸ Harrison v. Hodgson, 10 B. & C. 445, 1830; Rusberry v. State, 1 Tex. App. 664, 1877; Skidmore v. State, 43 Tex. 93, 1875.

⁹ State v. Parker, 75 N. C. 249, 1876.

¹⁰ Com. Dig. Pleader, 3 M. 16. See State v. Price, 111 N. C. 703, 1892; Stone v. State, 56 Ark. 345, 1892.

¹¹ 3 Lev. 113.

¹² See 1 Mod. 168; 2 Rol. Abr. 546.

¹³ Garnett v. Ferrand, 6 B. & C. 611, 1827.

¹⁴ Cox v. Coleridge, 1 B. & C. 37,

quiry be of a judicial nature all persons concerned have a right to be present.¹

A convict cannot be whipped as a punishment unless in conformity with law, and any whipping not so prescribed is indictable as a battery.²

§ 635. Persons having charge of poor and almshouses have the right to restrain by force, if necessary to the preservation of order, those under their charge. But where the keeper of a town almshouse seized and chained to the floor a pauper, who was at the time quietly reading, it was held to be no defence to an indictment for an assault that the pauper had been turbulent and unruly on prior occasions, and had been guilty of various prior destructive acts in the house, there being no impending necessity for such violent action.³ And it has been ruled that where a master of a union inflicts personal chastisement on a female pauper in an indecent manner, he is guilty of an assault, even though the extent of the correction is within the limits of moderation.⁴ And in Alabama the hirer of a convict has no right to inflict personal chastisement on him.⁵

Alms and poorhouse keepers may restrain inmate.

§ 636. As a general rule, if the prosecutor intelligently assented, this is a good defence.⁶ Thus, if it be proved that the struggle was an amicable contest, voluntarily entered into on both sides, and not likely to produce serious hurt to either party;⁷ or that the blow was given at the prosecutor's request, to save him, as was supposed, from the prosecution of a felony;⁸ or that the assault, when the offence is sexual, was agreed to by the woman;⁹ the defence is good. It may also be argued that persons engaging in a tumultuous frolic may be indictable for affray, though not for assault.¹⁰ On the other hand, if the fight

Assent a defence.

¹ *Daubney v. Cooper*, 10 B. & C. 237, 1829.

² *Cornell v. State*, 6 Lea, 669, 1881.

³ *Supra*, § 613; *State v. Hull*, 34 Conn. 132, 1863. See *State v. Hawkins*, 77 N. C. 494, 1877; *State v. Roseman*, 108 N. C. 765, 1891. That in a proper case chastisement may be inflicted, see *State v. Neff*, 58 Ind. 516, 1877.

⁴ *R. v. Miles*, 6 Jur. 243, 1860—*Gurney*. *Ford v. Skinner*, 4 C. & P. 239, 1830. *Supra*, § 613; *infra*, § 1585.

⁵ *Prewitt v. State*, 51 Ala. 33, 1877.

⁶ *Supra*, § 141; *R. v. Wollaston*, 12 Cox C. C. 180, 1872; and other cases cited *supra*, §§ 556–577, 612.

⁷ *Com. Dig. Pleader*, 3 M. 18; *R. v. Guthrie*, 11 Cox C. C. 522, 1870; *L. R.* 1 C. C. 243. See *Fitzgerald v. Cavin*, 110 Mass. 153, 1872.

⁸ *State v. Beck*, 1 Hill, (S. C.) 363, 1833.

⁹ *Supra*, §§ 141, 576.

¹⁰ See *supra*, § 371; *Duncan v. Com.*, 6 Dana, 295, 1838; though see *R. v. Hunt*, 1 Cox C. C. 177, 1845.

has anything of the character of illegality, or if the assault be of a nature injurious to the public as well as to the party assaulted, this reasoning does not apply.¹ But in any view, consent obtained through fraud, by stupefaction, or through the ignorance or incapacity of the party assaulted, is no defence.² Mere submission, without assent, is no defence.³ And assent to something different from that actually done is no defence.⁴ Thus consent on a woman's part is no defence to an indictment for a sexual assault when the consent was simply given to medical treatment;⁵ and consent to take certain food is no defence to an indictment for taking such food when infected by poison.⁶ It has been even held that consent on a woman's part to illicit intercourse is no defence to an indictment for assault in communicating to her a venereal disease;⁷ or to excessive force in the act.⁸ Nor is a husband's assent a defence to an indictment for an indecent assault on a wife.⁹ It has

¹ *State v. Newland*, 27 Kans. 764, 144-45, 577, 612, and remarks of 1882. That parties fighting with their fists at a prize-fight by consent, without ill-will, are guilty of assault has

been ruled in *R. v. Lewis*, 1 C. & K. 419, 1844; *R. v. Perkins*, 4 C. & P. 537, 1837; *R. v. Coney*, L. R. 8 Q. B. D. 534, 1882; 15 Cox C. C. 46; 46 L. T. (N. S.) 307; *Adams v. Waggoner*, 33 Ind. 531, 1870; *Com. v. Collberg*, 119 Mass. 350, 1876; *contra*, *Champer v. State*, 14 Ohio St. 437, 1863; *State v. Beck*, 1 Hill, (S. C.) 363, 1833; and see *supra*, §§ 142, 372 *et seq.* *Infra*, § 1465 *a.* In *R. v. Coney*, *ut supra*, Cave, J., went to the length of saying that "an assault being a breach of the peace, and unlawful, the consent of the person struck is immaterial." The rule is thus more guardedly stated in the same case by Stephen, J.: "The consent of the person who sustains the injury is no defence, if the injury is of such a nature, or if it is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured." To the same effect, see *State v. Burnham*, 56 Vt. 445, 1884.

² See, particularly, *supra*, §§ 141,

Kelly, C. B., in *R. v. Locke*, 12 Cox C. C. 244, 1872, cited *supra*, § 146.

³ *R. v. Case*, 1 Eng. Law & Eq. 544, 1850; 4 Cox C. C. 220; 1 Den. C. C. 580; *R. v. Nichol*, R. & R. 180, 1807; *R. v. McGavaran*, 6 Cox C. C. 64, 1852. *Supra*, §§ 141, 577.

Hence indecent fondling of a child without consent is an assault. *Ridout v. State*, 6 Tex. App. 249, 1879. Under Michigan statute, see *People v. Hicks*, 98 Mich. 86, 1893.

⁴ *Supra*, §§ 141, 146, 559, 612.

⁵ *R. v. Case*, 4 Cox C. C. 220; *R. v. Flattery*, 13 Ibid. 388, 1877; *Don Moran v. People*, 25 Mich. 356, 1872. *Supra*, §§ 559, 612.

⁶ *Com. v. Stratton*, 114 Mass. 303, 1874.

⁷ *R. v. Bennett*, 4 F. & F. 1105, 1866; *R. v. Sinclair*, 13 Cox C. C. 28, 1867; though see *Hegerty v. Shine*, 12 Irish L. T. R. 100, 1878, cited in 18 Alb. L. J. 202; 14 Cox C. C. 124, 142. *Supra*, § 612.

⁸ *Richie v. State*, 58 Ind. 355, 1877.

⁹ *State v. Boyland*, 24 Kans. 186, 1880.

also been held that it is no defence that the force applied was part of the form of initiation of a voluntary society which the party assailed had agreed to join, he not having known beforehand that this was part of the ceremony.¹ Assent, also, will be no defence to an indictment for a deadly assault.²

3. *Indictment and Verdict.*

§ 637. It is enough if the indictment charge an assault of the defendant on the prosecutor.³ It is not necessary that the word "unlawfully" should be used in the indictment if violence be averred;⁴ nor is "wilfully" or "maliciously" essential;⁵ nor is it necessary to allege that the assault and battery were committed in public, or to the terror of the citizens of the Commonwealth or State.⁶ Where, however, as in Indiana, there is a special statute defining assaults, the indictment must follow the statute.⁷

§ 638. As has been seen, all concerned, whether as inciters, aiders, or agents, are principals, and may be charged jointly with the assault, no matter what were their respective parts.⁸

Enough to aver assault on designated party.

All concerned are principals.

¹ *Belt v. Hansley*, 3 Jones (N. C.) 131, 1855; *State v. Williams*, 75 N. C. 134, 1876.

² *Supra*, § 144.

³ *State v. Trulock*, 46 Ind. 289, 1874; *Martin v. State*, 40 Tex. 19, 1874. See *State v. Beverlin*, 30 Kans. 611, 1883.

⁴ *Whart. Cr. Pl. & Pr.* § 269; *State v. Bray*, 1 Mo. 126, 1822; *Bloomer v. State*, 3 Sneed, (Tenn.) 66, 1855. See *State v. Munco*, 12 La. An. 625, 1857; *State v. Hays*, 41 Tex. 526, 1874. In Indiana, violence must be alleged or implied; *Howard v. State*, 67 Ind. 401, 1879; see *Buntin v. State*, 68 Ind. 38, 1879; and so of "unlawfully;" *State v. Smith*, 74 Ind. 557, 1880; see *Hays v. State*, 77 Ind. 450, 1888. That "wilfully and maliciously" are equivalent to "unlawfully," see *Hodgkins v. State*, 36 Nebr. 160, 1893.

⁵ *Ibid.*; *U. S. v. Lunt, Sprague*, 311, 1855.

⁶ *Com. v. Simmons*, 6 J. J. Marshall, 614, 1831.

⁷ *Malone v. State*, 14 Ind. 219, 1860; see *Slusser v. State*, 71 Ind. 280, 1880.

Under the New York Code a charge of "assault and battery" is equivalent to "assault in the third degree." *In re Bray*, 34 N. Y. St. Rep. 641; 12 N. Y. Sup. 366, 1890.

The statutory offence of "attempt to provoke an assault and battery" includes an attempt to provoke a simple assault. *Powers v. State*, 87 Ind. 144, 1882; *Marshall v. State*, 123 Ind. 128, 1890.

⁸ *Supra*, § 616. See *State v. Dalton*, 27 Mo. 13, 1858; *State v. Herdina*, 25 Minn. 161, 1878; *Tanner v. State*, 92 Ala. 1, 1891.

An indictment which avers that the defendant "in and upon the body of I. S., deceased, in the peace of the Commonwealth then and there being,

The injured party may be charged as unknown.¹

§ 639. *Two or more persons assaulted* may be properly joined in the same count, when the assault was a single act,² though if the act was not strictly single, such a joinder is bad for duplicity.³

When double blow is given both parties struck may be joined.

Battery may be discharged as surplusage.

§ 640. The "battery" can be discharged as surplusage, and a conviction sustained for the assault.⁴ And so of other averments of aggravation, which can be discharged, and a verdict taken for assault and battery.⁵ But there can be no conviction of a battery unless a battery be averred or implied.⁶

II. ASSAULTS WITH FELONIOUS INTENT.

§ 640 a. At common law assaults with intent to commit felonies were misdemeanors, and under this head fall all aggravated assaults.⁷ The punishment, indeed, varied accord-

Assaults classified by statute.

did make an assault, and him the said I. S. did strike divers grievous and dangerous blows, upon the head of him the said I. S., whereby the said I. S. was cruelly and dangerously beaten and wounded, and his life greatly endangered," sufficiently shows that the assault was upon a living person. *Com. v. Ford*, 5 Gray, 475, 1855. See *R. v. Mulroy*, 3 *Craw. & Dix*, 318, 1845.

An indictment against a medical practitioner charged that he made divers assaults on the deceased, a patient, and applied wet cloths to his body, and caused him to be put in baths. It was held that this was a proper mode of laying the offence, although all that was done was by the consent of the deceased; and that the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty. *R. v. Ellis*, 2 *C. & K.* 470, 1847—*Tindal and Rolfe*.

¹ *Whart. Cr. Pl. & Pr.* § 111; *State v. Snow*, 41 *Tex.* 596, 1874.

² See cases cited in *Whart. Cr. Ev.* 1880.

§ 590. *Whart. Cr. Pl. & Pr.* § 469.

See, also, *People v. Ellsworth*, 90 *Mich.* 442, 1892.

³ *Ibid.*; *State v. McClintock*, 8 *Iowa*, 203, 1859.

⁴ See *Fulford v. State*, 50 *Ga.* 591, 1874; *Hansford v. State*, 54 *Ibid.* 55, 1875; *Bard v. State*, 55 *Ibid.* 319, 1875; *Wood v. State*, 50 *Ala.* 144, 1867; *Bedell v. State*, 50 *Miss.* 492, 1874; *State v. Cass*, 41 *Tex.* 552, 1874; *Young v. State*, 44 *Ibid.* 98, 1875; *People v. Parker*, 69 *Hun*, 130; 23 *N. Y. Sup.* 704, 1893; *Marshall v. State*, 123 *Ind.* 128, 1890. For indictments for assaults, see *Whart. Prec.* 213 *et seq.* See *Hammons v. State*, 29 *Tex. App.* 445, 1891, where the failure sufficiently to charge burglary was discharged as surplusage, and the indictment held good as to assault with intent to murder.

⁵ *Ibid.*; *Com. v. Blaney*, 133 *Mass.* 571, 1882; *Ferrell v. State*, 2 *Lea*, 25, 1878; *Flynn v. State*, 8 *Tex. App.* 368, 1880.

⁶ *Young v. People*, 6 *Ill. App.* 434,

⁷ *Com. v. Roby*, 12 *Pick.* 496; *Com.*

ing to the discretion of the court, but the grade of offence was the same. By statutes, however, in most jurisdictions in this country, assaults have been divided into various grades; requiring distinctiveness of indictment and prescribing distinctiveness of punishment. At common law, also, it is the practice to state on the indictment such aggravations as would explain if not justify the sentence inflicted by the court. Some of the particular grades of assault which have been thus recognized will be now considered.¹

§ 641. On an indictment for an assault with intent to murder, the intent is the essence of the offence.² Unless the offence would have been murder, either in the first or second degree, had death ensued from the stroke, the defendant must be acquitted of this particular charge.³ And, as a general rule, in all cases of assaults with intent, the intent forming the gist of the offence must be

Intent to kill essential to indictment for assault with intent to murder.

v. McLaughlin, 12 Cush. 612, 1853; *v. Mize*, 80 Cal. 41, 1889; *Walls v. Com. v. Barlow*, 4 Mass. 439, 1808; *State*, 90 Ala. 618, 1891.

Murphy v. Com., 23 Gratt. 960, 1873; As to statutory construction, see *State v. Swann*, 65 N. C. 339, 1871 (a further, *State v. Gilman*, 69 Me. 163, 1878; *Davidson v. State*, 9 Humph. 455, 1848; *Hogan v. State*, 61 Ga. 43, 1878; *Meredith v. State*, 60 Ala. 441, 1878; *Humphries v. State*, 5 Mo. 203, 1838; *State v. Stout*, 49 Ohio, 270, 1892.

¹ For the classification of assaults in the New York Penal Code of 1882, see the Report of the N. Y. City Bar Association of Feb. 13, 1883.

² See *U. S. v. Small*, 2 Curtis C. C. 241, 1885; *U. S. v. Gallagher*, 2 Paine C. C. 447, 1832; *Com. v. Barlow*, 4 Mass. 439, 1808; *Com. v. Squire*, 1 Metc. 258, 1840; *People v. Shaw*, 1 Parker C. R. 61, 327, 1852; *People v. O'Leary*, 4 Ibid. 187, 1857; *Stewart v. State*, 5 Ohio, 242, 1831; *Sharp v. State*, 19 Ibid. 379, 1832; *Bowles v. State*, 7 Ibid. 599, 1836; *Wilson v. State*, 18 Ibid. 145, 1861; *Smith v. State*, 12 Ohio St. 511, 1861; *Hayes v. State*, 14 Tex. App. 330, 1883; *Davis v. State*, 15 Ibid. 475, 1884; *State v. Fiske*, 63 Conn. 388, 1893; *Crosby v. People*, 137 Ill. 325, 1891; *Hammons v. State*, 29 Tex. App. 445, 1891; *Hooper v. State*, 29 Tex. App. 614, 1891; *Felker v. State*, 54 Ark. 489, 1891; *Watts v. State*, 30 Tex. App. 533, 1891; *People*

As to special requisites under statutes, see *Slusser v. State*, 71 Ind. 280, 1880; *State v. Fee*, 19 Wis. 562, 1865; *Black v. State*, 8 Tex. App. 329, 1880. That a battery is not essential to an assault with intent to murder, see *State v. McClure*, 25 Mo. 338, 1857.

³ *State v. Neal*, 37 Me. 468, 1854; *Nichols v. State*, 8 Ohio St. 435, 1858; *Read v. Com.*, 22 Gratt. 924, 1872; *Elliott v. State*, 46 Ga. 159, 1872; *Jackson v. State*, 51 Ibid. 164, 1874; *People v. Scott*, 6 Mich. 287, 1859; *Wilson v. People*, 24 Ibid. 410, 1872; *People v. Comstock*, 49 Ibid. 330, 1882; *Campbell v. People*, 16 Ill. 17, 1854; *Hopkinson v. People*, 18 Ibid. 264, 1857; *State v. White*, 41 Iowa 316, 1875; *Rapp v. Com.*, 14 B. Mon. 615, 1854; *Mededith v. State*, 60 Ala.

specifically averred and satisfactorily proved.¹ The same rule is applicable to indictments for malicious shooting with intent to kill,² and to assaults with intent to do great bodily harm.³ There must in such cases be both attempt⁴ and intent.

The prosecution, therefore, as to the intent to murder, fails if it appear that the wound was given under such circumstances as would, had death ensued therefrom, have mitigated the offence from murder to manslaughter or excusable homicide.⁵

An assault with intent to commit manslaughter in hot blood is included in an assault with intent to commit murder.⁶

441, 1881; *Ewing v. State*, 4 Tex. App. 417, 1878; *U. S. v. Barnaby*, 51 Fed. Rep. 20, 1892; *McCormack v. State*, (Ala.) 15 So. Rep. 438, 1894. See, however, *Bonfanti v. State*, 2 Minn. 123, 1858, to the effect that the intent must be murder in first degree.

¹ *State v. Neal*, 37 Me. 468, 1854; *State v. Negro Bill*, 3 Harr. 571, 1842; *Seborn v. State*, 51 Ga. 164, 1874; *Smith v. State*, 52 Ibid. 88, 1874; *State v. Johnson*, 35 Ala. 363, 1862; *U. S. v. Tharp*, 5 Cranch C. C. 390, 1838; *State v. Johnson*, 9 Nev. 175, 1874; *Wilson v. State*, 4 Tex. App. 637, 1878; *Bingham v. State*, 6 Ibid. 169, 1879; *State v. Murphy*, 14 Mo. App. 73, 1883; *Freel v. State*, 125 Ind. 166, 1890; *Grantham v. State*, 84 Ga. 559, 1890; *Gallery v. State*, 92 Ga. 463, 1893; *State v. Musick*, 101 Mo. 260, 1890; *Snow v. State*, (Tex.) 21 S. W. Rep. 357, 1893; *State v. Woods*, (Mo.) 27 S. W. Rep. 1114, 1894; *Watson v. State*, 2 Wash. 504, 1891.

As to Iowa, see *State v. Schele*, 52 Iowa, 608, 1879.

As to assaults with intent to kill by poisoning, under New York Penal Code, see *People v. Burgess*, 27 N. Y. Week. Dig. 114, 1887.

² *Reed v. Com.*, 22 Gratt. 924, 1873; *Elliott v. State*, 46 Ga. 159, 1872; *State v. Painter*, 67 Mo. 84, 1878; *Ferguson v. State*, 6 Tex. App. 504, 1879; *infra*, § 1344. See Whart. Cr. Pl. & Pr. § 464;

Johnson v. State, 5 Dutch. 453, 1861; *State v. Hattabough*, 66 Ind. 223, 1879; *State v. Durham*, 72 N. C. 447, 1875; *Kelsey v. State*, 62 Ga. 558, 1879. As to divisibility of offences, see *supra*, § 27.

As to construction of N. Y. statute, see *People v. Kerrains*, 1 Th. & C. 333, 1873; *Slattery v. People*, 58 N. Y. 354, 1874.

On an indictment for feloniously assaulting, and beating with intent to disfigure, it has been said that stronger circumstances of malice aforethought must be proved than on an indictment for murder. It seems specific proof of the intent to disfigure must be made. *Pennsylvania v. McBirnie*, Addis. 28, 1792.

³ *State v. Gillett*, 56 Iowa, 430, 1881; *State v. Harrison*, 82 Iowa, 716, 1891; *Vosburgh v. State*, 82 Wis. 168, 1892; *People v. Miller*, 91 Mich. 639, 1892.

⁴ *People v. Devine*, 59 Cal. 630, 1881; *People v. Lee Kong*, 95 Cal. 666, 1892.

⁵ *Wright v. State*, 9 Yerg. 342, 1836; *Collier v. State*, 39 Ga. 31, 1869; *Vandermark v. People*, 47 Ill. 122, 1868; *Wilson v. State*, 4 Tex. App. 637, 1878; *Ex parte Brown*, 40 Fed. Rep. 81, 1889; *State v. Stout*, 49 Ohio, 270, 1892; *Beaty v. State*, 30 Tex. App. 677, 1892; *Spivey v. State*, 30 Tex. App. 343, 1891; *Low v. State*, (Tex.) 20 S. W. Rep. 366, 1892. *Infra*, § 645.

⁶ *State v. White*, 45 Iowa, 325, 1876;

Whether a person who, intending to murder A., and supposing B. to be A., shoots at and wounds B., may be convicted of wounding B. with intent to murder him, is elsewhere discussed.¹

If a shot be aimed at a crowd of which B. is a member, the offence may be charged as committed with intent to kill B.²

It has just been stated that a defendant cannot be convicted of an assault with intent to commit murder, unless an intent to commit murder can be proved. It is not necessary, however, to sustain such an indictment that a specific intent to take life should be shown.³ If the intent were to commit grievous bodily harm, and death occurred in consequence of the attack, then the case would have been murder in the second degree; and, in case of death not ensuing, then the case would be an assault with intent to commit murder in the second degree.⁴ And if the intent were to kill in hot blood, or to kill one erroneously believed to be an aggressor, then defendant may be convicted of an assault with intent to commit manslaughter.⁵

State v. Connor, 59 Ibid. 357, 1882; Rep. 81, 1889; People v. Miller, 91 and see State v. Waters, 39 Me. 54, Mich. 639, 1892; Gallery v. State, 92 1854; State v. Phinney, 42 Ibid. 384, Ga. 463, 1898; Smith v. State, (Tex.) 1856; State v. Butman, 42 N. H. 490, 20 S. W. Rep. 831, 1892; Hatton v. 1861; State v. Reed, 40 Vt. 603, 1868; State, 31 Tex. Cr. 586, 1893; Newton State v. Nichols, 8 Conn. 496, 1831; v. State, 92 Ala. 33, 1891; Horn v. Beckwith v. People, 26 Ill. 500, 1861; State, 98 Ala. 23, 1893; Smith v. State, People v. Congleton, 44 Cal. 92, 1872; 88 Ala. 23, 1890; Lane v. State, 85 Wall v. State, 23 Ind. 150, 1864; Meredith v. State, 60 Ala. 441, 1878; State 28 Tex. App. 355, 1890; Patterson v. v. Clair, 84 Me. 248, 1892; State v. State, 85 Ga. 131, 1890.

Postal, 83 Iowa, 460, 1891; Thomas v. That the intent is matter of fact to State, 90 Ga. 437, 1892; Slaughter v. be ascertained by the jury from all the Com., (Ky.) 22 S. W. Rep. 645, 1893; evidence, and not matter of law for State v. Moran, 46 Kans. 318, 1891. legal presumption from only part of

¹ *Infra*, § 645 a. *Supra*, §§ 107, 111, the evidence, see Gilbert v. State, 90 318. See R. v. Smith, 33 Eng. Law & Ga. 691, 1892; Chrisman v. State, 54 Eq. 567, 1857; Dears. C. C. 559; Lace- Ark. 283, 1891; State v. Hickam, 95 field v. State, 34 Ark. 275, 1878. Mo. 322, 1888.

² *Supra*, § 608.

⁴ See State v. Saylor, 6 Lea, 586, 1880.

³ Lilly v. People, 148 Ill. 467, 1894; Jackson v. State, 94 Ala. 85, 1892; Walls v. State, 90 Ala. 618, 1890; Allen v. State, 52 Ala. 391, 1875; Crosby v. People, 137 Ill. 325, 1891; Weaver v. People, 132 Ill. 536, 1890; Walker v. State, (Ind.) 36 N. E. Rep. 356, 1894; *Ex parte* Brown, 40 Fed. State v. Leary, 88 N. C. 615, 1883;

⁵ *Supra*, § 176; State v. Connor, 59 Iowa, 357, 1882. *Contra* in Michigan, People v. Lilley, 43 Mich. 521, 1880. As to "assault with intent to commit involuntary manslaughter," see Stevens v. State, 91 Tenn. 726, 1892. See

§ 641 a. As has already been observed, the defendant when the felonious intent is not proved may be convicted of the assault.¹ Where, however, the greater offence, being a felony, is proved, the minor offence, being an assault or attempt, is held in some jurisdictions to merge.²

Conviction of minor offence, but not when there is merger. There may be convictions of assault, where there are

White v. State, 13 Tex. App. 259, 1882; *Caruthers v. State*, Ibid. 339, 1883; *Harrell v. State*, Ibid. 374, 1883; *Gillespie v. State*, Ibid. 415, 1883; *People v. Devine*, 59 Cal. 630, 1881; *State v. McGuire*, 87 Iowa, 142, 1893; *State v. Stone*, (Iowa) 55 N. W. Rep. 6, 1893.

It is said in Minnesota (*Bonfanti v. State*, 2 Minn. 123, 1858) that where the intent is to commit an offence which would be murder in the second degree, if consummated, there can be no conviction of an assault with intent to murder. But this is supposing that all intended murder is murder in the first degree. That this is not the case has already been seen. *Supra*, § 377. And the better opinion is, there can be a conviction of assault with intent to commit murder, or of assault with intent to kill, on facts which, if the death had been proved, would only have justified a verdict of murder in the second degree, provided these facts show an intent, no matter how vague or morbid, to take life. See *People v. Scott*, 6 Mich. 287, 1859; *Wilson v. People*, 24 Ibid. 410, 1872; *Hopkinson v. People*, 18 Ill. 264, 1857; *Frolich v. State*, 11 Ind. 213, 1858, and other cases cited in the first part of this note.

¹ *R. v. Dawson*, 3 Stark. 62, 1821; *R. v. Dungey*, 4 F. & F. 99, 1864; *State v. Reed*, 40 Vt. 603, 1868; Com. *v. Fischblatt*, 4 Metc. 354, 1842; Fran-

cisco v. State, 4 Zab. 30, 1852; *Stewart v. State*, 5 Ohio, 242, 1831; *Clark v. State*, 12 Ga. 350, 1852; *State v. Stedman*, 7 Port. 495, 1839; *Dickerson v. Com.*, 2 Bush, 1, 1867; *State v. Bowling*, 10 Humph. 52, 1849; *McBride v. State*, 2 Eng. 374, 1847; *People v. McDonald*, 9 Mich. 150, 1861; *State v. Graham*, 51 Iowa, 72, 1879; *State v. Vadnais*, 21 Minn. 382, 1875; *Harrison v. State*, 10 Tex. App. 93, 1881; *People v. Fine*, 53 Cal. 263, 1878; *People v. Dartmore*, 2 N. Y. Sup. 310, 1888; *Kennedy v. People*, 122 Ill. 649, 1887; *People v. Prague*, 72 Mich. 178, 1888; *People v. Odell*, 1 Dak. 197, 1875; *State v. Vosburgh*, 82 Wis. 168, 1892; *Corley v. State*, (Ga.) 20 S. E. Rep. 212, 1894; *Jenkins v. State*, 92 Ga. 470, 1893; *State v. Brent*, 100 Mo. 531, 1890; *State v. Baldrige*, 105 Mo. 319, 1891; *Sullivan v. State*, 32 Tex. Cr. 50, 1892; *Robertson v. State*, 30 Tex. App. 498, 1891; *Morton v. State*, 91 Tenn. 437, 1892; *State v. King*, 111 Mo. 576, 1892; *Moore v. State*, (Tex.) 26 S. W. Rep. 404, 1894; *Winburn v. State*, 28 Fla. 339, 1891; *People v. Gordon*, 88 Cal. 422, 1891; *State v. Collyer*, 17 Nev. 275, 1883; *West v. Territory*, (Ariz.) 36 Pac. Rep. 207, 1894; *State v. Ackles*, (Wash.) 36 Pac. Rep. 597, 1894; *State v. Hertzog*, 41 La. An. 775, 1889; *State v. Parker*, 42 La. An. 972, 1890.

As to the statutory offence of "assault with intent to do bodily harm

² *Supra*, § 570; see *State v. Gilman*, 69 Me. 163, 1878; *Com. v. McLaughlin*, 12 Cush. 615, 1883; *Ex parte Brown*, 40 Fed. Rep. 81, 1889. In New York, under the Penal Code of 1882, there is no such merger.

the proper averments, on indictments for robbery,¹ for mayhem,² for rape,³ for false imprisonment,⁴ for riot.⁵

§ 642. Where the ability to commit a felonious attack is both apparently and really wanting, the offence is not complete.⁶ This position was pushed to an extreme in an early Indiana case where a man was indicted for shooting at another with intent to murder. On trial it appeared that the gun contained in it nothing but powder and cotton wad (though the man shooting believed it contained a bullet), and the man shot at was forty feet distant; and it was held that he was not guilty as charged.⁷ This ruling, however, was afterward reconsidered by the court that advanced it,⁸ and the true view is undoubtedly that, assuming the necessary intent to exist, it is enough if the act be apparently adapted to accomplish the particular thing intended.⁹ But if the party threatened knew the instru-

Must be
apparent
ability to
consum-
mate at-
tempt.

less than murder," see *People v. Ellsworth*, 90 Mich. 442, 1892; *Turner v. Muskegon Circ. Judge*, 88 Mich. 350, 1891; *People v. Troy*, 96 Mich. 530, 1893.

But he cannot be convicted of another offence of the same grade but based upon a different intent, as the intent to wound. *Barber v. State*, 39 Ohio, 660, 1884.

If the defendant has not requested the judge to instruct the jury that there may be a conviction of a minor offence under the indictment for assault with intent to murder, he cannot complain if the instructions are not given. *State v. Hanlon*, (Vt.) 19 Atl. Rep. 773, 1890; *People v. McNutt*, 93 Cal. 658, 1892; *Thurman v. State*, 32 Nebr. 224, 1891; *People v. Raher*, 92 Mich. 165, 1892.

If the circumstances are such that the defendant must be either guilty of the particular crime charged, or of no offence at all, instruction by the judge as to the minor offences ordinarily included in the charge are properly refused. *People v. Barry*, 90 Cal. 41, 1891; *State v. Moran*, 46 Kans. 318, 1891; *Zoldoske v. State*, 82 Wis. 580, 1892; *Patterson v. State*, 86 Ga. 70,

1890; *Moore v. State*, 31 Tex. Cr. 234, 1892; *State v. Maguire*, 113 Mo. 670, 1892; *State v. Doyle*, 107 Mo. 36, 1891; *State v. Musick*, 101 Mo. 260, 1890; *Misher v. State*, (Tex.) 22 S. W. Rep. 602, 1893; *State v. Woods*, (Mo.) 27 S. W. Rep. 1114, 1894. *Supra*, § 27. See *Com. v. Walsh*, 132 Mass. 8, 1882; *State v. Melton*, 102 Mo. 683, 1891. And see fully Whart. Cr. Pl. & Pr. § 247.

¹ *Infra*, § 858.

² *Supra*, § 584.

³ *Supra*, § 575.

⁴ *Supra*, § 609.

⁵ *Infra*, § 1550.

⁶ See *supra*, §§ 183-4, 606. *Young v. State*, 7 Tex. App. 75, 1879; *Johnson v. State*, Ibid. 210, 1879.

⁷ *State v. Swails*, 8 Ind. 524, 1856. See *supra*, §§ 182-3.

⁸ *Kunkle v. State*, 32 Ind. 220, 1869. But see subsequent statute requiring real danger. *McCulley v. State*, 62 Ind. 428, 1878.

⁹ *Mullen v. State*, 45 Ala. 43, 1872; *Hatton v. State*, 31 Tex. Cr. 586, 1892; *People v. Lee Kong*, 95 Cal. 666, 1892. *Supra*, §§ 606-8; and see *supra* §§ 183, 184, for authorities at large.

ment is utterly incapable of doing harm, the indictment does not lie.

Touching
not neces-
sary to
offence.

§ 643. An assault with intent to kill may be committed without actual striking or wounding.¹

In indict-
ment, par-
ticularity
of specifi-
cation is
not re-
quired.

§ 644. In an indictment for an assault with intent to commit an offence, the same particularity is not necessary as is required in the indictment for the commission of the offence itself.² It is true that in indictments for attempts it is requisite to set forth the mode of attempt.³

But an assault (herein differing from an attempt) is *per se* indictable; and hence it is not necessary to go into details as to the mode.⁴ Thus an indictment for an assault with intent to steal or to rob, without stating the goods or money intended to be stolen, is good.⁵ In an indictment for an assault with intent to murder, at common law, or under a statute which does not specify the instrument, it has been held unnecessary to state the instrument or means made use of by the assailant to effectuate the murderous intent,⁶ though

¹ State v. McClure, 25 Mo. (4 see Pontius v. People, 82 N. Y. 239, Jones) 338, 1857. See Zoldoske v. 1880; *contra*, U. S. v. Barnaby, 51 State, 82 Wis. 580, 1892; Cooley v. Fed. Rep. 20, 1892.

State, 88 Tenn. 250, 1889; State v. Melton, 102 Mo. 683, 1891.

² Crumbly v. State, 61 Ga. 582, 1878. *Supra*, § 182; Lacefield v. State, 34 Ark. 275, 1878.

See under North Carolina statute, State v. Taylor, 83 N. C. 601, 1880; and see Whart. Cr. Pl. & Pr. § 159.

³ *Supra*, § 192.

⁴ See Whart. Cr. Pl. & Pr. § 159; Morris v. State, 13 Tex. App. 65, 1883; State v. Smith, 41 La. An. 791, 1889.

⁵ Com. v. McDonald, 5 Cush. 365, 1850; Com. v. Rogers, 5 S. & R. 463, 1819; Dickerson v. Com., 2 Bush, 1, 1867; Taylor v. Com., 3 Ibid. 508, 1868; Morris v. State, 13 Tex. App. 65, 1883.

That an indictment for an assault with intent to steal a watch or money may be sustained by proof of intent to steal either, see Phillips v. State, 36 Ark. 282, 1880.

That "intent to commit murder" is an equivalent for "intent to kill,"

⁶ U. S. v. Herbert, 5 Cranch C. 87, 1838; State v. Daley, 41 Vt. 564, 1869; State v. Dent, 3 Gill & J. 8, 1830; State v. Gainus, 86 N. C. 632, 1882; Rice v. People, 15 Mich. 9, 1864; Kilkelly v. State, 43 Wis. 604, 1877; State v. Montgomery, 7 Baxt. 160, 1873; State v. Miller, 25 Kans. 699, 1881; State v. Chandler, 24 Mo. 371, 1857; State v. Seward, 42 Ibid. 206, 1868; State v. Franklin, 36 Tex. 155, 1871; Freel v. State, (Ind.) 25 N. E. Rep. 178, 1890; Baker v. State, (Ind.) 34 N. E. Rep. 441, 1893; State v. Collyer, 17 Nev. 275, 1883; State v. Sheerin. (Mont.) 31 Pac. Rep. 543, 1892. But see Trexler v. State, 19 Ala. 21, 1849; Flynn v. State, 8 Tex. App. 368, 1880; People v. Jacobs, 29 Cal. 579, 1866; State v. Moore, 82 N. C. 659, 1880; State v. Hooper, Ibid. 663, 1880; State v. Benthall, Ibid. 664, 1880. Compare Whart Cr. Pl. & Pr.

where the pleader has it within his power to aver the weapon, it is better that the averment should be made;¹ and where the statute speaks of "dangerous weapons," or in any way points to a particular instrument, there the weapon should be specified.² The details of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered matters of evidence to the jury to establish the intent, and not necessary to be incorporated in the indictment.³ And in any view it is sufficient, unless the statute impose special conditions, if the use of a deadly weapon be averred, and the intent be specifically stated.⁴ The

¹ *State v. Bernthall*, 82 N. C. 664, 1886; *Buchanan v. State*, (Tex.) 13 1880; *Trexler v. State*, 29 Cal. 579, S. W. Rep. 1000, 1890.

1866; *Flynn v. State*, 8 Tex. App. 368, 1880; and see *Porter v. State*, 57 Miss. 300, 1879, where it was said that when the pistol is averred to be loaded with shot, such loading may be inferred from the circumstances of the case.

² *Infra*, § 645 *d*; *Territory v. Sevailles*, 1 New Mex. 119, 1855. See *State v. Mosely*, 42 La. An. 975, 1890, where an indictment charging a wilful shooting with intent to murder, but omitting the words "with a dangerous weapon," which existed in the statute, was held sufficient. So, under a charge of "aggravated assault," the facts constituting aggravation should be given. *State v. Beadon*, 17 S. C. 55, 1881; *State v. Grant*, 34 S. C. 109, 1891. See, however, *State v. Lowry*, 33 La. An. 1224, 1881; *State v. Cognowitch*, 34 Ibid. 529, 1882; *State v. Alfred*, 44 La. An. 582, 1892.

As to evidence necessary to sustain the charge of "aggravated assault," see *Tracy v. State*, (Tex.) 24 S. W. Rep. 897, 1894; *Coolidge v. State*, (Tex.) 24 S. W. Rep. 904, 1894; *Stephenson v. State*, (Tex.) 25 S. W. Rep. 784, 1894; *Melton v. State*, (Tex.) 17 S. W. Rep. 257, 1891; *Halsell v. State*, (Tex.) 18 S. W. Rep. 418, 1890; *George v. State*, 21 Tex. App. 315,

³ Whart. Cr. Pl. & Pr. §§ 159 *et seq.* *Williams v. State*, 47 Ind. 568, 1874; *Harrison v. State*, 2 Cold. (Tenn.) 232, 1865; *Martin v. State*, 40 Tex. 19, 1874; *Bittick v. State*, 40 Ibid. 117, 1874; *Meredith v. State*, Ibid. 480, 1874; *State v. Rigg*, 10 Nev. 284, 1875; *Padgett v. State*, (Ind.) 3 N. E. Rep. 377, 1885; *Steffy v. People*, (Ill.) 22 N. E. Rep. 861, 1889; *State v. Jenkins*, (Ind.) 22 N. E. Rep. 133, 1889; *State v. Woodard*, (Iowa) 50 N. W. Rep. 885, 1891; *State v. Clayton*, 100 Mo. 516, 1890. But see *contra*, *Wood v. State*, 50 Ala. 144, 1874; *State v. Johnson*, 11 Tex. 22, 1853; *State v. Jordan*, 19 Mo. 212, 1878; *Territory v. Carrera*, (New Mex.) 30 Pac. Rep. 872, 1892. See *Agee v. State*, 64 Ind. 340, 1862; *Ash v. State*, 56 Ga. 583, 1866; *Mayfield v. State*, 44 Tex. 59, 1866.

⁴ *State v. Davis*, 26 Tex. 201, 1862; *People v. English*, 30 Cal. 214, 1866; *People v. Congleton*, 44 Cal. 92, 1872; *State v. Garvey*, 11 Minn. 154, 1866; *Johnson v. State*, (Ga.) 17 S. E. Rep. 974, 1893; *State v. Keele*, 105 Mo. 38, 1891; *State v. Doyle*, 107 Mo. 36, 1891; *State v. Maguire*, 113 Mo. 670, 1893. See Whart. Cr. Pl. and Pr. §§ 159, 163 *a*.

An indictment which charges the

indictment is not bad because it introduces several weapons cumulatively.¹

accused with "an assault and battery with a deadly weapon, with intent to commit manslaughter," cannot be construed to be an indictment for an assault with intent to kill, which is understood, and has been held to be an intent to commit murder. *Bradley v. State*, 10 S. & M. 618, 1848. But see *State v. Connor*, 59 Iowa, 357, 1882, where a conviction for an assault to commit manslaughter was sustained upon an indictment for an assault to commit murder; and other cases, *supra*, § 641.

An indictment for an assault with a deadly weapon, *e. g.*, a pistol, need not aver that the pistol was loaded. *Allen v. People*, 82 Ill. 610, 1876; *Cross v. State*, 55 Wis. 261, 1882; *State v. Hoffman*, 78 Mo. 256, 1883.

In an indictment for an assault with intent to kill, the person intended to be killed must be named or designated. *State v. Patrick*, 3 Wis. 812, 1854.

Where, in a case in Maine, the first two counts charged an assault, in different forms, with intent to murder, and the last two charged an assault with intent to kill, it was held, that they all charged but one substantive offence, and the verdict might be, guilty of an assault simply, or of an assault with intent to kill, or of one with intent to murder. *State v. Phinney*, 42 Me. 384, 1856.

In some jurisdictions the indictment must charge that the proposed act was done feloniously, with malice aforethought; it is not sufficient that this allegation is made in the first part of the indictment, where the assault is charged. See *Whart. Cr. Pl. & Pr.* § 260; *State v. Howell*, Ga. Decis.

part i. 158, 1842; *State v. Wilson*, 7 Ind. 516, 1856; but see *U. S. v. Gallagher*, 2 Paine C. C. 447, 1832; *State v. Robinson*, 55 Ark. 439, 1892.

That it is not necessary to charge the assault to be "aggravated," see *Meier v. State*, 10 Tex. App. 39, 1881; nor, on arrest of judgment, that it was with malice aforethought, see *Cross v. State*, 55 Wis. 262, 1882; though see, *aliter*, *Lilley v. State*, 43 Mich. 521 1880.

The object must be stated to be felonious, *e. g.*, feloniously to kill, etc.; *State v. Clayton*, 100 Mo. 516, 1890. *Whart. Cr. Pl. & Pr.* § 260.

"Malice aforethought" is an essential averment in such an indictment. *State v. Fee*, 19 Wis. 562, 1865; *State v. Wilson*, 7 Ind. 516, 1856; *Milan v. State*, 24 Ark. 346, 1866. But see *State v. Lynch*, (Oreg.) 26 Pac. Rep. 219, 1891. See *supra*, § 517; *Whart. Cr. Pl. & Pr.* § 258.

It is, however, otherwise with an assault with intent to kill. *State v. Newberry*, 26 Iowa, 467, 1868.

"Feloniously" is essential in an assault to commit a rape. *Mears v. Com.*, 2 Grant, 385, 1858. Whether it is necessary in other assaults with felonious intent is elsewhere considered. *Whart. Cr. Pl. & Pr.* § 260.

It is not necessary to aver the intent to commit murder was to commit murder *in the first degree*. The italicized words can be omitted. *Logan v. State*, 2 Lea, 222, 1879.

It is not necessary that the term "unlawfully" should be used. *State v. Williams*, 3 Foster, (N. H.) 321, 1851; *People v. Ah Toon*, 68 Cal. 362, 1886; *Whart. Cr. Pl. & Pr.* § 269.

¹ *State v. McDonald*, 67 Mo. 13, 1877.

§ 645. Whatever provocation or mitigation would be a defence to an indictment for homicide is a defence to an indictment for an assault with an intent to kill. If there be an aggression—a going *out* of the line of defence for the purpose of attack—self-defence ceases.¹ It is necessary that the danger should have been personal, imminent, and immediate; though, when the assault with intent to kill is necessary, according to the defendant's lights, to prevent the commission of one of the higher felonies, it is excusable.² Yet this violent action is not permissible in order to prevent such larcenies or trespasses as are not made with force.³ And whether the defendant had reasonable cause, according to his lights, to apprehend a felonious attack, is for the jury.⁴

§ 645 a. Shooting with intent to kill is in many jurisdictions a

Nor the words "maliciously or wilfully." *State v. Douglas*, (Kans.) 37 Pac. Rep. 172, 1894.

That the words "did attempt to shoot, kill and murder" sufficiently charge intent, see *Felker v. State*, 54 Ark. 489, 1891; *State v. Robinson*, 55 Ark. 439, 1892.

The term "assault with intent to kill" implies the unlawful and felonious attempt to take the life of another. *State v. Doty*, 5 Oreg. 491; *State v. Lynch*, 20 Oreg. 389, 1891.

¹ See *State v. Boyden*, 13 Ired. 505, 1852; *State v. McGreer*, 13 S. C. 464, 1880; *State v. McGraw*, (S. C.) 14 S. E. Rep. 630, 1892; *Fussell v. State*, (Ga.) 19 S. E. Rep. 891, 1894; *Sullivan v. State*, 32 Tex. Cr. 50, 1893. *Supra*, §§ 95 *et seq.*

² That prosecutor's dangerous character can be put in evidence, see *Uptegrove v. State*, 37 Ohio St. 662, 1882; *People v. Kelly*, 94 N. Y. 526, 1884; *People v. Frindel*, 12 N. Y. Sup. 498, 1890; *Bowlus v. State*, (Ind.) 28 N. E. Rep. 1115, 1891. See *Smith v. State*, 8 Lea, 402, 1881. But not to a provoked assault. *People v. Miller*, 49 Mich. 23, 1882; *Smith v. State*, 31 Tex. Cr. 33, 1892; *State v. Paterno*, 43

La. An. 514, 1891. Whart. Cr. Ev. § 69.

³ *Supra*, §§ 484, 628. See *State v. Morgan*, 3 Ired. 186, 1842; *Harris v. State*, 53 Ga. 640, 1875; *Brown v. State*, 55 Ibid. 169, 1875; *Williams v. State*, 43 Tex. 382, 1875; *Rodriguez v. State*, 8 Tex. App. 129, 1880; *State v. Donyes*, 14 Mont. 70, 1894; *State v. Smith*, 12 Mont. 378, 1892.

⁴ *State v. Alley*, 68 Mo. 124, 1878; *Spicer v. People*, 11 Ill. App. 294, 1882; *Garza v. State*, 11 Tex. App. 345, 1882; *Pease v. State*, 13 Ibid. 18, 1882; *Martin v. State*, 132 Ind. 600, 1892; *State v. McNamara*, 100 Mo. 100, 1890; *State v. Bateswell*, 105 Mo. 609, 1891; *Williams v. State*, 30 Tex. App. 429, 1891; *Reed v. State*, 31 Tex. Cr. 35, 1892; *People v. Dollor*, 89 Cal. 513, 1891; *State v. Douglas*, (Kans.) 37 Pac. Rep. 172, 1894; *Jackson v. State*, 94 Ala. 85, 1891. See, however, *State v. Nash*, 88 N. C. 618, 1883.

In *People v. De Los Angeles*, 61 Cal. 188, 1881, it was held that a belief that a rape was intended when set up as a defence to an indictment for an assault with a deadly weapon, must be "reasonable." See as to "reasonable," *supra*, §§ 489 *et seq.*

statutory offence, and is regulated by the rules we have already noticed as applying to assaults. An interesting question arises, however, when the person shot is not the person whom the defendant intended to shoot. Under a statute which makes it simply indictable to shoot at a person maliciously, there may be a conviction without regard to whether the person shot was the one the offender had in view.¹ But where the statute makes the offence the shooting a person with intent to kill him, then we have an important distinction to observe. If A. shoots B., intending to shoot B., yet mistaking B. for C., then the conviction may be sustained under the statute for reasons already given.² But if the shooting of B. were entirely inadvertent and accidental, then an indictment under the statute, averring B. to be the person intended to be shot, cannot be sustained.³ When, also, the statute makes the use of loaded arms indictable, then the averment of "loaded arms" in the indictment is essential, and must be substantively proved.⁴ And all other statutory conditions must be observed in the indictment.⁵

§ 645 b. An assault with intent to commit a felony is, at common law, only a misdemeanor.⁶ Hence, as the grade of the offence is the same as that of a simple assault, the averments of felonious intent can be stricken out, and a conviction had for assault, and for assault and battery.⁷ Assaults with intent to commit rape are considered in another chapter.⁸

¹ *R. v. Smith*, Dears. C. C. 559, 1855; 7 Cox C. C. 51; 33 Eng. L. & E. 567; *R. v. Jarvis*, 2 M. & R. 40, 1837; *R. v. Stopford*, 11 Cox C. C. 643, 1870; *Callahan v. State*, 21 Ohio St. 306, 1871; *Walker v. State*, 8 Ind. 290, 1856; *People v. Torres*, 38 Cal. 141, 1869. See *supra*, §§ 107, 119.

² *Supra*, § 387; *State v. Gilman*, 69 Me. 163, 1878.

³ *R. v. Hewlett*, 1 F. & F. 91; *Com. v. Morgan*, 11 Bush, 601, 1876; *State v. Meadows*, 18 W. Va. 658, 1881; *Barcus v. State*, 49 Miss. 17, 1873; *Morgan v. State*, 13 Sm. & M. 242, 1849; *Lacefield v. State*, 34 Ark. 275, 1878; *Roadcap v. Com.*, (Va.) 14 S. E. Rep. 625, 1892. *Supra*, § 120.

⁴ *R. v. Harris*, 5 C. & P. 159, 1831. *Supra*, § 183.

⁵ *Griffin v. State*, 12 Tex. App. 423, 1882; *State v. Clark*, 80 Iowa, 517, 1890. See, however, *Knight v. State*, 84 Ind. 73, 1882.

⁶ *State v. Scott*, 24 Vt. 127, 1852; *Stout v. Com.*, 11 S. & R. 179, 1824; though see *Curtis v. People*, 1 Ill. 199, 1859; *State v. Boyden*, 13 Ired. 505, 1852; *Territory v. Conrad*, 1 Dak. Ter. 363, 1877. By statute, in Illinois, assault with intent to commit petit larceny is a felony, although petit larceny is only a misdemeanor. *Kelly v. People*, 132 Ill. 363, 1890. *Supra*, § 640 a.

⁷ *Supra*, §§ 27, 643; Whart. Cr. Pl. & Pr. §§ 247, 249, 251, 261, 742.

⁸ *Supra*, § 576.

§ 645 c. Where confederacy is proved each party is chargeable with the other's acts, subject to the limitations heretofore given.¹

All parties
indictable.

III. ASSAULTS WITH DANGEROUS WEAPONS.

§ 645 d. By statutes existing in most jurisdictions assaults with dangerous weapons are subjected to punishment greater than that assigned to simple assaults. Under these statutes the following points may be noted :

Made in-
dictable by
statute.

(1) The gravamen of the offence is the use of a dangerous weapon with intent to hurt. Mere accidental possession of a dangerous weapon without using it, or intent to use it, would not constitute the offence, nor would the intent without the use.²

Danger is to be estimated by the effect likely to be produced by the weapon ; and when the statute specifies danger to life, such danger must be proved.³ A bowie-knife has been held to be in this sense a dangerous weapon ;⁴ and so has a chisel, when used for stabbing ;⁵ and a heavy iron weight or other ponderous instrument ;⁶ and a heavy pistol when used as a bludgeon ;⁷ and heavy stones thrown at the assailed ;⁸ and a heavy pestle used as a club.⁹

(2) Whether a weapon was, under the circumstances, dangerous, is a question of fact to be determined by all the circumstances of the case, and especially by the mode of use.¹⁰ A " deadly " weapon

¹ *Supra*, §§ 213 *et seq.* See *State v. Hang Tong*, (Mo.) 22 S. W. Rep. 381, 1893. Where intent is a required element it is sufficient if the co-conspirators knew that the actor whom they were encouraging, aiding or abetting, entertained the intent. *Tanner v. State*, 92 Ala. 1, 1891.

² *Tarpley v. People*, 42 Ill. 340, 1866 ; *People v. Congleton*, 44 Cal. 92, 1872 ; *People v. Murat*, 45 Ibid. 281, 1881 ; *State v. Napper*, 6 Nev. 113, 1870. See *McKinney v. State*, 25 Wis. 378, 1870 ; *supra*, § 644.

³ *R. v. Noakes*, 5 C. & P. 326, 1831 ; *U. S. v. Small*, 2 Curt. 241, 1855 ; *Briggs v. State*, 6 Tex. App. 144, 1879. That an axe is *ex vi termini* a deadly weapon, see *State v. Shields*, 110 N. C. 497, 1892 ; *Parks v. State*, 29 Tex. App. 597, 1890.

⁴ *Buchanan v. State*, 24 Ga. 283, 1857 ; see *Briggs v. State*, 6 Tex. App. 144, 1879 ; *Johnson v. State*, 7 Ibid. 210, 1879.

⁵ *Com. v. Branham*, 8 Bush, 387, 1871.

⁶ *State v. West*, 6 Jones, (N. C.) 505, 1859 ; *Milner v. State*, 30 Ga. 137, 1860 ; *McReynolds v. State*, 4 Tex. App. 327, 1878.

⁷ *Prior v. State*, 41 Ga. 155, 1870.

⁸ *Coleman v. State*, 28 Ga. 78, 1859. See *Regan v. State*, 46 Wis. 256, 1879 ; *Com. v. Duncan*, 91 Ky. 592, 1891.

⁹ *Rasberry v. State*, 1 Tex. App. 664, 1877.

¹⁰ *U. S. v. Small*, 2 Curt. 241, 1855 ; *Doering v. State*, 49 Ind. 56, 1874 ; *Prior v. State*, 41 Ga. 155, 1870 ; *Berry v. Com.*, 10 Bush, 15, 1873 ; *State v. Davis*, 14 Nev. 407, 1879 ; *State v.*

is one which, in the manner used, is likely to cause death or serious bodily injury.¹ When the weapon is a gun or pistol, it need not be levelled;² but there must be something to indicate that the assault was real.³ It is not necessary, however, in order to sustain the case of the prosecution, to prove that the blow took effect.⁴

(3) The indictment, under a statute prohibiting assaults with dangerous weapons, should not only aver the weapon to be dangerous, but should specify it.⁵ The assault must be averred to be with a dangerous or deadly weapon, as the case may be.⁶ The averment, "With a certain dangerous weapon, to wit, with a pistol then and there loaded with powder and with a leaden ball," is sustained by proof of an assault by shooting with a pistol.⁷

IV. ASSAULT ON OFFICERS, ETC., WHEN IN THE EXECUTION OF THEIR DUTIES.⁸

§ 646. The right of resistance to illegal official action, it must be remembered, is essential, not merely to all free government, but

Franklin, 36 Tex. 155, 1871; Kouns v. State, 3 Tex. App. 12, 1877; Hunt v. State, 6 Ibid. 663; Ballard v. State, (Tex.) 13 S. W. Rep. 674, 1890; Com.

v. Duncan, 91 Ky. 592, 1891; Melton v. State, 30 Tex. App. 273, 1891; Jenkins v. State, 30 Tex. App. 379, 1891; Woodson v. Com., (Ky.) 21 S. W. Rep. 584, 1893; People v. Irving, 18 N. Y. Week. Dig. 335; 19 N. Y. Week. Dig. 7, 1884; State v. Collyer, 17 Nev. 275, 1888; State v. Hertzog, 41 La. An. 775, 1889. *Contra*, that it is a question of law for the judge, see State v. Rigg, 10 Nev. 284, 1875; People v. McNutt, 93 Cal. 658, 1892.

¹ Reynolds v. State, 4 Tex. App. 327, 1878; State v. Rosener, 8 Wash. 42, 1894.

² State v. Epperson, 27 Mo. 255, 1858.

³ *Supra*, § 604. See Johnson v. State, 43 Tex. 376, 1875. In Fastbinder v. State, (Ohio) 2 Am. Law Journ. 107, 1884, it was held that under the Ohio statute, to sustain a prosecution of this class, the gun must be shown to have been loaded.

⁴ People v. Keeper, 18 Cal. 636, 1861; People v. Yslas, 27 Ibid. 630, 1865; Mayfield v. State, 44 Tex. 59, 1875.

⁵ State v. Moore, 82 N. C. 659, 1880; State v. Benthall, Ibid. 664, 1880; Territory v. Servailles, 1 New Mex. 119, 1855; People v. Savercool, (Cal.) 22 Pac. Rep. 856, 1889; Territory v. Armijo, (New Mex.) 37 Pac. Rep. 1117, 1894.

⁶ People v. Vierra, 52 Cal. 451, 1877. See Ash v. State, 56 Ga. 583, 1876; Mayfield v. State, 44 Tex. 59, 1875; State v. Henn, 39 Minn. 476, 1888; People v. Pape, 66 Cal. 366, 1885.

⁷ *Supra*, § 644.

⁸ Com. v. Fenno, 125 Mass. 387, 1878.

That weapons may be cumulatively averred, see People v. Casey, 72 N. Y. 393, 1878. As to variance, see People v. Cavanagh, 62 How. (N. Y.) 187, 1881; Ferguson v. State, 4 Tex. App. 156, 1878.

⁹ By the Federal Act of April 9, 1866, (Civil Rights Act) penalties are attached to the violating the pro-

to any government whatsoever. The Roman law has been charged with being despotic; but by the Roman law this right is repeatedly and unreservedly recognized.¹ If there be no jurisdiction in the officer, then issues the terse command, “Vim vi repellere licit.” When an officer transcends his powers, obedience to him may become even an offence.

Illegal
official
action
may be
forcibly
resisted.

“Extra territoriam ius dicenti impune non paretur. Idem est, si supra iurisdictionem suam velit jus dicere.”² With sharp emphasis does the same law summon the citizen to resist acts of oppression and extortion attempted by government officials: “Sanctum licere universis, obicere manus his, qui ad capienda bona alicuius venerint, qui succubuerint legibus; ut etiam si officiales ausi fuerint, a tenore datae legis desistere, ipsis privatis resistantibus a facienda iniuria arceantur.”³ If government agents attempt to extort illegal taxes, the party on whom the attempt is made has what is quaintly called the “Jus eum propulsandi.”⁴ Even to the remotest provinces is this right reserved. “Contra nostra praecepta si quis vetito et temerario ausu exactionem audebit—licebit provinciali, temeritatem legitime repellere.”⁵ Nor was it from any popular impulse that the Roman law thus spoke. Except for the preservation of the due symmetry of government, and the maintenance of each member of the body politic, subject as well as officer, in his due orbit, the Roman law had no mission. But that each member of the body politic should be so kept in his due orbit, its concern was great. If each subordinate official—each tax collector or each deputy of a deputy prefect—be recognized as *jure divino* impeccable until his proceedings are by law reversed, then all the gradations of government will be destroyed. Not merely will the subject have to submit to spoliation without redress, not only

visions of that Act, and for obstructing officers, etc., in their duties, etc. St. 1866, 27, 28. There is nothing, however, in this statute to prevent the arrest of a Federal officer, though in execution of his duties, on a State warrant for felony; U. S. v. Kirby, 7 Wall. 482, 1868; or misdemeanor; Penny v. Walker, 64 Me. 480, 1874.

¹ L. 12. 4. Cod. si a non competente iudice. (7. 48.) L. 170. D. de reg. iur.

² L. 20. D.

³ L. 5. Cod. de iure fisci (10. 1).

⁴ L. 4. Cod. de discussoribus.

⁵ L. 5. Cod. de executor. et exact.

See, for a summary of these and other statutes, Berner's Lehrbuch, § 211, who shows that even the canon law, which accepted the *jure divino* claims of government in their highest sense, took the same view: “Auch das Kanonische Recht, das gewiss dem Strafbaren Widerstande gegen die Obrigkeit keinen Vorschub leisten will, bestätigt diese Grundsätze.” C. 5. x. de regulis juris. C. 6 de sentent. ex comm. in Vito.

will the coffers of subalterns be gorged with the spoils of the wrecked industry of the laborer, but the pettiest policeman will have the same *jure divino* claims to irresistibility as the prince, and in case of collision the prince can claim no higher infallibility than the policeman. Instead of government this would be chaos.

§ 647. Nor could it be justly replied, so said the old jurists, that the subject, in case of oppression, could have redress by a suit at law. What redress could he have if the injury suffered by him be irreparable? What comfort is it to a man who has been insulted, plundered, or wounded, that the officer who has done him the injury is removed or imprisoned? And how poor a compensation is money to one who has had his family rights invaded, or his person maimed, or his business destroyed? And can even such reparations as these be secured? Is it sure that the law will punish the officer for his illegal acts? Is not the idea of the irresistibility of an official so far blended with that of infallibility, that the same superstitious reverence for authority which saved him from being resisted when he outraged another may save him from being convicted when sued for the outrage? Is it certain that the offending officer will allow an appeal? Is it not likely that the violence that outrages will interpose to prevent the party injured from making complaint? So argued the old jurists in support of the position that when an officer transcends his jurisdiction, or illegally encroaches on a subject's rights, then resistance to him is not only lawful but meritorious. The old English common law writers argued from another standpoint. The theory of due and symmetrical official gradation, which so much fascinated the jurists of Rome, had no charms for those of England at the time the English common law took shape. To them feudalism was the true governmental model, and in feudalism the mesne lord, or the lord of the manor, or the lord of the manor's bailiff, was as absolute as the lord paramount. Undoubtedly the mesne lord was responsible to the lord paramount if the lord paramount was strong enough to exact such responsibility. But the vassal was bound to implicit obedience to the lord whom he immediately served, or to any representative that lord might depute. To this principle of feudalism may be traced that line of early English decisions which hold, that when officers of justice transcend their powers the remedy is not resistance but submission, and subsequent appeal to the law for redress. No doubt this view has been, in recent years, as is elsewhere seen, much modified. But it may still be a question whether a sound and free jurisprudence does not re-

Oppressed
party in
such cases
not con-
fined to a
resort to
law.

commend modifications still more liberal, and a still closer approximation to the principles of the jurists of Rome.

§ 648. But even by the English common law it is settled that to constitute the offence of resisting an officer it must be shown that the process is legal.¹ The officer must at the time be engaged in executing his duties, and the defendant must be notified thereof;² and unless there be notification or knowledge to this effect, the killing of the officer in resisting the arrest will not be murder. Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning in order to arrest him, but not telling his business or using words of arrest, and the party not knowing that the other was an officer, in the first surprise snatched down a sword which hung in his room and killed the bailiff, this was ruled to be only manslaughter.³

To justify arrest process must be legal and must be notified.

An officer making an arrest by virtue of a warrant, however, is not bound to exhibit his warrant and read it to the prisoner before securing him, if he resist.⁴ And there is a current of authority to

¹ *Supra*, § 414; *Com. v. Newton*, 123 Mass. 420, 1877; *People v. Muldoon*, 2 Parker C. R. 13, 1823; *Com. v. Bryant*, 9 Phila. 595, 1872; *State v. Zeibart*, 40 Iowa, 169, 1874; *Barbour's Cr. Treatise*, 82; *Roscoe's Cr. Ev.* 625, 656. See *State v. Cassady*, 52 N. H. 500, 1872; *Com. v. Tobin*, 108 Mass. 426, 1871; *State v. Moore*, 39 Conn. 244, 1872.

In *Com. v. Tobin*, 108 Mass. 426, 1871, the defendant was indicted for assaulting an officer in the discharge of his duty. It appeared that the defendant was arrested for a breach of the peace. It did not appear that any complaint was subsequently made against him. The defendant requested a ruling that the failure to complain against and prosecute him for the offence for which he was arrested made the officer a trespasser, and the defendant had a right to resist him. This was refused by the Supreme Court, because the offence of defendant was complete as soon as he had assaulted an officer lawfully holding

him, and the subsequent failure of the officer to discharge his further duty cannot affect defendant's previous offence. See *State v. McAfee*, 107 N. C. 812, 1890. See, fully, *supra*, §§ 402-444; and *Whart. Cr. Pl. & Pr.* §§ 1-17.

² 1 Hale, 470. *Infra*, § 650; *supra*, §§ 402-444; *Whart. Cr. Pl. & Pr.* §§ 1-11; *R. v. Cumpton*, L. R. 5 Q. B. D. 341, 1880; 42 L. T. (N. S.) 543; *Codd v. Cabe*, 13 Cox C. C. 202, 1872; *Johnson v. State*, 5 Tex. App. 43, 1879; *Thomas v. State*, 90 Ga. 437, 1892; *White v. State*, 29 Tex. App. 530, 1891. See, under Alabama statute, *Jones v. State*, 60 Ala. 99.

It is sufficient if the official character of the officer be known to the defendant. *State v. McAfee*, 107 N. C. 812, 1890.

³ 1 Hale 470. *Supra*, §§ 402-444.

⁴ *Com. v. Cooley*, 6 Gray, (Mass.) 350, 1856. See *Johnson v. State*, 30 Ga. 426, 1860; *Whart. Cr. Pl. & Pr.* §§ 1-11.

the effect that the legality of an officer's appointment cannot be tested by a forcible resistance to his acts.¹ This may be sound law when the defendant, by his conduct, or by the issue presented by him, admits that the party resisted holds the office in question. But the rule ought not to be extended to cases where the object is to test the right of the party resisted to hold the office,² nor to cases where the pretence is to exercise an office not really existing.³

§ 649. If the defendant, indicted for resisting an officer, can prove that he was ignorant that the party resisted was an officer, this is a defence to the indictment for resistance;⁴ but not to that for an assault, if undue violence were used.⁵ So persons interfering in an arrest by an officer under criminal process, not knowing that he is an officer and acting in the discharge of his duty, but interfering with the intention of quelling a fight, if they use more force than is necessary for that purpose, are liable to an indictment for an assault.⁶ On the other hand, a defendant who aggressively assaults an officer in ignorance of the lat-

¹ See *R. v. Gordon*, 1 Leach, 516, N. Y. 509, 1865; *People v. Muldoon*, 1782; *R. v. Newton*, 1 C. & K. 469, 2 Parker C. R. 13, 1823; *Logue v.* 1844; *Jones v. Stevens*, 11 Price, 235, Com., 38 Pa. 265, 1861; *State v. Belk*, 1822; *State v. Boies*, 34 Me. 235, 76 N. C. 10, 1877; *Johnson v. State*, 1852; *Com. v. Dugan*, 12 Metc. 233, 26 Tex. 117, 1861. See *Com. v. Kirby*, 1847; *Com. v. Cooley*, 6 Gray, 354, 2 Cush. 577, 1849, and cases *supra*, §§ 1856; *People v. Hopson*, 1 Denio, 574, 419, 491.

1845; *Muir v. State*, 8 Blackf. 154, That the indictment must aver such knowledge, see *State v. Maloney*, 12 R. S. 251, 1879, citing *Com. v. Kirby*, 2 Cush. 577, 1849; *Com. v. Cooley*, 6 Gray, 35, 1856; *State v. Downer*, 8 Vt. 424, 429, 1836; *Kernan v. State*, 11 Ind. 471, 1858; *United States v. Tinklepaugh*, 3 Blatch. 425, 1856; *United States v. Keen*, 5 Mason, 453, 1830; *Com. v. Israel*, 4 Leigh, 675, 1833; *State v. Hilton*, 26 Mo. 199, 1858. *Supra*, §§ 87-8.

² See *Smith v. Taylor*, 1 New Rep. 196, 1817; 11 Mod. 308; 4 M. & S. 548; *R. v. Curvan*, 1 Mood. C. C. 132, 1826; *Com. v. Carey*, 12 Cush. 246, 1853; *People v. Gulick*, Hill & Denio, 229, 1843; *McQuoid v. People*, 3 Gilm. 76, 1846; *Cantrill v. People*, Ibid. 356, 1846; *Aulanier v. Governor*, 1 Tex. 653, 1848.

In *Com. v. Sheriff*, 3 Brewst. 343, 1869, it was held that remonstrance was not resistance. And see Whart. Cr. Pl. & Pr. § 5, and *infra*, § 1617.

³ *Ex parte Snyder*, 64 Mo. 58, 1877.

⁴ *Supra*, § 87; *R. v. Ricketts*, 3 Camp. 68, 1813; *Com. v. Kirby*, 2 Cush. 577, 1849; *Yates v. People*, 32

⁵ See *supra*, § 630 a. That an excessive assault by the officer may be repelled by the party attacked without criminal responsibility, see *Com. v. Dougherty*, 107 Mass. 243, 1871.

Supra, § 102.

⁶ *Com. v. Cooley*, 6 Gray, 350, 1856.

ter's official rank is said to be liable, for the reason that he voluntarily perpetrates an unlawful act, to conviction for the aggravated offence.¹ But this exception is to be jealously limited. It is against the policy of the State to clothe its servants with official immunities, except when engaged in official acts. The immunity belongs not to the individual but to the office; and if the immunity is to be vindicated, the office must be proclaimed. To punish resistance to a secret officer as a crime turns first the officer into a spy, and then the spy into a despot.²

It should at the same time be remembered that though an officer attempting to execute process be unauthorized, and therefore a trespasser, yet he is not bound to submit to unreasonable and unnecessary violence,³ and may defend himself against the same without being guilty of an assault.⁴ Nor is a blow necessary to constitute the offence of resistance.⁵ There must, however, be some actual overt act of obstruction.⁶

§ 650. An indictment for resisting an officer while attempting to serve a lawful process need not describe particularly the nature of the process, or the mode of the resistance.⁷ But the indictment must set forth that such process was legal, or so describe it as to show it to be so; and if issued from a court of limited jurisdiction, it must appear that the court, in issuing it, acted within the sphere of their authority.⁸ It

Indictment need not set forth process in detail.

¹ U. S. v. Liddle, 2 Wash. C. C. 1875. Under Texas statute, see Hill 205, 1808; U. S. v. Ortega, 4 Ibid. v. State, 43 Tex. 329, 1875. 531, 1825; U. S. v. Benner, Baldwin, 531, 1825. *Supra*, § 87.

² It is no defence to an indictment for forcibly obstructing an officer of the customs in the discharge of his duties, that the object of the defendant was personal chastisement, and not to obstruct or impede the officer in the discharge of his duties, if he knew the officer to be so engaged. U. S. v. Keen, 5 Mason, 453, 1820.

³ People v. Murray, 7 N. Y. Sup. 548, 1889.

⁴ People v. Gulick, Hill & Denio, 229, 1843.

⁵ Roddy v. Finnegan, 43 Md. 490, 1875; Woodworth v. State, 26 Ohio St. 196, 1875. Under Wisconsin statute, see State v. Welch, 37 Wis. 196,

⁶ Com. v. Sheriff, 3 Brewst. 343, 1869. In U. S. v. Lukins, 3 Wash. C. C. 335, 1818, it was said *obiter* that refusal to obey an officer is indictable resistance. This is disapproved in State v. Welch, 37 Wis. 196, 1875, as without authority and reason.

⁷ McQuoid v. People, 3 Gilm. 76, 1846.

⁸ U. S. v. Stowell, 2 Curtis C. C. 153, 1854; State v. Scammon, 22 N. H. 44, 1850; State v. Beasom, 40 N. H. 367, 1860; Cantrill v. People, 3 Gilm. 356, 1846; Bowers v. People, 17 Ill. 373, 1847; State v. Hailey, 2 Strob. 73, 1847; Slicker v. State, 8 Eng. (13 Ark.) 397, 1853. See State v. Henderson, 15 Mo. 486, 1852; State v. Burt, 25 Vt. 373, 1853. And see *contra*, State v. Belk, 76 N. C. 94, 1877.

is not enough to say that the defendant "resisted" the officer; for this is a mere conclusion of law.¹

651. Municipal and police are, equally with State officers, under the protection and subject to the limitations of this branch of the law.²

Municipal
and police
officers un-
der same
sanction.

And so of
officers
charged
with pro-
cess.

§ 652. Officers charged with process are eminently under the protection of the law, and to forcibly resist them is therefore not only an indictable offence,³ but, if amounting to an obstruction of process, is a contempt of court, summarily punishable as such.⁴ If a party assist in resisting a criminal arrest, he may become thereby an accessory after the act, by endeavoring, if the case be one of felony, to shelter the accused,⁵ while if the offence be misdemeanor (or, according to the old authorities, treason) then by the old common law a party aiding in resisting the arrest is indictable as a principal in such offence.⁶ Now, however, that the common law offence of accessoryship has become generally obsolete, the offence is tried in most jurisdictions as a substantive felony or misdemeanor, as the case may be.⁷ It is within the election of the prosecution, however, to treat the offence as a substantive misdemeanor, waiving its accessorial character; and in most jurisdictions this is required by statute.⁸

¹ *Lamberton v. State*, 11 Ohio, 282, 493, 1880; *U. S. v. Fullhart*, 47 Fed. 1842; though see *U. S. v. Batchelder*, Rep. 802, 1891. *Infra*, § 1380. As to 2 Gall. 15, 1814; *State v. Hooker*, 17 Vt. 658, 1845. who is an officer in this sense, see *Maverly v. State*, 10 Lea, 729, 1882.

An indictment for assaulting and obstructing an officer in the discharge of his duties as such averred that the defendant made an assault upon the officer, and, while the latter was in the due and lawful execution of his office, did "unlawfully, knowingly, and designedly hinder and oppose him," etc.; this was held to be a sufficient allegation that the defendant knew that the person assaulted was an officer. *Com. v. Kirby*, 2 Cush. 577-8, 1844.

² *Johnson v. State*, 30 Ga. 426, 1860.

³ See *supra*, § 414; *Whart. Cr. Pl. & Pr.* §§ 1-5; *Phillips v. State*, 66 Ga. 755, 1881. Under federal statute, see *U. S. v. Martin*, 17 Fed. Rep. 150, 1883; *U. S. v. Kindred*, 4 Hughes,

⁴ *Whart. Cr. Pl. & Pr.* §§ 949 *et seq.*

⁵ *Supra*, § 241; 4 Bl. Com. (Wend. ed.) 129-30; Dalt. 530; 1 Hale, 619; 2 Hawk. c. 29, s. 26; *R. v. Marsden*, L. R. 1 C. C. 131, 1868; 11 Cox C. C. 90; *U. S. v. Tinklepaugh*, 3 Blatch. 425, 1856; *Slicker v. State*, 13 Ark. 397, 1853.

⁶ See *R. v. Marsden*, L. R. 1 C. C. 131; 11 Cox C. C. 90, 1868; *State v. Downer*, 8 Vt. 424, 1836; *State v. Buchanan*, 17 Ibid. 573, 1845; *Com. v. Miller*, 2 Ashm. 61, 1839. As to rescue, see *infra*, § 1680.

⁷ *Infra*, §§ 1677, 1680.

⁸ *R. v. Cumpton*, L. R. 3 Q. B. D. 341, 1880; *R. v. Bailey*, L. R. 1 C. C. 347, 1872; *Woodworth v. State*, 26 Ohio St. 196, 1875.

It is not necessary that there should be a blow struck or force actually applied,¹ though it is essential that the resistance should imply the application of force, actual or threatened;² mere vituperation not constituting the offence, unless there be an apparent intention to resist by force.³ But whether the process be criminal or civil, resistance to its execution, whereby such execution is hindered, is an indictable offence.⁴ The officer's title is not at issue in such a prosecution,⁵ when it appears that he is an officer *de facto*,⁶ *i. e.*, the recognized official representative of a government in actual power.⁷ The process, however, must be legal *primâ facie*,⁸ since if this test were not applied everybody could arrest everybody else.⁹ When "legally appointed and duly qualified" is averred, these averments must be proved.¹⁰ Merely technical defects on the writ, however, cannot be set up as a defence.¹¹ Knowledge that the person resisted is an officer, however, must be shown, though this knowledge may be inferred from all the circumstances of the case.¹²

§ 652 *a*. The converse of what has just been stated is true in regard to the duty imposed upon citizens to aid officers when in the lawful discharge of their duties. As is noticed more fully in another work,¹³ "This duty of the citizen is absolute. . . . His obligation to come to the aid of the

Officers
entitled
to call
in aid.

¹ U. S. *v.* Lukins, 3 Wash. C. C. 335, 1818; U. S. *v.* Bootie, 2 Burr. 864; *Garrett v. State*, 89 Ga. 446, 1892. *Woodworth v. State*, 26 Ohio St. 196, 1875; *Heath v. State*, 36 Ala. 273, 1862. *State v. Black*, 109 N. C. 856, 1891; *Supra*, § 648.

² See *supra*, §§ 604, 646; *State v. Moore*, 39 Conn. 244, 1872.

³ *Com. v. Sheriff*, 3 Brewst. 343, 1869; *State v. Welch*, 37 Wis. 196, 1875.

⁴ See Whart. Cr. Pl. & Pr. §§ 4 *et seq.*

⁵ U. S. *v.* Wood, 2 Gall. 361, 1815; *State v. Bateswell*, 105 Mo. 609, 1891; Whart. Crim. Ev. § 833. *Supra*, §§ 646 *et seq.*; *infra*, § 1617.

⁶ *R. v. Newton*, 1 C. & K. 469, 1844; *Morse v. Calley*, 5 N. H. 220, 1830; *Com. v. Dugan*, 12 Metc. 233, 1847; *State v. Carroll*, 38 Conn. 448, 1871; *People v. Hopson*, 1 Denio, 574, 1845; *Roddy v. Finnegan*, 43 Md. 490, 1878; *State v. Johnson*, 12 Ala. 840, 1847;

⁷ See, on this subject, Whart. Cr. Pl. & Pr. § 966. *Infra*, § 1572 *d*.

⁸ *Supra*, § 646; Whart. Cr. Pl. & Pr. §§ 7 *et seq.*; *Com. v. Cooley*, 6 Gray, 354, 1856; *Cantrill v. People*, 8 Ill. 356, 1846; *State v. Shelton*, 79 N. C. 605, 1879. As to tests, see Whart. Cr. Pl. & Pr. § 6, 1878.

⁹ See *supra*, §§ 402, 444, 648.

¹⁰ *State v. Sherburne*, 59 N. H. 99.

¹¹ *Supra*, §§ 402-444; *Com. v. Martin*, 98 Mass. 4, 1867; *People v. Mead*, 92 N. Y. 415, 1883; *McQuoid v. People*, 3 Gilm. 76, 1846; *Nolty v. State*, 17 Wis. 668, 1864; *Graham v. State*, 29 Tex. App. 31, 1890.

¹² *Supra*, § 649. Whart. Cr. Pl. & Pr. § 7.

¹³ Whart. Cr. Pl. & Pr. § 17, *note*.

sheriff (or other officer) is just as imperative as that imposed on the latter to see that the community suffer no harm from licentiousness."¹

¹ King, J., cited *Ibid.*; and see 5 Whart. 437, 1840; Anon., 1 Haz. U. *infra*, § 1584; R. v. Brown, C. & M. S. Reg. 263; Garrett v. State, 89 Ga. 314, 1841; Resp. v. Montgomery, 1 446, 1892. Yeates, 419, 1795; Comfort v. Com.,

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

Self-defence. Improper Charge Concerning Quarrel.

Defendant requested the court to instruct the jury "that if the defendant went to M.'s house to commit any offence against the law, but abandoned such intention and attempted to avoid a difficulty with his adversary, M., and was then pursued, his right of self-defence revived, and he had the right to kill his adversary to prevent being killed or any serious bodily injury to himself, and if the jury so find they will acquit the defendant." Refused. Held, on appeal, error. *McSpatton v. State*, 30 Tex. App. 616, 1892.

A Forcible Retaking of Stolen Property is Not an Assault.

The court instructed the jury, at the request of the State, that "even though they should believe that Richard T. Bennett and George C. Evans irregularly or improperly obtained possession of the horses in controversy, yet such fact would not justify defendant in retaking the same by force, nor by the use of a deadly weapon." Held error, as the evidence showed that the horses had been taken formerly from the defendant, who in good faith claimed possession of them. *State v. Dooley*, 121 Mo. 591, 1894.

Shooting Case. Erroneous Charge.

It was held error for the court to assume in its charge, as a matter of law, that to discharge a gun loaded with powder only at a person not more than fifteen steps distant would constitute the statutory offence of shooting at another, as the law fixes no maximum or minimum distance. *Clark v. State*, 84 Ga. 577, 1890.

Charge that Drunkenness is No Excuse Held Erroneous.

Where there is evidence that the defendant was too drunk to be able to form an intent, on trial for assault with intent to murder, it is error for the judge to instruct the jury in the language of Rev. St. Ill. 1889, c. 38, § 291, that "drunkenness is no excuse for the commission of any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, connivance, or force of some other person for the purpose of causing the perpetration of an offence." Such an intent to murder constitutes the gist of the offence. *Crosby v. People*, 137 Ill. 325, 1891.

Charge Relative to Character.

An instruction on the trial of an indictment for assault with intent to murder, that defendant is not on trial for having a good or bad character; that the jury are not to take into account his good or bad character; and that if the allegations are not supported by the proof beyond a reasonable doubt, they must acquit. Held error. *Jones v. State*, 96 Ala. 102, 1892.

Right to Protect Property by Necessary Force.

Where the facts were that the prosecutor was driving on the side of a beaten road where defendant was cutting the grass, when the alleged assault took place; the defendant requested the court to charge "that the defendant had a legal right to cut the grass on his side of the highway; that the grass there growing belonged to him as much so as the grass growing on any other part of his farm; and for the purpose of harvesting the grass so growing on his side of the highway he had a right to be there in person for that purpose, either of his own right or as the servant of his father, who appears to be the owner of the land, so long as he did not interfere with the free and ordinary use of the highway for public travel." And also that defendant had a right to protect the grass, and in so protecting it from being run over and destroyed by Stieman he would be justified in using as much force as would be necessary to keep Stieman from destroying it; and if the jury found that no more force was used than was necessary to protect it, their verdict should be for the defendant. Refused. Held error. *People v. Foss*, 80 Mich. 559, 1890.

PART II.

OFFENCES AGAINST PROPERTY.

CHAPTER IX.

FORGERY.

I. DEFINITION.

Forgery is fraudulently making a false suable document with intent to defraud, § 653.

Is a misdemeanor at common law, and as such cognizable in State courts, § 653.

II. MODES OF PERPETRATION.

All concerned in are principals, § 655.

Partner may be guilty of against partner, § 656.

Party signing his name when such name is another's may be guilty of forgery, § 657.

Otherwise when names are slightly variant, § 658.

Forgery to sign under an assumed name, § 659.

Forgery to sign name of non-existent person, § 660.

Forgery to alter writer's name when effect is to defraud, § 661.

And so to falsely alter one's own executed deed, § 662.

Fraudulently executing deed with a false date may be forgery, § 663.

Forgery to make false entry in pass-book, § 664.

So as to entries in book settlements, § 665.

So as to books of original entry, § 666.

So when clerk makes false entries in book he is employed to keep, § 667.

Signing another's name without authority is forgery, § 668.

Agent having *bond fide* belief that he is authorized to sign is not guilty of forgery, § 669.

Fraudulently using a man of straw as acceptor to charge a responsible person of the same name is forgery, § 670.

Forgery to fill up blank with terms other than authorized, § 671.

So to fill up without authority cheque already signed, § 672.

So for an agent fraudulently to alter terms he was employed to write, § 673.

But it is not forgery fraudulently to induce another to sign a document, § 674.

Forgery may be by writing, printing, or engraving, § 675.

An erasure may be a forgery, § 676.

And so of mutilations, § 677.

An addition must be specifically pleaded, § 678.

False personation is not forgery, § 679.

III. WHAT INSTRUMENTS ARE THE OBJECTS OF FORGERY.

Necessary that instrument should support a *prima facie* case, § 680.

But instrument need not be in writing or in words, § 681.

Bonds, deeds, commercial paper, receipts, orders, "other writing," § 682.

Judicial or political records, § 683.

Book entries, § 684.

Railway and other tickets, § 685.

False making of another's signature to a statement exposing the latter to suit is forgery, § 686.

So of certificates of character, § 687.

But not, it seems, of diplomas or pictures, § 688.

Certificate as to negotiable paper is forgery, § 689.

So of trade-marks or labels when party issuing is liable to action for deceit, § 690.

Instrument must be capable, if genuine, of being proof in legal process, § 691.

But such process need not be against the party whose name is forged, § 692.

Nor need the party injured have a local legal existence, § 693.

Nor need there be any immediate personal injury, § 694.

Nor need the instrument be more than *prima facie* proof, § 695.

But an instrument that in no possible case can be sued on cannot be the object of forgery, § 696.

Defects as to seals, stamps, and attestations, may not destroy legal efficacy, § 697.

Forgery of void bank notes not indictable, though otherwise

when the object is to impose upon third person, § 698.

Notes of a prohibited denomination may be forged, § 699.

A forged bank note must be such as to support a *prima facie* case, § 700.

Fraud on public at large is sufficient to sustain indictment, § 701.

Not forgery to induce another to sign his name, § 702.

IV. UTTERING.

Uttering and publishing is knowingly passing an instrument as good, § 703.

Uttering forged notes is indictable at common law, § 704.

To uttering an intent to defraud is necessary, § 705.

Uttering may be inferentially proved, § 706.

No defence that instrument was obtained by a trap, § 707.

But there must be an exhibition of the instrument *lucri causa*, § 708.

And a capacity to injure, § 709.

When offence is felony, parties counselling are accessories before the fact, § 710.

Venue is placed where forged instrument was passed, § 711.

Uttering is an independent offence, § 712.

Intent to defraud to be inferred from facts, § 713.

No defence that there was no party at the time to be defrauded, § 714.

Scienter may be proved by other forgeries and utterings, § 715.

V. PROOF OF CHARTER OF BANK.

When bank is defrauded, existence of bank must be proved or judicially noticed, § 716.

VI. INTENTION.

Intention to defraud necessary to offence, § 717.

No defence that the party intended no harm, or that the claim was just, § 718.

VII. HANDWRITING, § 719.

VIII. HAVING COUNTERFEIT MONEY IN POSSESSION.

Having counterfeit money in possession with intent to defraud is a statutory offence, § 720.

Indictment in such case must describe as in forgery, § 721. *Scienter* in such case is material, § 722.

Intent to be inferred, § 723.

Having in possession several kinds of notes is one offence, § 724.

IX. INFERENCE OF FORGERY FROM EXTRINSIC FACTS.

Collateral mechanical evidence of forgery, § 725.

Presumption of forgery from uttering, § 726.

X. INDICTMENT IN FORGERY AND UTTERING.

Not duplicity to state the offence in varying phases, § 727.

Variance as to general designation of instrument fatal, § 728.

Instrument must be accurately set forth, § 728 *a*.

Of a foreign language translation must be given, § 729.

Setting forth of non-producible instruments may be excused, § 730.

Vignettes and mottoes need not be given, § 731.

Nor stamps, § 732.

Indorsements need not be given nor surplusage, 733.

Otherwise as to dates, 734.

Altered and inserted words, when material must be averred, § 735.

Sewing to indictment is not sufficient, § 736.

"Tenor" means words; "purport," character, § 737.

"Purporting to be" not essential, § 738.

Indictment must show instrument to be capable of being used in legal process, § 739.

Must aver extraneous facts when necessary for this purpose, § 740.

In setting forth charters of banks indictments must conform to statute, § 741.

Intent to defraud must be specially averred and so of *scienter*, § 742.

Possibility of fraud is enough to sustain averment, § 743.

Party to be defrauded must be specified, § 743 *a*.

When notes of fictitious bank are forged, party on whom notes are passed should be averred, § 744.

Actual damage need not be averred or proved, § 745.

Not always necessary to aver person on whom paper is passed, § 746.

Place of uttering may be laid as place of forgery, § 747.

XI. COINING.

State courts take jurisdiction of, § 748.

Counterfeit must be likely to deceive, § 749.

All participants are principals, § 750.

General description of coin is enough, § 751.

Offering with intent to defraud is uttering, § 752.

Guilty knowledge is to be inferred from facts, § 753.

Existence of genuine original need not be proved, § 754.

Fraudulent diminution is coining, § 755.

POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)

I. DEFINITION.

§ 653. FORGERY at common law¹ is defined by Sir Wm. Blackstone as the fraudulent making or altering of a writing to the prejudice of another's right,² and by Mr. East as the false making or altering, *malo animo*, of any written instrument for the purposes of fraud and deceit.³

According to Sir J. F. Stephen,⁴ "every one commits a misdemeanor who forges any document by which any other person may be injured, or utters any such document knowing it to be forged, with intent to defraud, whether he effects his purpose or not."⁵

In 1865, in a remarkable case, which will be hereafter criticised,⁶ Cockburn, C. J., declared that forgery, "by universal acceptation, is understood to mean" "the making or altering a writing so as to make the alteration purport to be the *act of some other person*, which it is not." But this definition was soon found too scant, and afterward, in 1869, we hear it announced on a crown case reserved, by Kelley, C. B., with the concurrence of all his associates, that the offence consists in the fraudulent making of an instrument, in words purporting to be what they are not, to the prejudice of another's rights.⁷

By Blackburn, J., in the same case, the following definition

¹ That the crime of uttering forged papers is included in the common law definition of forgery, see *In re Adutt*, 55 Fed. Rep. 376, 1893.

² 4 Bl. Com. 247. As to intent to defraud, see *infra*, § 717.

³ See 2 Russ. on Cr. 709 *et seq.* for a full examination of the English cases; and see, also, 2 East P. C. 852; *State v. Kimball*, 50 Me. 411, 1861; *Com. v. Chandler*, Thacher C. C. 187, 1828; *Pennsylvania v. McKee*, Addis 33, 1792; *Van Horne v. State*, 5 Ark. 1845.

⁴ Dig. Crim. Law, art. 366.

⁵ Of this he gives the following illustrations:

An order from a magistrate to a jailer to discharge a prisoner as upon bail being given. *R. v. Harris*, R. & M. (1 Moody) 393, 1833. *Infra*, §§ 682, 683.

A certificate of character to induce the Trinity House to enable a seaman to act as master. *R. v. Toshack*, 1 Den. C. C. 492, 1849. *Infra*, § 637.

Testimonials whereby the offender obtained an appointment as a police constable. *R. v. Moah*, D. & B. 550, 1856. *Infra*, § 687.

The like with intent to obtain the office of a parish schoolmaster. *R. v. Sharman*, Dears. C. C. 285, 1854. *Infra*, §§ 653, 685, 705.

A certificate that a liberated convict was gaining his living honestly, to obtain an allowance. *R. v. Mitchell*, 2 F. & F. 44, 1860. *Infra*, § 687.

⁶ *In re Windsor*, 6 B. & S. 522, 1865; 10 Cox C. C. 118; the latter report being the fullest; and see criticism, *infra*, § 667.

⁷ *R. v. Ritson*, L. R. 1 C. C. 200, 1869. *Infra*, § 663.

from Comyn is adopted: "Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of another." This definition comes nearer than the two previous toward satisfying the cases which will appear hereafter. As, however, it is too limited in its description of the instrument of forgery ("deed" or "writing"), the following definition is now proposed:

Forgery in making a false suable¹ document with intent to defraud.²

Forgery is the making a false suable document with intent to defraud.

Is a misdemeanor at common law.

The offence is consummated by the making of a false document, on which suit might be brought, with intent to defraud, without any uttering.³

§ 654. By the common law forgery is a misdemeanor.⁴

By statutes passed in England and the United States, various kinds of forgery are made felonies. Whether in particular cases the statute has absorbed the offence is a matter of special statutory construction. It may be generally stated that unless the statute, in its terms, undertakes to be absorptive, establishing a statutory offence coextensive with the offence at common law, forgery may still be pursued as a common law misdemeanor in cases to which the statute does not reach, in those States where a common law criminal jurisdiction exists. On the other hand, when the statute in its terms is coextensive with the common law, then the statutory remedy must be exclusively followed; and eminently important is it for the pleader to recollect this in cases where by statute the offence is made a felony.⁵ Yet as a rule, in those States in which there is a common law criminal jurisdiction, the legislature has not attempted to absorb the common law in one sweeping statutory enactment, but has simply (as in England) declared that certain kinds of forgery shall be felonies, or shall be subject to special penalties. Where this is the

¹ I insert this limitation in accordance with the law hereafter given (infra, §§ 680-86) and to exclude the falsification of historical and news documents. The publication of false news is an independent offence. *Infra*, § 1448.

² 3 Steph. Hist. Crim. Law, 186. See discussion of Eno's Case, 30 Alb. L. J. 144 *et seq.*; Spear on Extrad. (2d ed.) 276. The definition and classifica-

tion of forgery in New York has been remodelled in the Penal Code of 1882, §§ 509 *et seq.*

³ R. v. Crocker, 2 Leach, 987, 1805; R. & R. 97; Com. v. Ladd, 15 Mass. 526, 1819; Com. v. Chandler, Thacher C. C. 187, 1828.

⁴ *Supra*, § 22. State v. Murphy, 17 R. I. 698, 1892.

⁵ See *supra*, §§ 25-8.

case, other kinds of forgery, not enumerated in the statutes, may be prosecuted at common law.

That forgery of federal securities is cognizable in State courts we have already seen.¹

II. MODES OF PERPETRATION.

§ 655. Where forgery is a misdemeanor, all concerned, by force of the general rule as to misdemeanors, are principals.

Where, however, the offence—*e. g.*, in counterfeiting—is a statutory felony, those counselling and advising are accessories before the fact, in those States in which the distinction between principal and accessory is maintained, while in other States such persons are principals. But all actually contributing to the work are principals.² Nor is it necessary that they should be cognizant of each other's action. Thus in trials for forging bank paper, the maker of the paper, the engraver of the plate, the filler up of the instrument, have been held principals, though no one of them knew that the others were concerned.³

Parties
concerned
in are
principals.

A fortiori is this the case with principal and agent, the principal present and commanding, and the agent executing.⁴ And a party acting through an innocent agent is principal in the first degree.⁵

§ 656. Forgery may be committed by a partner, in falsely altering the books of the firm, when the intent is to defraud his partners.⁶

Partner
may be
guilty of
as against
partner.

§ 657. *When a person signs paper in his own name, though it be on a false affirmation of procuration from another, this is not forgery,*⁷ unless, as we will see, the name written is used in such a way as to throw the

Party sign-
ing his
name

¹ *Supra*, § 266.

1875; *Gooden v. State*, 55 Ala. 178,

² See *Gregory v. State*, 26 Ohio St. 510, 1875; *State v. Crab*, 121 Mo. 554, 1894; *Com. v. Fitzpatrick*, 3 Penn. Distr. Rep. 305, 1894. *Infra*, § 710.

³ *R. v. Smith*, 9 Cox C. C. 162, 1862;

⁴ *R. v. Dade*, 1 Mood. C. C. 307, 1831; *R. v. Kirkwood*, *Ibid.* 304, 1831. *Supra*, § 216.

Leigh & C. 168; *R. v. Moody*, 9 Cox

⁵ *R. v. Dodd*, 18 L. T. (N. S.) 89, 1868.

These are cases of forgery by the treas-

⁶ *R. v. Bingley*, R. & R. 446; *Com. v. Stevens*, 10 Mass. 181, 1813; *Langdon v. People*, 133 Ill. 382, 1890; *Territory v. Barth*, (Ariz.) 15 Pac. Rep. 673, 1887.

urers of voluntary societies to defraud their associates; but the reasoning applies to all partnerships.

⁷ *R. v. White*, 2 C. & K. 404, 1849; 1 Den.-C. C. 208; 2 Cox C. C. 210.

⁸ *Com. v. Hill*, 11 Mass. 136, 1814; *Gregory v. State*, 26 Ohio St. 510,

For other cases, see *infra*, §§ 669, 674.

when
such name
is another's
may be
guilty of
forgery.

onus of the obligation on another person bearing the same name. But if the name signed is common to two persons, one of whom signs it, or causes it to be signed¹ in such a way (*e. g.*, by adding or even implying a wrong

¹ So in a case where an innocent person was induced to sign his name as accepting a bill, and the defendant introduced a false address, it was held forgery. *R. v. Blenkinshop*, 2 C. & K. 531, 1847; s. c. 1 Den. C. C. 276; *R. v. Mitchell*, Ibid. 282, 1844; *State v. Farrell*, 82 Iowa, 553, 1891. *Infra*, §§ 670, 713.

Sir J. F. Stephen (Dig. Crim. Law, art. 356) gives the following:

"To make a false document is—

"(a) To make a document purporting to be what in fact it is not; *R. v. Ritson*, R. & M. 486; *infra*, §§ 663, 682;

"(b) To alter a document, without authority, in such a manner that if the alteration had been authorized it would have altered the effect of the document; *R. v. Hart*, R. & M. 486; *Moore v. Com.*, 92 Ky. 630, 1892; *Com. v. Wilson*, 89 Ky. 157, 1889; *infra*, § 671; s. c. 7 C. & R. 652;

"(c) To introduce into a document, without authority, whilst it is being drawn up, matter, which, if it had been authorized, would have altered the effect of the document; *R. v. Griffiths*, D. & B. 584;

"(d) To sign a document—

"(i) In the name of any person without his authority, whether such name is or is not the same as that of the person signing;

"(ii) In the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing; *infra*, § 670. *Sheppard's Case*, 1 Leach, 226; *R. v. Parkes*, 2 Leach, 775; *infra*, §§ 660, 726;

"(iii) In a name represented as

being the name of a different person from that of the person signing it, and intended to be mistaken for the name of that person; *R. v. Mahoney*, 6 Cox C. C. 487; *infra*, § 670;

"(iv) In a name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be; *R. v. Hatfield*, 2 Russ. on Cr. 733.

"But it is not making a false document—

"To procure the execution of a document by fraud; *R. v. Chadwick*, 2 M. & R. 545; *infra*, §§ 674, 702;

"To omit from a document being drawn up matter which would have altered its effect if introduced, and which might have been introduced, unless the matter omitted qualifies the matter inserted; 1 Hawk P. C. 265;

"To sign a document in the name of a person personated by the person who signs it, or in a fictitious name, provided that the effect of the instrument does not depend upon his identity with that person, or the correctness of the same assumed by him.

"It is not essential to the making of a false document that the false document should be so framed that, if genuine, it would have been valid or binding, provided that, in cases in which the forgery of any particular instrument is made a specific offence by any statute, the false document must, in order that the offence may be completed, fall within the description given in the Act. But see *infra*, § 692.

address) as to make the writing purport to be by that other, this is forgery;¹ and so when one of these two, having obtained possession of a bill, cheque, or order payable to another, indorses it, knowing he is not the person to whom the bill or check was payable.² This is falsely personating another, and signing that other's name, which is indictable as forgery;³ and it is no defence that the two parties have the same name.

§ 658. But it is said to be otherwise when names are not identical (*e. g.*, Storer and Story), and when the defendant, by signing his true name (Story), obtains from the post-office a money order addressed to Storer. This may be indictable as a false pretence, but not as a forgery at common law.⁴

Otherwise when names are slightly variant.

§ 659. It is forgery to sign a money order in an assumed name, if the name were assumed to defraud the person to whom such order was given, though the prisoner was known to the prosecutor only by the assumed name.⁵ But obtaining money on the pretence that a signature by a non-existent person is good, is not forgery but false pretences.⁶

Forgery to sign under an assumed name.

§ 660. It may, however, be forgery⁷ to sign the names of non-

"The fact that a document is made to resemble that which it purports to be, and is not, is evidence, for the consideration of the jury, of an intent to defraud, but is not essential to the making of a false document.

"Provided that, in cases in which the forgery of any particular instrument is made a specific offence by any statute, the false document must have such a resemblance to the document which it is intended to resemble as to be likely to deceive a common person "

¹ *R. v. Webb*, Bayl. Bills, 432; *Barfield v. State*, 29 Ga. 127, 1859. See *Com. v. Foster*, 114 Mass. 311, 1873. In *State v. Robinson*, 1 Harr. (N. J.) 507, 1838, it was held forgery to change on a bank bill the name of the city where the bank was situate so as to charge another bank of the same name but of a different city.

² *R. v. Aickles*, 2 East P. C. 988;

¹ Leach C. C. 438, 1787; *R. v. Bontien*, R. & R. 260, 1813; *People v. Peacock*, 6 Cowen, 73, 1826; *U. S. v. Long*, 30 Fed. Rep. 678, 1887; *State v. Wheeler*, 20 Oreg. 192, 1890. *Infra*, § 670.

³ *R. v. Epps*, 4 F. & F. 81, 1864; *Mead v. Young*, 4 T. R. 28, 1790. *Infra*, § 680

⁴ *R. v. Story*, R. & R. C. C. 81, 1805.

⁵ *R. v. Francis*, R. & R. C. C. 209, 1811. See, fully, *infra*, 660.

⁶ *R. v. Martin*, 14 Cox C. C. 375, 1879; 41 L. T. (N. S.) 531; see *infra*, §§ 1144, 1162.

⁷ *R. v. Lewis*, Fost. 116; *R. v. Wilks*, 2 East. P. C. 957; *R. v. Bolland*, *Ibid.*; *R. v. Lockett*, 1 Leach, 94, 1772; *R. v. Parks et al.*, 2 *Ibid.* 775, 1796; 2 East P. C. 963; *R. v. Froud*, 1 B. & B. 300; R. & R. 389, 1819; *R. v. Sheppard*, 1 Leach, 226, 1781; *R. v. Whiley*, 2 *Ibid.* 983, 1804;

existent persons or of a non-existent firm,¹ who apparently (though not really) represent responsible parties. If, however, the fictitious name be one which the defendant had been accustomed to employ, and under which he had done business, a conviction cannot be sustained;² nor is it forgery when the offence is not the assumption of the name of a supposed third person, but the adoption of *an alias* or alternative name by the party charged.³

It is forgery at common law to forge the name of an imaginary child as representative of a childless person.⁴ So, also, is it indictable, on the same reasoning, to forge the name of a non-existing, though apparently responsible, corporation, when the object is to defraud.⁵ This principle is of much use in cases where a corporation alleged to be defrauded is incorrectly described, or is prohibited from issuing the notes in question.⁶ In such case it is sufficient to aver as the party defrauded the person on whom it is attempted to pass the forged note.⁷

§ 661. Where the drawer of a paid check on a bank, after it was

R. & R. 90, 1805; R. v. Francis, Ibid. 209; and see R. v. Webb, 3 B. & B. 228, 1821; R. v. Watts, R. & R. 436, 1821; U. S. v. Turner, 7 Pet. 132, 1838; State v. Hayden, 15 N. H. 355, 1844; Com. v. Costello, 119 Mass. 214, 1876; Com. v. Smith, 6 S. & R. 569, 1819; Sasser v. State, 13 Ohio, 453, 1844; State v. Givens, 5 Ala. 747, 1843; Henderson v. State, 14 Tex. 503, 1855; Lascelles v. State, 90 Ga. 347, 1892; State v. Minton, 116 Mo. 605, 1893; State v. Allen, 116 Mo. 548, 1893; Brewer v. State, 32 Tex. Cr. 74, 1893; Billings v. State, 107 Ind. 54, 1886; People v. Parker, 67 Mich. 222, 1887; State v. Wheeler, 20 Oreg. 192, 1890; State v. Warren, 109 Mo. 430, 1891. As to intent, see R. v. Bontien, R. & R. 260, 1813; R. v. Peacock, Ibid. 273. See *infra*, § 698.

not really) good name may be forgery. See People v. Elliott, 90 Cal. 586, 1891, where the defendant intended to forge the check of R. & M., a firm, but actually signed A. E. R. & Co. *Held*, not forgery, although indictable under statute of California for making and passing checks bearing fictitious names

¹ R. v. Bontien, R. & R. 260, 1813; R. v. Aickles, 1 Leach C. C. 438, 1787; 2 East P. C. 988.

² R. v. Martin, 14 Cox C. C. 375, 1879; affirming Dunn's Case, 1 Leach C. C. 57, 1765; Com. v. Baldwin, 11 Gray, 197, 1858.

³ R. v. Lewis, 2 East P. C. 957.

⁴ *Infra*, §§ 698, 716; U. S. v. Mitchell, Baldwin C. C. 366, 1881; White v. Com., 4 Binn. 418, 1812; Buckland v. Com., 8 Leigh, 732, 1837.

¹ R. v. Rogers, 8 C. & P. 629, 1838; R. v. Ashby, 2 F. & F. 560, 1860. In other words, to declare a bad note to be good is a false pretence; to sign a bad note by an apparently (though

⁶ *Infra*, § 698.

⁷ *Infra*, § 744. As to false pretence in such cases, see *infra*, §§ 1128, 1162.

returned to him, altered his signature so as to give it the appearance of forgery, in order to defraud the bank and criminate the payee, this has been held in England not to be forgery.¹ But as an action, supposing the altered signature to be what it purported to be after alteration, would lie against the bank in favor of the alterer, this decision cannot be sustained.²

Forgery to alter writer's name when effect is to defraud.

The test is, could such an action *primâ facie* lie on such fraudulently altered paper, by means of such alterations, against a person intended, directly or indirectly, to be defrauded? If it could not, the offence, no doubt, is not forgery.³ But if it would sustain such an action, forgery is made out.

§ 662. Is it forgery to alter one's own deed, so as to make it purport to be what it is not, and thus, if it be sustained as altered, to prejudice the rights of another? Now if A., engaging with B. to convey to the latter certain land, and undertaking, after the terms are settled, to draw the deed, omit or introduce a material item in defiance of his agreement, this may be forgery, in accordance with principles hereafter laid down in another relation.⁴

And so to falsely alter one's own executed deed.

And it is clear that if, after a vendor, by an instrument duly executed, has conveyed land to another, he should falsely alter the date of the deed, so as to cut out intermediate incumbrances, this would be forgery. The deed has become a muniment of title; a false alteration is made in it in such a way as to prejudice prior vendees or mortgagees, if the alteration be sustained; and hence it is forgery to make the alteration.⁵

§ 663. Still further has this principle been pushed in England, in a decision sustained by the judges in 1869, in a crown case reserved. A., the vendor of lands, after duly conveying them to B., who entered into possession, leased them to C. (A.'s son), by a deed antedating that to B., and C. produced this lease in an action against B. Was the introduction of this false date forgery in A. and C.? So was

Fraudulently executing a deed with a false date may be forgery.

¹ *Brittain v. Bank of London*, 3 F. & F. 465, 1862; 11 W. R. 569.

² See 2 Russ. on Cr. 719. *Infra*, § 695.

³ *People v. Fitch*, 1 Wend. 198, 1828; *People v. Cady*, 6 Hill, 490, 1844. *Infra*, §§ 680 *et seq.*

⁴ *Infra*, § 671.

⁵ *People v. Fitch*, 1 Wend. 198, 1828, may seem to conflict with this principle; but the paper altered by the maker in *People v. Fitch* was not a muniment of title, but an exhausted draft.

it held by the judges, relying on the definition already given, that making an instrument fraudulently purporting to be that which it is not is forgery.¹ This has been doubted in Massachusetts;² and, indeed, under our registry laws, it is difficult for a fraud of this kind to be made effectual in reference to real estate. It could arise, however, in all cases where a fraudulent subsequent assignment of chattels is set up with a false date to defeat an intervening *bonâ fide* attachment or sale. It was said by Kelly, C. B., in sustaining the conviction in the case above cited, that it was impossible to distinguish the case from those in which deeds made in false names were held to be forgeries. To fabricate a deed with a false date issuing from a prior deceased grantor, with intent to cut out a subsequent grantee, would be clearly forgery; why not a falsely antedated deed emanating from the forger himself? Now the position that executing a deed in a fictitious name is forgery is too well and too justly settled to be shaken; and as in the case before us the material point in the deed is *date* and not *name*, we may accept as authoritative the decision on which we here comment. The deed is a forgery, because it is a fictitious deed, emanating from a person who in the eye of the law is dead as to the particular property, but who falsely claims to be alive as to such property, and capable of disposing of it.³ And it was declared, in the language of Blackburn, J., "that every instrument which fraudulently purports to be that which it is not, is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed."

§ 664. Is the entry of a false item in a pass-book forgery? As illustrating this, we may take pass-books with grocers or other tradesmen, the book being kept by the customer, and the vendor entering, from time to time, sales; or, as another instance, a banker's pass-book, in which the banker enters from time to time cash received or paid out by him. Is it forgery for either party falsely and fraudulently to make or alter

Forgery to
make false
entry in
pass-book.

¹ R. v. Ritson, 39 L. J. M. C. 10; C. C. 276; R. v. Mitchell, Ibid. 282, L. R. 1 C. C. 200, 1869, relying on 1847; Com. v. Wilson, 89 Ky. 157, Coke, 3 Inst. 169. 1889; and R. v. Epps, 4 F. & F. 81,

² Com. v. Baldwin, 11 Gray, 197, 1864, in which the *name* was genuine, 1858. but the forgery was in making the

³ As analogous cases, see R. v. Blenkinsop, 2 C. & K. 531, 1847; 1 Den. address.

entries in such books, to the prejudice of the other party? Now such books are the joint property of the two parties; and each acts as the agent of the other in making entries. Hence, if one make an entry, contrary to the instructions either express or implied of the other, this is equivalent to an agent fraudulently filling up a blank intrusted to him with a wrong sum, which, as will presently be more fully seen, is forgery.¹ *A fortiori* is this the case when either party fraudulently alters a prior entry.²

§ 665. It may be also forgery, as we will see more fully, to fraudulently affect settlements of book accounts by the subsequent introduction of false items.³

So of entries in book settlements.

§ 666. We must extend this reasoning to such books of original entry as by the *lex loci contractus* are evidence against a vendee. A. goes to B.'s store to purchase goods under such a law. He buys his goods, and the price is fixed; and B. becomes A.'s agent for the purpose of entering the sale in B.'s books of original entry. Now if B. enters fraudulently wrong articles or sums, this is equivalent to filling up a blank in A.'s cheque for a larger amount than A. directs. A. authorizes B. to charge him with a particular amount in a writing that binds A. B. enters fraudulently a larger amount. This, on the principle just stated, is forgery in B.⁴ It is true that this was apparently denied in New Hampshire, in 1865, in a case where it was held not forgery for a man to make a false entry in his own account book,⁵ a proposition which is correct in those cases where the accountant, in accounting, acts exclusively on his own behalf, and where his entries do not bind another. But the rule is not law in respect to an accountant who acts as agent for another whom he thus binds, nor is it law in those States in which a forged book account may be legal evidence in support of a plaintiff's claim. Perhaps, however, we

So as to books of original entry.

¹ See *infra*, § 671. As to bankers' pass-books, this has been frequently

held: *R. v. Smith*, 9 Cox C. C. 162, 1862; *Leigh & C.* 168, where the entry of a false deposit was made in the pass-book with intent to defraud a society of which the defendant was treasurer, and by showing them the false entries, to be continued in office

as treasurer: *S. P.*, *R. v. Moody*, 9 Cox C. C. 166, 1862; *Leigh & C.* 173; *Harrison's Case*, 1 Leach, 180, 1782.

The same reasoning applies to other pass-books.

² See *Biles v. Com.*, 32 Pa. 529, 1859; *Barnum v. State*, 15 Ohio, 717, 1846; *R. v. Smith*, 9 Cox C. C. 162, 1862; *Leigh & C.* 168; *R. v. Moody*, *Ibid.* 166, 1862.

³ *Barnum v. State*, 15 Ohio, 717, 1846.

⁴ And see *infra*, § 671.

⁵ *State v. Young*, 46 N. H. 266, 1865. See *Biles v. Com.*, cited *infra*, § 667.

may trace the decision of the court in this case to the peculiar structure of the New Hampshire statute. "In examining our statute," said Sargent, J., who gives the opinion of the court, "it will be seen that almost every form of writing or instrument known to the law is specifically enumerated as the subject of forgery, but no mention is made of accounts or books of account. Is it not probable that if the law was intended to apply to so common a thing as accounts, they would have been mentioned with the other things specified?"

§ 667. Is a clerk guilty of forgery in making a false entry in a book he is employed to keep? If he be directed by his principal to enter one sum, and with intent to defraud the principal he enter another sum, then this is forgery.¹ The case is in fact the same as those elsewhere cited,² where it is properly ruled to be forgery for a person employed to fill up a blank to fill it up with a sum larger than his principal authorizes.³

But supposing the clerk is not directed by his employer to enter simply a particular statement in his books, but has a general discretion allowed him as to the mode of keeping the same, and suppose there are no specific commands from his employer as to the particular item alleged to be charged? Here we come to an apparent conflict of authorities, the first of which in point of time is a case in Pennsylvania, decided in 1859, where it was held that it was forgery for a confidential clerk to "make a false addition of one figure in the amount of cash received from bills receivable, in the month of August, 1856, and in the alteration of another true figure in said addition. The true addition was \$6,455.63, while the false addition was \$5,955.63, the first figure, 5, being an alteration of the original figure in the addition, which was a 6. The result of this forgery was to represent the cash received five hundred dollars less than the actual amount; and of course, to enable their clerk to abstract that sum from the funds of the firm." This was held forgery, first in the Philadelphia Quarter Sessions, and secondly, in the Supreme Court of the State. "The act in question," said Judge Ludlow, in the course of a lucid and well-argued opinion delivered by him in the court below, "was not only prej-

¹ *McConnell v. Kennedy*, 29 S. C. 180, 1888.

² See *Biles v. Com.*, 32 Pa 529, 1859.

³ See *infra*, § 671.

udicial to the rights of the prosecutors, but the writing, if genuine, might have been 'the evidence of their rights.' True, the 'journal' would not be received as evidence for the prosecutors in a suit of law, but in equity, for collateral purposes, it might have been evidence of their rights; and then, by the adjudged cases, the offence committed would have been forgery." "Again, the entry in question is, in substance, an acquittance, or in the nature of a receipt from the firm to the defendant; as confidential book-keeper, he receives the amount of the bills receivable; to discharge himself from liability, he enters the several items in the journal as the *agent of the firm*; and then, not as the agent of the firm, but as an individual and for his own wicked gain, so erases or alters, or makes a figure or figures in the sum total representing the addition of the entire entry, as to deceive and thereby defraud his employers." This opinion was accepted and affirmed by the Supreme Court, and in both points the ruling can be sustained on the reasoning above given. The books, as altered, could, in several aspects, be made the basis of civil action against the defendant's employer. And they were sufficiently the books of such employer as to make any false entry in them by the defendant forgery.¹

But in 1865, on a *habeas corpus* in an extradition case before the English Queen's Bench, that court, under the leadership of Cockburn, C. J., uttered a different view of the law from that which has just been expressed.² The cases, indeed, were by no means identical. Charles Windsor, the party petitioning the English court in the case now before us, had been a clerk in the Mercantile Bank of New York, and as such had charged himself on the books, on October 28, 1864, with nearly \$250,000 more assets than were deposited in the vaults to his credit; this sum having been embezzled by him. Was this forgery? No doubt the entries could, if genuine, have been used as evidence in a suit against the bank, and no doubt they were false, and made with intent to lull the suspicions of the bank until the work of embezzlement was complete, and the offender had safely absconded. But were they false in the sense of being a false receipt from the bank to the forger, as was the case in the Pennsylvania prosecution just cited?

¹ *Biles v. Com.*, 32 Pa. 529, 534, 537, *v. Com.* is discussed and disapproved 1859. To the same effect is an unreported decision of Judge King, a master of this department of law, in *Com. v. Nicholson*, Phil. 1842. *Biles* ^{75 60 56} *in re Hall*, 8 Ont. App. 31, 1882. ² *Ex parte Windsor*, 10 Cox C. C. 118; 6 B. & S. 522, 1865.

In one sense they were, because, if they were true, the bank could have no claim against the clerk making them. And if so, the latter was indictable for forging what was a receipt from his employers.¹ These points, however, were not argued before Chief Justice Cockburn, nor, indeed, permitted to be argued. At the very outset he peremptorily announced a definition of forgery which expressly excluded the case before the court. "Forgery," he declared, "was in 'universal acceptation,' the making or altering a writing so as to make the writing or alteration purport to be the act of *some other* person, which it is not."² Of course, after this summary disposal of the case, the counsel for the United States could say but little. They suggested, however, that the case before the court might be put on the same footing as that of *R. v. Hart*, where it was held forgery for an agent fraudulently to fill up a blank acceptance with a larger sum than was directed. To this, however, Chief Justice Cockburn replied: "There a man passed off as the acceptance of the acceptor a different sum from that the acceptor meant. This is a statement *to* the bank, not a statement put forward *by* the bank." Upon the reasoning above given three criticisms may be ventured. *First*, the definition proclaimed by Chief Justice Cockburn as ruling the case was afterward rejected by the judges sitting in 1869 on a crown case reserved,³ and a definition adopted which would have included the case now before us. *Secondly*, the position that a false statement made *to* the party defrauded is not forgery, when it might be if it purported to be made *by* the party defrauded, is in conflict with several well-considered English rulings.⁴ *Thirdly*, a statement

¹ See *R. v. Moody*, L. & C. 173, 1862; in which, on an indictment for forging an entry on a banker's pass-book, Martin, B., said: "The forged document, if genuine, would have been evidence that the bank had received the money, and was accountable for it. Then why is it not an accountable receipt?" See *Eno's Case*, 30 Alb. L. J. 144. *In re Tully*, 20 Fed. Rep. 812, 1884, it was held (in an extradition case), that false entries in book accounts by a bank officer, for the purpose of covering defalcations, is not forgery by the English law. The case was declared by the court to be identical with that of *Windsor*, above cited.

² In this, as in other rulings by Cockburn, C. J., in cases in which the United States were concerned, as a political power, during the late civil war, there is a hardness of tone toward the United States, which may be explained by the critical relations in which the two governments then stood. How far the decision here criticised was thus unconsciously affected need not now be discussed.

As giving the New York rule, see *People v. Phelps*, 49 How. Pr. 462, 1875.

³ See *supra*, § 653; *R. v. Ritson*, L. R. 1 C. C. 200, 1869.

⁴ *R. v. Smith*, 9 Cox C. C. 162, 1862; L. & C. 168; *R. v. Moody*, 9 Cox C. C. 166, 1862; L. & C. 173; *R. v. Dodd*,

to a principal by an agent may be also a statement by the principal who accepts the statement. The actual point, however, ruled by Cockburn, C. J., is still accepted in England as law.¹

§ 668. To sign the name of another, without authority, it need scarcely be repeated, is forgery at common law,² providing something like deceptive similitude is attempted.³ Even where a person, relying on the kindness of another (*e. g.*, a near relative), puts the latter's name to an obligation, this is forgery.⁴ Nor is it any defence that the party forging intended to pay the obligation before maturity.⁵ It is also forgery in A. to induce C. (an innocent agent) to forge B.'s name, on the pretence that B. had authorized C. to do so.⁶

Signing
another's
name
without
authority
is forgery.

§ 669. When the signature is made by an alleged agent in the principal's name, it should appear, to sustain a prosecution for forgery, that the act was without authority; and where, from the course of dealings between the parties, the agent has reached the *bonâ fide* belief that he is entitled to act for the principal, a case of forgery cannot be made out.⁷ So where a person for a series of years forged the name of his friend as the indorser of his notes and bills, with the knowledge of his friend, who, although judgments were obtained and executions issued against him in suits on such forged indorsements, never disavowed such acts until the person committing the forgeries had absconded and fled from justice, it was held,

Agent
having
bonâ fide
belief he
was
authorized
not so
indictable.

18 L. T. (N. S.) 89, 1858. See *In re Jarrard*, 4 Ont. R. 278, 1879, where it was held (on extradition process) that the altering in his own favor by a public officer, "made to falsify the whole of an audited account," is forgery.

¹ *Infra*, § 718.

² See *Lamirande's Case*, 10 Low. Can. R. 780, 1860; *In re Tully*, *ut supra*; *Spear on Extrad.* (2d ed.) 271.

⁶ *Gregory v. State*, 26 Ohio St. 510, 1875.

³ *R. v. Forbes*, 7 C. & P. 224, 1835; *R. v. Hill*, 8 C. & P. 274, 1835; *Dixon's Case*, 2 Lewin, 178; *Com. v. Henry*, 118 Mass. 460, 1875; *Roush v. State*, 34 Nebr. 325, 1892. *Infra*, § 680.

⁷ *R. v. Forbes*, 7 C. & P. 224, 1835; *R. v. Parish*, 8 Ibid. 94, 1837; *R. v. Watts*, 3 B. & B. 197; s. c. R. & R. 436; *R. v. Clifford*, 2 C. & K. 202, 1846; *Parmalee v. People*, 8 Hun, 623, 1876; *Shanks v. State*, 25 Tex. 326, 1860; *Sweet v. State*, 28 Tex. App. 222, 1889; *McCay v. State*, 32 Tex. Cr. 233, 1893; *People v. Reinitz*, 6 N. Y. Sup. 672, 1889; *People v. Loew*, 19 N. Y. Sup. 360, 1892; *In re Tully*, 20 Fed. Rep. 812, 1884; *Aholtz v. People*, 121 Ill. 560, 1887; *Kotter v. People*, 150 Ill. 441, 1894. See *Moore v. Com.*, 92 Ky. 630, 1892. *Supra*, § 148.

⁴ *Abbott v. State*, 59 Ind. 70, 1878; *State v. Warren*, 109 Mo. 430, 1891.

⁵ *R. v. Beard*, 8 C. & P. 143, 1837.

in a case where the indorser was sued and suffered a default, and attempted no defence until after the escape of the maker of the notes, that proof of these facts was admissible in evidence, and that from them the jury might imply an authority from the indorser to the maker thus to use his name.¹

To show authority from the prosecutor, a letter left unanswered from the defendant to the prosecutor, claiming authority, has been held to be evidence sufficient for the jury.² And where the person whose name was used was informed of it at the time, and did not at once repudiate it, although upon the trial he was a witness, and denied all authority, this is a defence.³

But a person who signs his name as attorney for another without authority may, if he claim to be authorized so to sign, be indictable for a false pretence, but not for forgery.⁴ To hold it forgery would make it forgery when A., falsely giving B. as authority, writes any statement with intent to defraud. But where there is no claim to authority, signing another's name to negotiable paper is forgery.⁵

§ 670. It has been already stated that when there are two persons of the same name, it is forgery in one of them to use his name in such a way as to fraudulently charge another.⁶ This rule properly applies to cases where the forging is done by the defendant as agent for a man of straw, or where the latter signs his name at the former's direction, and the former (the defendant) uses the signature so obtained to prejudice a responsible person bearing the same name.⁷ Even when the names are not precisely identical, a conviction may be sustained. Thus, in an English case, *P. M.*, the defendant, undertook to get his mother-in law "C. W.'s" name to two notes. Taking the notes to his wife, he induced her

Fraudulently using a man of straw as acceptor to charge a responsible person of the same name is forgery.

¹ *Weed v. Carpenter*, 4 Wend. 219, 1830. See *R. v. Beard*, 8 C. & P. 143, 1837. son, 28 Minn. 52, 1881, where the question is ably discussed. *Supra*, § 657.

² *R. v. Beardsall*, 1 F. & F. 529, 1859.

³ *R. v. Smith*, 3 F. & F. 504, 1862.

⁴ *R. v. White*, 2 C. & K. 404, 1847; 2 Cox C. C. 210; *R. v. Arscott*, 6 C. & P. 408, 1834; *State v. Young*, 46 N. H. 266, 1865; *Com. v. Baldwin*, 11 Gray, 197, 1857; *Com. v. Foster*, 114 Mass. 311, 1873; *Heilborn's Case*, 1 Parker C. C. 429, 1854; *Mann v. People*, 15 Hun, 155, 1879; *State v. Will-*

⁵ *Supra*, § 655. See *Phipps's Case*, 4 Crim. Law Mag. 865; 8 Ont. App. 77, 1882.

⁶ *Supra*, § 657.

⁷ *R. v. Epps*, 4 F. & F. 81, 1864; *Mead v. Young*, 4 T. R. 28, 1792; *R. v. Webb*, 6 Moore, 447, *n.*; *R. & R.*, 405, 1819; *R. v. Mitchell*, 1 Den. C. C. 282, 1847. See *Com. v. Foster*, 114 Mass. 311, 1873.

to sign them in her maiden name, "A. W.," and handed them over, saying, "Here are the notes." The jury convicted him on the ground that when he got his wife's name to the notes his intention was to use them as his mother-in-law's; and it was held by the judges, on a case reserved, that the conviction was right.¹

It is admissible for the prosecution to introduce such relevant facts as may prove that a nominal acceptor was a fiction, or mere man of straw.²

§ 671. We are now led to an important position which tends to rule many analogous questions in forgery. It is this:

When an agent has authority to fill with a particular sum a blank in a paper signed by his principal, it is forgery to fill the blank with a larger sum. This has been held to be the law even in cases where the writer believed that the

Forgery to fill with terms other than authorized.

larger sum was due him.³ And an unauthorized filling of blanks falls generally under the same rule.⁴ But it is not forgery for a party, after an agreement is executed, to enter *bonâ fide* the terms agreed to by the other party.⁵

§ 672. *A fortiori* is it forgery to fill up without authority a cheque already signed,⁶ and to alter, without authority, in such cheque, the words "order of," to "bearer."⁷

So to fill cheque without authority.

§ 673. It has also been held that a person employed to draw a legal instrument is guilty of forgery if he fraudulently alter a provision in it; and clearly would this be the rule in cases of wills or deeds signed in blank;⁸ and on this principle may be justified the rulings already

So for an agent fraudulently to alter terms he was employed to write.

¹ R. v. Mahony, 6 Cox C. C. 487, 1854.

² R. v. White, 2 F. & F. 554, 1861; R. v. King, 5 C. & P. 123, 1832.

³ R. v. Hart, 1 Mood. C. C. 486, 1832; 7 C. & P. 682, 1836; R. v. Wilson, 2 C. & K. 527, 1847; 2 Cox C. C. 426; 1 Den. C. C. 284; State v. Flanders, 38 N. H. 324, 1859; State v. Kroeger, 47 Mo. 552, 1871; State v. Taylor, 117 Mo. 181, 1893.

That a paper so altered does not bind the party, see Thoroughgood's Case, 2 Co. Rep. 9 b, 1577; Swan v. Land Co., 2 H. & C. 175, 1863; Frazer v. Mackennon, L. R. 4 C. P. 704, 1869; Hollenbeck v. Dewitt, 2 Johns. 404, 1807.

⁴ Wilson v. Commis., 70 Ill. 46, 1873; State v. Maxwell, 47 Iowa, 454, 1877;

People v. Dickie, 62 Hun, 400, 1891; Hooper v. State, 30 Tex. App. 412, 1891; Becker v. State, (Tex.) 18 S. W. Rep. 550, 1892. See Roberts v. State, 92 Ga. 451, 1893.

⁵ Pauli v. Com., 89 Pa. 432, 1879.

⁶ Flower v. Shaw, 2 C. & K. 703, 1848; Wright's Case, 1 Lewin C. C. 135, 1824. See, apparently, *contra*, dictum of Parsons, C. J., in Putnam v. Sullivan, 4 Mass. 45, 1804.

⁷ State v. Kroeger, 47 Mo. 552, 1871.

⁸ See Combe's Case, Noy, 101; Moore, 760; Wilson v. Commis., 70 Ill. 46, 1873; State v. Maxwell, 47 Iowa, 454, 1877.

given, that a clerk is guilty of forgery in making particular entries in his master's book, contrary to his master's specific instructions.¹

§ 674. It is not forgery fraudulently to induce a person to execute a document on a misrepresentation of its contents;² nor to obtain such signature to a document, the contents of which have been altered without the signer's knowledge.³ The defendant in such case has written nothing, and ordered nothing to be written. If it were otherwise, then the case might be forgery. But in Maine, though on reasoning it is difficult to accept, it has been held forgery for a party, after obtaining from a grantor assent to a correct deed, afterward (but before signature) to substitute for it a deed that is incorrect.⁴

§ 675. Aside from writing by pen and ink, forgery may be committed by printing;⁵ by pencil writing;⁶ by the use of another's seal; by pasting one name in a note over another name;⁷ by photographic process;⁸ and by engraving, or preparing materials for engraving;⁹ but not, it is said, by painting, though with intent to defraud, the name of a famous painter upon a picture, so as to secure its sale; the reason given being that forgery is limited to the false making of a document or paper.¹⁰

§ 676. It has just been said that materially to alter a deed or will, or to erroneously fill up a blank in a note, is, when fraudulently done, forgery. There can be no doubt that the *erasure* by a clerk or agent, of a figure, in an account kept by him as such, is as much forgery as is *adding* a

¹ See *supra*, § 667.

Cox C. C. 32, 1858, and cases cited

² R. v. Collins, 2 M. & Rob. 461, 1841; Putnam v. Sullivan, 4 Mass. 45, 1804; Com. v. Sankey, 22 Pa. 390, 1858; Hill v. State, 1 Yerg. 76, 1824; Wells v. State, 89 Ga. 788, 1892; People v. Underhill, 142 N. Y. 38, 1894; see State v. Flanders, 38 N. H. 324, 1859, cited *supra*, § 671.

⁵ Whart. on Ev. § 616.

⁷ State v. Robinson, 1 Harr. (N. J.) 507, 1838.

⁸ R. v. Rinaldi, Leigh & C. 330; 9 Cox C. C. 391, 1863.

⁹ R. v. Dade, 1 Mood. C. C. 307, 1831; R. v. Kirkwood, Ibid. 304, 1831; People v. Rhoner, 4 Parker C. R. 166, 1859. See R. v. Smith, D. & B. 566;

³ R. v. Chadwick, 2 M. & Rob. 545, 1842.

8 Cox C. C. 32, 1858.

⁴ State v. Shurtliff, 18 Me. 368, 1841.

¹⁰ R. v. Closs, Dears. & B. 460; 7

⁶ Com. v. Ray, 3 Gray, 441, 1855; Cox C. C. 494, 1858. See *infra*, § 681. and see R. v. Smith, D. & B. 567; 8

figure. In either case the offence is fraudulent alteration of a writing, which is forgery. The same principle may be extended to every fraudulent abrasion, mutilation, or severance, which materially changes the terms of an instrument. Thus it has been held forgery to fraudulently sever from an instrument a memorandum attached to it, forming with it an entire contract, and investing it with an important qualification;¹ and so of an erasure of a limitation of negotiability.² But it has been said not to be forgery of the main paper to obliterate a receipt from a bond;³ or an indorsement from a note,⁴ these being independent obligations or assurances, in no way affecting the original qualities of the instrument alleged to be forged. In the cases last mentioned the indictment must be for the forgery of the independent obligation or assurance.

§ 677. It is forgery to fraudulently alter any part of an instrument when the alteration is capable of working injury to another. Thus, it is forgery to alter the dates, names, ^{And so of alterations.} or any other material parts of an instrument, when the alteration gives it a new operation.⁵ Consequently, it is forgery fraudulently to alter the sum in a note;⁶ to erase one signature or indorsement and insert another;⁷ to insert after a party's name a

¹ *State v. Stratton*, 27 Iowa, 420, 1869. 1892; *State v. Adamson*, 43 Minn. So, in a case tried in Massachusetts, 196, 1890; *Hennessey v. State*, 23 Tex. in 1813, where the defendant was App. 340, 1887; *Com. v. Hide*, 94 Ky. charged, not with forgery, but with a 517, 1893.

² *R. v. Elsworth*, Bayley on Bills, 430, 1780; 2 East P. C. 986; *R. v. Teague*, Ibid, 979, 1802; s. c. R. & R. 33; *R. v. Post*, R. & R. 101, 1806; *R. v. Atkinson*, 7 C. & P. 669, 1837; *Goodman v. Eastman*, 4 N. H. 455, 1828; *Haynes v. State*, 15 Ohio St. 455, 1864; *State v. Wooderd*, 20 Iowa, 541, 1866; *Surles v. State*, 89 Ga. 167, 1892; *State v. Schwartz*, 64 Wis. 432, 1885; *State v. Wingard*, 40 La. An. 733, 1888. See *Bell v. State*, 21 Tex. App. 270, 1886.

³ *Garner v. State*, 5 Lea, 213, 1880. 733, 1888. See *Bell v. State*, 21 Tex. App. 270, 1886.

⁴ *Thornburg v. State*, 6 Ired. 79, 430, 1813; R. & R. 251; *Com. v. Ladd*, 15 Mass. 526, 1819; *State v. Robinson*, 1 Harr. (N. J.) 507, 1838; *State v. Hitchens*, 2 Harring. (Del.) 527, 1834; *State v. Waters*, 3 Brev. 507, 1814; 2 Tr. Con. R. 569.

⁵ *State v. McLeran*, 1 Aiken, 311, 1826. See *State v. Davis*, 53 Iowa, 252, 1880.

⁶ *State v. Dorrance*, 86 Iowa, 428

false address ;¹ to alter the date of a promissory note or order ;² to antedate a deed, though by the grantor himself, to cut out a prior sale ;³ to insert a solvent banker's name in place of one who had failed ;⁴ to change the vignettes or marginal emblems of a bank note when the effect is to defraud ;⁵ to add to a copy of a receipt, offered to supply a lost original, the words, " in full for all demands ;"⁶ to alter book accounts and pass-books ;⁷ to fill up fraudulently blank cheques or acceptances ;⁸ and to alter a receipt on a note, though such receipt was without signature.⁹ It is even forgery for a person fraudulently to alter an instrument previously forged by himself ;¹⁰ but after a cheque has been paid to alter one's own signature so as to charge the banker with forgery, is an attempt to obtain in only under false pretence.¹¹ But the mere addition of surplusage to a document (*e. g.*, a witness to a paper not requiring a witness, or a mere insensible description) has been held not to be forgery ;¹² though this cannot hold in case where the forged addition might become an increment of the proof of the validity of the document.

§ 678. It should be remembered, however, that the forgery of an *addition* to an instrument cannot, as in the case of the alteration of a substantial integral part, be laid as a forgery of the *whole*. It must be specially alleged, and proved as laid.¹³

The forgery of the obligor's name or of any material integral items, it need scarcely be repeated, may be laid as the forgery¹⁴ of

¹ *R. v. Blenkinsop*, 1 Den. C. C. 276, 1847. *Supra*, § 657.

² *Master v. Miller*, 4 T. R. 320, 1793; s. c. 2 H. Bl. 140; *Henfree v. Bromley*, 6 East, 309, 1805; *Powell v. Devett*, 15 Ibid. 29, 1812; *R. v. Atkinson*, 7 C. & P. 669.

³ See *supra*, § 663.

⁴ *R. v. Treble*, 2 Taunt. 328, 1810; *R. v. R.* 164; *State v. Robinson*, 1 Harr. (N. J.) 507, 1838.

⁵ See *R. v. Keith*, Dears. C. C. 454, 1855; 6 Cox C. C. 533; 29 Eng. L. & E. 558; *infra*, § 681; though see *State v. Waters*, 3 Brev. 507, 1814.

⁶ *State v. Floyd*, 5 Strob. 58, 1850; *Upfold v. Leit*, 5 Esp. 100, 1804.

⁷ *Supra*, §§ 664-6.

⁸ *Supra*, § 671.

⁹ *Kegg v. State*, 10 Ohio, 75, 1840; *State v. Kattleman*, 35 Mo. 105, 1864.

¹⁰ *R. v. Kinder*, 2 East P. C. 855, 1800. *Supra*, § 661.

¹¹ 2 Russ. on Cr. (9th Am. ed.), 718; *Brittain v. Bank of London*, 3 F. & F. 465, 1862. *Supra*, § 661.

¹² *R. v. Treble*, 2 Leach, 1040; 2 Taunt. 328, 1810; *State v. Gherkin*, 7 Ired 206, 1847.

¹³ *R. v. Birkett*, R. & R. 251, 1813. See, fully, *infra*, § 735.

¹⁴ *Jervis's Archbold C. P.* (9th ed.) 365; *R. v. Dunn*, 1 Leach, 57, 1765; *R. v. Bigg*, 1 Stra. 18; *Com. v. Hide*, 94 Ky. 517, 1893; *Strang v. State*, 32 Tex. Cr. 219, 1893; *People v. Henries*, 9 N. Y. Sup. 862, 1890.

the whole obligation. And if one signature be shown to be forged, it is not necessary to prove the forgery of the rest.¹

False personation is not forgery if no writing.

§ 679. False personation of another, unless accompanied by false writing, is not forgery.²

III. WHAT INSTRUMENTS ARE OBJECTS OF FORGERY.

§ 680. To sustain an indictment for forgery it is generally necessary that the instrument alleged to be forged should be one which would expose a particular person to legal process.³

Necessary that the instrument forged should be one on which suit could be brought.

Apparent legal efficiency, however, is enough. It is not necessary that such suit should have in it the elements of ultimate legal success. It is enough if the forged instrument be apparently sufficient to support a legal claim.⁴ It is sufficient, also, if the claim be indirect. Thus,

¹ *People v. Rathbun*, 21 Wend. 509, 1839. forged the indorsement of another person's name, and returned it. It was

² See *R. v. Hevey*, R. & R. 407, n., 1782; 2 East P. C. 856; 1 Leach C. C. 229; *R. v. Story*, R. & R. 81, 1805. held that the prisoner could not be convicted upon this indictment, as the document was only an inchoate in-

³ *Infra*, §§ 692-95; *State v. Corley*, 4 Baxt. 410, 1870; *Clarke v. State*, 8 Ohio St. 630, 1858; *Reed v. State*, 28 Ind. 396, 1867; *Dixon v. State*, 81 Ala. 61, 1886. An application for an insurance policy is not such an instrument as may be the subject of forgery. *Com. v. Dunleay*, 157 Mass. 386, 1892. instrument of no value when the prisoner forged the indorsement, and was not a bill of exchange. See Whart. Cr. Pl. & Pr. § 185. By Stephen, J., it was held the case was one of forgery at common law.

In *R. v. Harper*, 44 L. T. (N. S.) 615, 1881; L. R. 7 Q. B. D. 78, the first count was for forging and uttering an indorsement on a bill of exchange, the second count for forging a paper writing in the form of and purporting to be a bill of exchange, and in the third count for forging a certain paper writing. It appeared that the prosecutor wrote the body of a bill of exchange, but without signing the drawer's name, and sent it to the prisoner, who was to accept it and procure an indorsement by a solvent person, and to return it to the prosecutor. The prisoner accepted it, and

In *Com. v. Dallinger*, 118 Mass. 439, 1875, the court held that an instrument purporting to be signed by I. S., which is made payable to the order of I. S., is not a promissory note until indorsed; and an indictment for forgery which charges, in separate counts, the making and uttering of such a promissory note, without setting out the indorsement by I. S., cannot be sustained, it appearing in evidence at the trial that there was but one I. S. See *Com. v. Henry*, 118 Mass. 460, 1875; *Com. v. Costello*, 120 Mass. 358, 1876; *Thompson v. State*, 49 Ala. 16, 1878.

⁴ *Infra*, §§ 691 et seq.

forging of legal records or writs is indictable, though the only suit that could be brought on the forged document, supposing it to be genuine, would be one against the officer issuing it, for negligence.

§ 681. In a prosecution already cited, for falsely painting an artist's name on the corner of a picture, so as to make the picture pass for an original by such artist, it was held that the offence was not forgery at common law, as forgery must be of a document or writing.¹ The decision can be rested on the ground that the false name thus painted could not under any circumstances be the ground of a suit against the artist who bore the name. If, however, the reasoning of the court rests on the position that there can be no forgery except of a document, limiting a document to a mere form of words, this reasoning cannot be sustained. A baker's tally, in some parts of the United States, consists simply of a stick of wood, deposited with the customer, on which the baker on the delivery of a loaf makes a notch as a voucher of such delivery. There can be no question that, in accordance with the cases heretofore cited,² a false notch by the baker, fraudulently made, is forgery.³ So, taking a "positive" impression of a note, as a preliminary photographic process, is forgery, though the impression is but a picture on glass.⁴ And the false making of the ornamental border of a bank note has been held to be virtually forging a note, though no words were filled in.⁵

§ 682. Whatever falls under the head of bonds, deeds, commercial paper, or receipts, and kindred writings, may be the object of forgery at common law. For the purpose of detailed enumeration, however, it may be mentioned that the principle has been specifically applied to bonds,⁶ to deeds,⁷ to commercial paper of all kinds,⁸ to cheques on

¹ *R. v. Closs*, Dears. & B. 460, 1857; 7 Cox C. C. 494. edness" issued by a city is a "bond," see *Bishop v. State*, 55 Md. 138, 1880.

² See *supra*, § 675. And so of a bail-bond. *Costley v.*

³ See *Rowland v. Burton*, 2 Harr. State, 14 Tex. App. 156, 1883. That (Del.) 288, 1837; *Kendall v. Field*, 14 Me. 30. counterfeiting the securities of foreign nations is indictable, see *U. S. v.*

⁴ *R. v. Rinaldi*, L. & C. 330, 1863; 9 Cox C. C. 391. White, 27 Fed. Rep. 200, 1886.

⁵ *R. v. Keith*, Dears C. C. 454, 1855. 6 Cox C. C. 533; 29 Eng. Law & Eq. 558. See *supra*, § 677. *Infra*, § 731. ⁷ See *R. v. Ritson*, L. R. 1 C. C. 200, 1870; *State v. Minton*, 116 Mo. 605, 1893; *People v. Parker*, 67 Mich. 222, 1887; *Hanks v. State*, 13 Tex. App. 289, 1882.

⁶ *Com. v. Linton*, 2 Va. Cas. 205, 1821; *Pennsylvania v. Misner*, Addis. 44, 1792. That a "certificate of indebt- ⁸ See *R. v. Kinnear*, 2 M. & Rob. 117, 1837; *R. v. Morton*, 2 East P. C.

banks,¹ to wills;² to receipts;³ to orders for delivery of orders, money or things;⁴ to entries on book accounts;⁵ to tele- "other writing," graphic messages;⁶ and in fine to all written or other in- etc. struments which may be the foundation of a suit against another.

955, 1795; Com. v. Butler, 12 S. & R. 237, 1824; Com. v. Ward, 2 Mass. 397, 1806; Com. v. Henry, 118 Mass. 460, 1875; Com. v. Dallinger, 118 Mass. 439, 1875; Ames's Case, 2 Greenl. 365, 1823; *In re* Adutt, 55 Fed. Rep. 376, 1893; McCay v. State, 32 Tex. Cr. 233, 1893; Graham v. Richardson, 11 N. Y. Sup. 328, 1890; State v. Schwartz, 64 Wis. 432, 1885; White v. Territory, 1 Wash. 279, 1890; State v. Wheeler, 20 Oreg. 192, 1890; State v. Taylor, (La.) 15 So. Rep. 407, 1894.

That such paper must make out a *prima facie* case, see *infra*, §§ 691 *et seq.*

¹ State v. Coyle, 41 Wis. 267, 1876; State v. Burd, 115 Mo. 405, 1893; State v. Vincent, 91 Mo. 662, 1887; Com. v. Russell, 156 Mass. 196, 1892; State v. Curtis, 39 Minn. 357, 1888; Smith v. State, 20 Nebr. 284, 1886; State v. Clement, 42 La. An. 583, 1890. That a check is a bill of exchange, see People v. Kemp, 76 Mich. 410, 1889.

² R. v. Sterling, 1 Leach, 99, 1780; R. v. Coogan, 1 Leach, 449, 1787; 2 East P. C. 948; R. v. Tylney, 1 Den. C. C. 319, 1848; Green v. Terwilliger, 56 Fed. Rep. 384, 1892.

³ Barnum v. State, 15 Ohio, 717, 1846; State v. Riebe, 27 Minn. 315, 1880; State v. Henderson, 29 W. Va. 147, 1886; Com. v. Fitzpatrick, 3 Penn. Dist. Rep. 305, 1894.

That a receipt is an acquittance, see State v. Shelters, 51 Vt. 102, 1878; Com. v. White, 147 Mass. 76, 1888; State v. Murphy, (La.) 14 So. Rep. 920, 1894. That a discharge of a

mortgage is an acquittance, see People v. Swetland, 77 Mich. 53, 1889.

Receipts. As to limitations of this term, see R. v. French, L. R. 1 C. C. 217, 1870; Com. v. Lawless, 101 Mass. 32, 1869. And other cases cited Whart. Crim. Pl. & Pr. § 185. An ordinary receipt is an acquittance. R. v. Martin, 7 C. & P. 549, 1836; R. v. Houseman, 8 C. & P. 180, 1837; Com. v. Ladd, 15 Mass. 526, 1819.

⁴ R. v. Ward, 2 East P. C. 861, 1727; U. S. v. Green, 2 Cranch C. C. 520, 1824; Harris v. People, 9 Barb. 664, 1851; Com. v. Ayer, 3 Cush. 150, 1849; State v. Leak, 80 N. C. 403, 1879; State v. Lane, Ibid. 407, 1879; State v. Kesler, Ibid. 472, 1879; Thomas v. State, 59 Ga. 784, 1877; Burke v. State, 66 Ibid. 157, 1880; Anderson v. State, 65 Ala. 553, 1880; Stewart v. State, 113 Ind. 505, 1887; State v. Phillips, 78 Mo. 49, 1883; Gardner v. State, 96 Ala. 12, 1892; Malton v. State, 29 Tex. App. 527, 1891; Alexander v. State, 28 Tex. App. 186, 1889.

As to treasury notes, see U. S. v. Fisler, 4 Biss. 59, 1865. As to meaning of "order" and "request" for payment of money, see, fully, Whart. Cr. Pl. & Pr. §§ 193, 194; R. v. Illidge, 1 Den. C. C. 404, 1849; T. & M. 127; 3 Cox C. C. 552; R. v. Harris, 6 C. & P. 129, 1837; 1 Mood. 393; R. v. McConnell, 1 C. & K. 371, 1844; 2 Mood. 298; R. v. Lonsdale, 2 Cox C. C. 222, 1847; Noakes v. People, 25 N. Y. 380, 1862; Evans v. State, 8 Ohio St. 196, 1857; Carberry v. State, 11 Ibid. 410, 1860; State v. Lamb, 65 N. C. 419,

⁵ *Supra*, §§ 666-7.

⁶ R. v. Stewart, 25 Up. Can. Q. B. 440, 1866.

Statutes, we should at the same time remember, have been passed in England and in most jurisdictions in the United States, making it felony to forge writings of the general class just mentioned ; and under these statutes forgeries of "bills of exchange,"¹ of "promissory notes," of "deeds," of "bonds," of "orders," of "receipts," of "warrants," and of "requests," have been made specifically indictable.² "Other writing" is, when adopted in a statute, to be used as comprehending all documents objects of common law forgery.³

§ 683. It is forgery at common law to forge any judicial writ.⁴

1871; *Kennedy v. State*, (Tex.) 26 S. W. Rep. 78, 1894; *Dixon v. State*, (Tex.) 26 S. W. Rep. 500, 1889; *Crawford v. State*, 31 Tex. Cr. 51, 1892; *People v. Bibby*, 91 Cal. 470, 1891; *State v. Jefferson*, 39 La. An. 331, 1887; *Smith v. State*, 25 Fla. 517, 1889; *State v. Gullette*, 121 Mo. 447, 1894. As to "affidavits" under Federal statute, see *U. S. v. Wentworth*, 11 Fed. Rep. 52, 1882; *U. S. v. Barnhart*, 33 Fed. Rep. 459, 1887. As to "money order," see *U. S. v. Morris*, 7 The Rep. 581, 1879; 19 Alb. L. J. 403; *U. S. v. Long*, 30 Fed. Rep. 678, 1887. As to pension papers, see *U. S. v. Wilcox*, 4 Blatch. 385, 1859; *U. S. v. Albert*, 45 Fed. Rep. 552, 1891. As to insurance policy, see *State v. Horan*, 64 N. H. 548, 1888; *State v. Hilton*, 35 Kans. 338, 1886. As to forged power of attorney, see *Pennsylvania Ins. Co. v. Philadelphia G. & N. R. Co.*, 153 Pa. 160, 1893.

¹ That a draft without a drawer's name is not a bill of exchange under the statute, see *R. v. Harper*, L. R. 7 Q. B. D. 78, 1881; 44 L. T. (N. S.) 615; cited *supra*, § 680. But a bank cheque is a bill of exchange. *Hawthorn v. State*, 56 Md. 530, 1880. *Contra*, *Townsend v. State*, 92 Ga. 732, 1893.

² For the meaning of these terms, see Whart. Cr. Pl. & Pr. §§ 185-199.

As to "certificate," see *State v. Grant*, 74 Mo. 33, 1881; *State v. Rhine*, 84 Iowa, 169, 1891.

³ Under the term "other writing," in the United States Revised Statutes, § 5418, a custom-house oath is included. *U. S. v. Lawrence*, 13 Blatch. 211, 1875. As to forged indorsement on a pension check, see *U. S. v. Albert*, 45 Fed. Rep. 552, 1891.

As to other miscellaneous writings, see *People v. Henries*, 9 N. Y. Sup. 862, 1890; *Garmire v. State*, 104 Ind. 444, 1885; *State v. Adamson*, 43 Minn. 196, 1890; *People v. Sharp*, 53 Mich. 523, 1884; *Territory v. Barth*, (Ariz.) 15 Pac. Rep. 673, 1887; *People v. Munroe*, 100 Cal. 664, 1893; *Dixon v. State*, 81 Ala. 61, 1886; *Williams v. State*, 90 Ala. 649, 1891; *Com. v. Wilson*, 89 Ky. 157, 1889.

For meaning of "other instruments in writing" under Illinois statute, see *Shirk v. People*, 121 Ill. 61, 1887; *People v. Bibby*, 91 Cal. 470, 1891.

⁴ *R. v. Harris*, 1 Mood. C. C. 393; 6 C. & P. 129, 1833; *R. v. Collier*, 5 Ibid. 160, 1831; *Com. v. Mycall*, 2 Mass. 136, 1806. See *People v. Cady*, 6 Hill, (N. Y.) 490, 1844, a case where the intent to defraud was held not to be proved. As to a forged bill of costs, see *Luttrell v. State*, 85 Tenn. 232, 1886.

Hence it is a forgery to forge an order from a magistrate for the discharge of a prisoner;¹ or a deposition to be used in the trial of a cause,² or the seal of a court.³ From this we may rise to the general position, accepted from the earliest days of the English common law, that the forgery of any matter of judicial or executive record is indictable at common law.⁴ Hence to fraudulently alter a marriage register is forgery;⁵ and so of the making a false certificate of the recording of a deed;⁶ and so of naturalization papers;⁷ and so of an entry in a tax duplicate.⁸ But it has been ruled otherwise as to political documents of no possible legal effect.⁹

Judicial or political records may be the subject of forgery.

It has been said, indeed, that offences of this kind, to be technically forgeries, must have the tendency to be prejudicial to the rights of others.¹⁰ But it should be observed (1) that in most cases of forged writs the officer issuing the writ, if it were genuine, would be liable for misconduct in an action on the case; (2) that in cases of forgery of records there is usually a party to be injured by falsification of the record; and (3) that in any view the prejudice to others is enough even if it be contingent and remote.¹¹ But if the alleged record is on its face inoperative, it does not fall under this head. Hence it is not forging an exemplification to make falsely a document purporting to be a decree of divorce, which does not on its face purport to be a copy from the record.¹²

§ 684. The law as to book entries has been already discussed in another connection.¹³ It is enough now generally to state that it is forgery for the treasurer of a society to make entries in his banker's pass-book of false deposits pur-

And so of book entries.

¹ Ibid.; *R. v. Fawcett*, 2 East P. C. 862, 1793.

² *State v. Kimball*, 50 Me. 409, 1861.

³ *Fadner v. People*, 33 Hun, 240, 1884; 10 Abb. New Cas. 462, 1882.

⁴ 1 Hawk. P. C. by Curwen, 262, 5. See, as to Minnesota statute, *State v. Adamson*, 43 Minn. 196, 1890. See, however, under federal statute, *U. S. v. Irwin*, 5 McLean, 178, 1851.

⁵ *R. v. Dudley*, 2 Sid. 71.

⁶ *State v. Tompkins*, 71 Mo. 613, 1880.

⁷ *U. S. v. Randolph*, 1 Pitts. 24, 1853.

⁸ *Com. v. Beamish*, 81 Pa. 389, 1876, aff. in *Luberg v. Com.*, 94 Pa.

85, 1880.

⁹ *State v. Anderson*, 30 La. An. 557, 1878; 1 South. L. J. 183.

¹⁰ *People v. Cady*, 6 Hill, (N. Y.) 490, 1844. See *State v. Tompkins*, 71 Mo. 613, 1880.

¹¹ *R. v. Nash*, 2 Den. C. C. 493, 1852; *R. v. Dodd*, 18 L. T. (N. S.) 89, 1868. See *infra*, §§ 693 *et seq.*, 701, 743.

¹² *Brown v. People*, 86 Ill. 239, 1877.

¹³ See *supra*, §§ 666, 667.

porting to have been made by him as treasurer of such society;¹ for a vendor to make false entries in his book of original entries when such books are legal evidence against a vendee;² for a clerk to make a false statement in his journal of the sum of money received by him for his employers;³ and for a person keeping his own books, falsely to alter a joint settlement of accounts between him and a customer.⁴

§ 685. A ticket, when noticed in the present relation, is an order from the treasurer or ticket agent of an institution, addressed to a doorkeeper, conductor, or other working agent, requiring him to admit the holder to certain rights. Hence the ticket, resolved into its elements, is an obligation which, if genuine, subjects the obligor to legal process; and hence the forgery of a ticket which possesses this characteristic is forgery at common law. This applies to all tickets on which the obligor may be held responsible; *e. g.*, railway tickets, tickets to exhibitions, concerts, theatres, and lottery tickets, when the latter are not forbidden by law.⁵

But suppose the ticket be free, or consist simply of a free pass? This question has arisen in England and in the United States; and it has been properly held that, as there is always some consideration, greater or less, received for such tickets, and as, at all events, the issuers of such tickets are liable for gross negligence to the holders in case of accident, the forgery of such tickets or passes is indictable at common law.⁶

Yet, at the same time, it must be remembered that, to make any ticket appear to be an obligation which it is forgery to falsify, something more than the mere words of the ticket must usually be set out in the indictment. The ticket on its face, rarely, if ever, contains a legal obligation. It is very briefly expressed, and sometimes the salient words are given only in signs and initials. These gaps and breaks the indictment must supply, so that the obligation may appear to be one on which the obligor is responsible. And if such

¹ *R. v. Smith*, 9 Cox C. C. 162, 1862; *Barnum v. State*, 15 Ohio, 717, Leigh & C. 168; *R. v. Moody*, 9 Cox 1846.

C. C. 166, 1862; L. & C. 173; *R. v. Dodd*, 18 L. T. (N. S.) 89, 1868. ⁵ See *R. v. Fitch*, 9 Cox C. C. 160, 1862, case of a turnpike ticket.

² *Supra*, §§ 666, 667.

⁶ *Com. v. Ray*, 3 Gray, 441, 1855.

³ *Ibid.*; *People v. Phelps*, 49 How. Pr. (N. Y.) 462, 1874; *Biles v. Com.*, 32 Pa. 529, 1859. See *R. v. Boulton*, 2 C. & K. 604, 1848; *Roberts v. State*, 92 Ga. 451, 1893; *infra*, § 705.

description be erroneous, it is fatal, for the description, being material, cannot be rejected as surplusage.¹

It was once thought in England that, while the *forging* of a railway pass was indictable at common law, such was not the case as to *uttering*.² This distinction, however, cannot be maintained, and it may now be said to be acknowledged that in all cases where it is forgery to *make* an instrument, it is indictable at common law to *utter* such forged instrument.³

§ 686. The false making of the signature of another as authority for any statement which, if the writing were true, would expose that other to an action of assumpsit, or a suit for damages for deceit, will subject the person falsely writing or printing such signature to an indictment for forgery.⁴ But the statement must be one in some way calculated to expose to suit the party whose name is forged.⁵

False making of another's signature to any statement exposing the latter to suit is forgery.

§ 687. Forgery and uttering a certificate of good character, with intent to defraud and with a capacity for defrauding, is indictable at common law,⁶ if there be anything in the recommendation on which a suit could be brought if it were valid.⁷ And under this head fall testimonials of character for the purpose of obtaining office;⁸ and letters of recommendation for the purpose of receiving specific bounties or favors, when the alleged writer of such letters would be liable to suit if the letter were genuine and damage ensued. But a mere complimentary letter of introduction does not fall within the rule.⁹

So of certificate of character.

§ 688. But there must be an intent to defraud a particular person, or class of persons.¹⁰ Hence, the false making of a diploma, and hanging it up in the defendant's house, without the intent to commit a fraud, has been held not to be

But not, it seems, of pictures.

¹ Com. v. Ray, 3 Gray, 441, 1855.

² R. v. Boulton, 2 C. & K. 604, 1848.

³ R. v. Sharman, Dears. C. C. 285, 1854; 6 Cox C. C. 312; 24 Eng. L. & Eq. 553.

⁴ Ames's Case, 2 Greenl. 365, 1823; though see State v. Givens, 5 Ala. 747, 1844.

⁵ Jackson v. Weisiger, 2 B. Monroe, 214, 1841. *Infra*, § 691.

⁶ R. v. Toshack, T. & M. 207, 1849; 1 Den. C. C. 592; 4 Cox C. C. 38, 1854; R. v. Sharman, Dears. C. C.

285; 6 Cox. C. C. 312; R. v. Mitchell,

2 F. & F. 44, 1860; R. v. Moah, 7

Cox C. C. 503, 1853; Dears. & B. 550.

But see, as to a fraudulent teacher's licence, Maddox v. State, 87 Ga. 429,

1891.

⁷ Waterman v. People, 67 Ill. 91, 1873.

⁸ R. v. Sharman, R. v. Moah, *ut sup.*

⁹ Ibid.; U. S. v. Green, 2 Cranch C. C. 521, 1824; Mitchell v. State, 56 Ga.

171, 1876.

¹⁰ *Infra*, § 717. *Contra*.

forgery,¹ though it would be otherwise if the diploma were used as a certificate of character.² And, as we have seen, painting a picture, intending to represent that it was painted by an eminent artist, and writing that artist's name in the corner, is not forgery.³

§ 689. Of course, when a certificate as to negotiable paper takes the technical form of an indorsement,⁴ its false making is forgery, if the instrument is one which would sustain *primâ facie* a suit.⁵ And so must it be as to the marking good of cheques; though this, in respect to the guaranty of a note, has been doubted in Alabama, under the peculiar statute of that State.⁶

§ 690. When a trade-mark or label can be made the basis of a suit against the alleged issuer in an action for deceit or warranty, then to falsely appropriate such trade-mark or label is forgery; otherwise not. Thus, if a false certificate from A. be made by B.

as to the value of certain papers or goods, this is forgery in B., because A. would have been liable on this certificate, if genuine, in an action for deceit. But if there be no guaranty implied or expressed, then forgery does not lie. Thus, in a trial in England, it appeared that the prosecutor sold powders called "Borwick's Baking Powders," and Borwick's Egg Powders," wrapped in printed papers; and that the defendant procured 10,000 wrappers to be printed similar to Borwick's, except that the name of Borwick was omitted. The defendant then sold in these wrappers, in other respects similar to those of the prosecutor, powders of his own. The jury found that the wrappers so far resembled Borwick's as to deceive a person of ordinary observation, and that they were prepared by the defendant for the purposes of fraud. The court, however, held that there was no forgery, for no suit of any kind could have been maintained against Borwick on the wrappers as reproduced by the defendant.⁷

¹ R. v. Hodgson, Dears. & B. 3, 1856; 7 Cox C. C. 122, noticed *infra*, 1875.

§ 718. *Infra*, §§ 709, 718, 1139 *et seq.*

² McClure v. Com., 86 Pa. 353, 1878.

³ R. v. Closs, Dears. & B. 460, 1857. *Supra*, § 681.

⁴ R. v. Lewis, Fost, 116; Poage v. State, 3 Ohio St. 229, 1854; Pennsylvania v. Misner, Addis. 44, 1792.

⁵ Com. v. Dallinger, 118 Mass. 439, 1875.

⁶ State v. Givens, 5 Ala. 747, 1844.

⁷ R. v. Smith, 8 Cox C. C. 32, 1858;

Dears. & B. C. C. 566. Sir J. F. Stephen (Dig. Crim. Law, art. 357), speaking of this case, says: "It would seem as if in this case the element wanting to complete the offence was

§ 691. It has been already stated that an instrument, to be the subject of forgery, must be such that it can be used as proof, either perfect or imperfect, in a suit with another. Upon this qualification several observations may now be made.¹

The instrument must be capable, if genuine, of being proof in legal process.

§ 692. It is not necessary that such process should be against the party in whose name the forged instrument is made. It is enough if, in a suit brought by such party, such forged paper may be used as *primâ facie* proof.² Thus, it is forgery at common law to falsely make or alter a receipt, though such receipt, ordinarily speaking, could only be used in proof as evidence for the defence in a suit brought by the person whose name was forged. And, hence, in cases heretofore noticed, it is ruled to be forgery for a clerk to make an entry on his books charging himself with a less amount of cash than he has actually received, though such entry, supposing it to bind the employer, would be viewed mainly as evidence against the employer on a suit brought by him against the clerk for a sum greater than that entered on the books.

But such process need not be against the person whose name is forged.

§ 693. Nor need the party injured be one who by the *lex delicti commissi* has a local legal existence. It does not follow that because a party is incapable of local legal existence he is incapable of being sued, either civilly or criminally, for deceit. Hence it is that prosecutions for forgery have under these circumstances been sustained.³ Thus where, in cases already cited, the treasurers of certain English societies, which the law held incapable of legal existence, forged entries in bankers' pass-books in order to defraud such societies, it was held that this was forgery.⁴ So, no doubt, an indictment for forgery would lie for forging the note of a married woman, though by the

Nor need the party injured have a local legal existence.

the intent to defraud by means of the document, rather than the absence of a document capable of being forged; the offence lay in selling spurious as real powders. The wrappers without the powders could have no effect whatever. The essence of forgery is that the document itself should be made the instrument of fraud. See *People v. Molins*, 7 N. Y. Crim. Rep. 51, 1888.

¹ *Supra*, § 680. See *Jacobs v. State*, 61 Ala. 448, 1878; *State v. Adamson*, 43 Minn. 196, 1890.

² See *infra*, §§ 714, 739; *People v. Krummer*, 4 Parker C. R. 217, 1854; *Brewer v. State*, 32 Tex. Cr. 74, 1893.

³ *R. v. Dodd*, 18 L. T. (N. S.) 89, 1868; *R. v. Smith*, L. & C. 168, 1862; 9 Cox C. C. 162; *R. v. Moody*, L. & C. 173, 1862; 9 Cox C. C. 166. *Supra*, § 680.

¹ See *infra*, § 696.

lex delicti commissi she is incapable of being civilly sued.¹ And the reasons for this are threefold. First, she might be liable to a prosecution for false pretences, supposing the note to be good, for obtaining money or goods on the false pretence of being *capax negotii*. Second, she might be sued extra-territorially in jurisdictions where coverture is no defence. Third, she may have a settled estate which may be bound by the note. And hence it is forgery to counterfeit the name of a banker who is by law prohibited from issuing genuine notes of the forged class.²

Nor need there be any immediate possible injury. § 694. Nor need there be any person capable of being immediately defrauded by the forgery. It is enough if injury may be possibly inflicted in the future.³ This is strikingly illustrated in the cases to be presently cited, where it was held to be forgery to falsely make a will for a living person.⁴

Nor is it necessary that the instrument should be any more than *prima facie* proof. § 695. It is enough if the party on whom the forgery is executed should be exposed to apparent risk.⁵ Thus an instrument purporting on its face to be issued by a specific corporation or body politic is the object of forgery, though the names of the officers of such corporation or body politic are given erroneously in the forgery.⁶ So it is forgery to make a false certificate of municipal indebted-

¹ *Wilcoxon v. State*, 60 Ga. 184, 513, 1879; *State v. Ferguson*, 35 La. 1878. See, also, *People v. Baker*, 100 Cal. 188, 1893.

² See *infra*, §§ 698-700; and see Whart. Conf. of Laws, §§ 101, 110.

³ *Infra*, §§ 713, 714, 739, 1200; *R. v. Nash*, 2 Den. C. C. 493, 1852; *R. v. Sterling*, 1 Leach, 99, 1780; though see *R. v. Hodgson*, Dears. & B. 3, 1856; 7 Cox C. C. 122, 1856; *infra*, § 718, where it was held that there must be some individuation of the person. *Infra*, § 709.

⁴ *Infra*, § 697.

⁵ *Supra*, § 680; *R. v. Pike*, 2 Mood. C. C. 70, 1835; *Com. v. Costello*, 120

Mass. 358, 1875; *Bishop v. State*, 55 Md. 138, 1880; *Langdale v. State*, 100 Ill. 263, 1876; *Harding v. State*, 54 Ind. 359, 1881; *Lemasters v. State*, 95 Ibid. 367, 1883; *State v. Fisher*, 65 Mo. 437, 1879; *Peete v. State*, 2 Lea,

513, 1879; *State v. Ferguson*, 35 La. An. 1042, 1883; *Rembert v. State*, 53 Ala. 467, 1875; *Travis v. State*, 83 Ga. 372, 1889; *Billups v. State*, 88 Ga. 27, 1891; *State v. Gullette*, 121 Mo. 447, 1894; *Kennedy v. State*, (Tex.) 26 S. W. Rep. 78, 1894; *Dixon v. State*, (Tex.) 26 S. W. Rep. 500, 1889; *Rudicel v. State*, 111 Ind. 595, 1887; *State v. Adamson*, 43 Minn. 196, 1890; *Com. v. Fitzpatrick*, 3 Penn. Dist. Rep. 305, 1894; *State v. Wingard*, 40 La. An. 733, 1888; *Com. v. Wilson*, 89 Ky. 157, 1889; *Alexander v. State*, (Tex.) 12 S. W. Rep. 595, 1889. *Supra*, §§ 182-5.

⁶ *U. S. v. Turner*, 7 Peters, 132, 1833; *R. v. Pike*, 2 Mood. C. C. 70, 1835. See *infra*, §§ 743-4; and as to fictitious banks, see *supra*, § 660. *Infra*, § 746.

ness though the municipality has no power to incur such indebtedness.¹ It is forgery, also, to make a false note whose consideration, if the note were genuine, would be illegal.² That a forged instrument was on its face impeachable for usury is also no defence.³ Nor is it a defence that the statute under which a forged bond purports to be issued may on a contingency be declared to be unconstitutional.⁴ And no matter how defective may have been the forgery, it is enough if there be a possibility of fraud.⁵ Thus though a bill can only be negotiated by the indorsement of two payees, the false making of the indorsement of one of them is forgery;⁶ and so of a note dated on Sunday.⁷ And so a man may be convicted of forging the will of another who is still alive, as upon the latter's death the will, if genuine, would be the basis of legal procedure.⁸ Yet, on the other hand, as will presently be seen, where a will is forged to devise lands, without the formalities which the *lex rei sitae* prescribes as necessary to the validity of such an instrument, the offence is held not forgery at common law.⁹ But, generally, no matter how good may be the defence that the party whose name is

¹ *State v. Eades*, 68 Mo. 150, 1878. See *U. S. v. Sprague*, 11 Biss. 376, 1882; *Costley v. State*, 14 Tex. App. 156, 1883; *Allgood v. State*, 87 Ga. 668, 1891; *State v. Gullette*, 121 Mo. 447, 1894; *Garmire v. State*, 104 Ind. 444, 1885; *Shannon v. State*, 109 Ind. 407, 1886; *State v. Hilton*, 35 Kans. 338, 1886; *People v. Bibby*, 91 Cal. 470, 1891; *State v. Gryder*, 44 La. An. 962, 1892.

² *Dunn v. People*, 4 Colo. 126, 1878. Where a check set out in the indictment was not indorsed, it was held that the indictment was good; "the check, not the indorsement, was the alleged forgery." *Smith v. State*, 20 Nebr. 284, 1886.

³ *People v. Fadner*, 10 Abb. New Cas. 462, 1881; but see s. c. in error, 33 Hun, 240, 1884; and see 19 Week. Dig. 433.

⁴ *Bowles v. State*, 37 Ohio St. 35, 1881.

⁵ *R. v. Elliot*, 1 Leach, 175, 1777; *R. v. Fitzgerald*, 1 Leach, 20, 1741; *U. S. v. Turner*, 7 Peters, 132, 1832; *Com. v. Costello*, 120 Mass. 358, 1875; *Kegg v. State*, 10 Ohio, 75, 1840; *State v. Dennett*, 19 La. An. 395, 1867; *Harding v. State* 54 Ind. 359, 1876.

⁶ *R. v. Wall*, 2 East P. C. 953, 1800; *R. v. Moffatt*, 1 Leach, 431, 1787. *Infra*, § 697.

To be a subject of forgery, an order for money for goods need not be addressed to any one. *State v. Gullette*, 121 Mo. 447, 1894; *Kennedy v. State*, (Tex.) 26 S. W. Rep. 78, 1894.

⁷ *R. v. Winterbottom*, 2 C. & K. 37, 1845; s. c. 1 Den. C. C. 41, 1844.

⁸ *Vansickle v. People*, 29 Mich. 61, 1874; *State v. Sherwood*, (Iowa) 58 N. W. Rep. 911, 1894.

⁹ *R. v. Sterling*, 1 Leach, 99, 1773; *R. v. Coogen*, Ibid. 449, 1787; s. c. 2 East P. C. 948.

forged may have to the forged writing (*e. g.*, outlawry in case of a promissory note), if the forged writing be *prima facie* capable of legal use, it is forgery.¹ And parol evidence is admissible to show that a document, when its ambiguity is latent, or when it is part of a general parol arrangement, is capable of sustaining a suit.² Hence, when by proof of extrinsic facts an apparently void document may be made effective, such document may be the subject of forgery.³

§ 696. But where an instrument is so palpably and absolutely invalid that it can under no circumstances be proof in a legal procedure, then falsely to make it is no forgery.⁴ Thus a meaningless paper cannot be the subject of forgery;⁵ nor an instrument so incomplete as to be obviously incapable of enforcement,⁶ as a promissory note which has no signature;⁷ nor a navy bill payable to — or order;⁸ nor a certificate of acknowledgment which does not state that the grantor made the acknowledgment;⁹ nor a signature on its face so absurd a copy as to show that it was not intended to deceive.¹⁰ As will be noticed in the next section, the

But an instrument that can in no possible case be sued on cannot be the object of forgery.

¹ See *R. v. Teague*, R. & R. 33, 1802; *State v. Dunn*, 23 Oreg. 562, 1893. 1 Idaho, (N. S.) 531, 1874. See U. S. *v. Barnhart*, 33 Fed. Rep. 459, 1887; *Com. v. Dunleay*, 157 Mass. 386, 1892;

² See Whart. on Ev. §§ 937 *et seq.*; and see *R. v. Kay*, L. R. 1 C. C. 257, 1870. *State v. Dorrance*, 86 Iowa, 428, 1892; *Fomby v. State*, 87 Ala. 36, 1888.

³ *State v. Briggs*, 34 Vt. 501, 1861; *Com. v. Ray*, 3 Gray, 441, 1855; *Com. v. Hinds*, 101 Mass. 209, 1869; *People v. Galloway*, 17 Wend. 540, 1837; *Carberry v. State*, 11 Ohio St. 410, 1860; *State v. Wheeler*, 19 Minn. 98, 1872; *Rembert v. State*, 53 Ala. 467, 1875; *Williams v. State*, 24 Tex. App. 342, 1887; *Rollins v. State*, 22 Tex. App. 548, 1886; U. S. *v. Barnhart*, 33 Fed. Rep. 459, 1887; *Nelson v. State*, 82 Ala. 44, 1886.

⁴ *State v. Briggs*, 34 Vt. 501, 1861; *Com. v. Ray*, 3 Gray, 441, 1855; *Com. v. Hinds*, 101 Mass. 209, 1869; *People v. Galloway*, 17 Wend. 540, 1837; *Carberry v. State*, 11 Ohio St. 410, 1860; *State v. Wheeler*, 19 Minn. 98, 1872; *Rembert v. State*, 53 Ala. 467, 1875; *Williams v. State*, 24 Tex. App. 342, 1887; *Rollins v. State*, 22 Tex. App. 548, 1886; U. S. *v. Barnhart*, 33 Fed. Rep. 459, 1887; *Nelson v. State*, 82 Ala. 44, 1886. ⁵ *Henderson v. State*, 14 Tex. 503, 1855; *People v. Tomlinson*, 35 Cal. 503, 1868; *State v. Humphreys*, 10 Humph. 442, 1850.

⁶ *Abbott v. Rose*, 62 Me. 194, 1873; *People v. Shall*, 9 Cow. 778, 1829; *Waterman v. People*, 67 Ill. 91, 1873; *State v. Wheeler*, 19 Minn. 98, 1872; *Howell v. State*, 37 Tex. 591, 1872; *Raymond v. People*, 2 Colo. App. 329, 1892.

⁷ *R. v. Richards*, R. & R. 193, 1811; *R. v. Randall*, Ibid. 195, 1811; *R. v. Pateman*, Ibid. 455, 1821. See *R. v. Harper*, cited *supra*, § 680.

⁸ *R. v. Burke*, R. & R. 496.

⁹ *People v. Harrison*, 8 Barb. 560, 1850.

¹⁰ *Abbott v. State*, 59 Ind. 70, 1878; *People v. Elliott*, 90 Cal. 586, 1891; *State v. Warren*, 109 Mo. 430, 1891.

Tex. App. 111, 1883; *People v. Head*,

same rule applies where the instrument forged has not the number of witnesses required by the applicatory law. But it is forgery to falsely make a document which, though void and frivolous in itself, may be one of a chain of papers on which a *primâ facie* case may be sustained.¹

§ 697. Defects as to legal formalities, *e. g.*, seals, or stamps, or due attestations, may not preclude such a prosecution. But when the law to which an instrument is subject makes it absolutely and everywhere inoperative without certain formalities, then falsely to make it without such formalities is not forgery.² Thus if certain witnesses are necessary to a deed or will, falsely making a deed or will without such witnesses is not forgery, if the law requiring such witnesses be as to realty the *lex rei sitæ*, and as to personalty, the *lex domicilii*.³ But it is otherwise when the law simply provides that without such formalities such instruments shall not be the foundation of a suit. In such case, according to the accepted doctrines of private international law,⁴ the instrument could be sued on in a foreign land, without such formalities. Hence, falsely to make or alter such instrument, though without the due legal formalities, *e. g.*, stamps, is forgery.⁵

Defects in seals, stamps, and attestations may not destroy legal efficacy.

§ 698. Making a bank note in the name of a bank which never existed, when there is no such similitude to any valid bank paper as would impose on a person of ordinary pru-

Forgery of void bank note not

¹ *Com. v. Costello*, 120 Mass. 358, 1875; *Howell v. State*, 37 Tex. 591, 1872. See *State v. Hilton*, 35 Kans. 338, 1886. *v. Young*, 47 N. H. 402, 1867; *Carpenter v. Snelling*, 97 Mass. 452, 1867; *Pennsylvania v. Misner*, Addis. 44, 1792; *Com. v. Searle*, 2 Binn. 332, 1810;

² *Cunningham v. People*, 4 Hun, 455, 1875; *Rollins v. State*, 22 Tex. App. 548, 1886. *State v. Greenlee*, 1 Dever. 523, 1828; *People v. Frank*, 28 Cal. 507, 1865; *Horton v. State*, 32 Tex. 79, 1869;

³ *R. v. Wall*, 2 East P. C. 953, 1800; *R. v. Rushworth*, R. & R. 317, 1816; *R. v. Burke*, Ibid. 496, 1822; *State v. Smith*, 8 Yerg. 150, 1835; *People v. Harrison*, 8 Barb. 560, 1850. See, as to mortgage executed by husband alone, *People v. Baker*, 100 Cal. 188, 1893. *State v. Haynes*, 6 Cold. 550, 1869; *Cross v. People*, 47 Ill. 152, 1868; *State v. Hill*, 30 Wis. 416, 1872; *People v. Bibby*, 91 Cal. 470, 1891; though see *John v. State*, 23 Ibid. 504, 1868; *State v. Mott*, 16 Minn. 472, 1871.

⁴ Whart. Confl. of Laws, § 685.

⁵ *R. v. Hawkeswood*, 6 T. R. 606, note; *R. v. Morton*, 2 East P. C. 955; *R. v. Pike*, 2 Mood. C. C. 70, 1835; *R. v. Teague*, R. & R. 33, 1802; *State* See Whart. on Ev. § 697.

An additional reason for the position in the text is to be found in those jurisdictions in which the revenue laws permit the stamp to be attached by any party wishing to use the paper.

indictable, though otherwise when the intent and effect is to impose upon third person.

dence, is not forgery,¹ though, as is elsewhere seen, to pass such a note renders the party concerned liable to an indictment for obtaining money by false pretences. So it is not forgery to counterfeit a bank note which, from the law to which it is subject, is null and void.² If, however, a bank note is forged in the name of a bank purely fictitious, but with such skill and semblance to valid bank notes as to impose upon persons of ordinary prudence, the forgery, if the intent laid be to defraud the party on whom the note is passed, is indictable as forgery at common law.³

§ 699. Again, the fact that the circulation of notes below a particular denomination is forbidden by law does not relieve a person forging them from forgery, even though the intent laid be to defraud the bank. For (1) the banker may be made liable on such notes, the prohibition going only to circulation; and (2) there is also a possibility of defrauding third persons.⁴ To forge even the notes of a person prohibited by a local law from issuing notes is indictable,⁵ as he may be made extra-territorially liable,⁶ and so, *a fortiori*, is the forgery of the notes of an expired bank.⁷ As a consequence, if the bank note is so accurately counterfeited as to deceive, in the main, ordinary observers, it is no defence that the names of the officers nominally issuing the note were misrecited.⁸

§ 700. It will be seen, therefore, that the instrument, in order to make it *primâ facie* proof, must appear, upon the face of it, to have been made to resemble a true instrument of the denomination mentioned in the indictment, so as to be capable of deceiving persons using ordinary observation,⁹ although not those acquainted as experts with

A forged bank note must be such as to support a *primâ facie* case.

¹ See *infra*, § 700; *supra*, § 660.

² *R. v. Moffatt*, 1 Leach, 431, 1787.

³ *Supra*, § 660; *infra*, § 749.

⁴ *State v. Vanhart*, 2 Harr. (N. J.) 327, 1839; *Butler v. Com.*, 12 S. & R. 237, 1827; *Clary v. Com.*, 4 Barr, 210, 1846; *Twitchell v. Com.*, 9 Ibid. 211, 1848; *Thompson v. State*, 9 Ohio St. 354, 1859; *Rollins v. State*, 22 Tex. App. 548, 1886. See *Hendrick v. Com.*, 5 Leigh, 707, 1834; though see *Van Horne v. State*, 5 Ark. 349, 1845.

⁵ *Butler v. Com.*, 12 S. & R. 237, 1824.

See *Cahoon v. State*, 8 Ohio, 537, 1838; and see *Gutchins v. People*, 21 Ill. 642, 1859, which holds that the doctrine of the text does not apply in cases where it is criminal to pass the bills whose forgery is attempted.

⁶ Whart. Conf. of Laws, §§ 101, 110.

⁷ *White v. Com.*, 4 Binn. 418, 1812;

Buckland v. Com., 8 Leigh, 732, 1837.

⁸ *U. S. v. Turner*, 7 Peters, 132, 1833; *R. v. Pike*, 2 Mood. C. C. 70, 1838.

⁹ *Infra*, § 749. See Jervis's Arch.

such instrument.¹ Thus a person may be convicted of forging a cheque on a bank, although the counterfeit does not so much resemble the genuine cheque of the drawer as to be likely to deceive the officers of the bank on which it is drawn.² Were absolute similitude required, no indictment whatever could be maintained for forgery, for if the similitude were perfect, no forgery could be proved.

Hence if the offence be the imposition on another of the forged note of a fictitious bank, it is enough if the bank note be sufficiently like others of the same class to deceive the person on whom the note is passed, if prudent according to his lights.³

§ 701. An indictment may be maintained for forgery when the fraud is directed primarily against the public at large.⁴ Several instances of this species of forgery have been already mentioned.⁵ To these may be added that it is declared by Hawkins⁶ to be forgery at common law to counterfeit a commission under the privy seal, and a licence from the barons of the exchequer to compound a debt.

Fraud against public at large is sufficient to sustain indictment

§ 702. As has been already shown, assent of the party injured, in most cases of private wrongs, bars a prosecution. In forgery it is no answer that this assent was procured by fraud. Thus it is not forgery to induce another, by misreading papers, to sign his name to an instrument he did not intend to sanction.⁷ Even the prosecutor's laches

Not forgery to induce another to sign his name.

C. L. (6th ed.) 305; *R. v. Collicott*, 2 Leach, 1048, 1812; 4 Taunt. 300; *R. & R.* 212, 219; *R. v. Jones*, 1 Leach, 204, 1779; *U. S. v. Morrow*, 4 Wash. 1828; *State v. Carr*, 5 N. H. 367, 1831; *State v. Fitzsimmons*, 30 Mo. 236, 1860. ¹ See *R. v. Elliott*, 2 East P. C. 951, 1771. And so of a photograph of a federal security under special federal statute. *Ex parte Holcomb*, 2 Dill. 392, 1872. And so of being in any way concerned in manufacturing plates for forgery. *U. S. v. Rossvalley*, 3 Ben. 157, 1869. ² *Com. v. Stephenson*, 11 Cush. 481, 1853. ³ *Supra*, § 660. ⁴ *Infra*, § 717. ⁵ *Supra*, § 683. ⁶ 1 P. C. 31. ⁷ *R. v. Chadwick*, 2 M. & Rob. 545, 1845; *R. v. Collins*, *Ibid.* 461, 1843;

may work an estoppel of his right to prosecute. Thus a party who permits another to use his name frequently and without rebuke cannot complain if the latter forge such name.¹

IV. UTTERING, ETC.

§ 703. To utter and publish a document is to offer directly or indirectly, by words or actions, such document as good.² Passing a paper, under the statute, it is said, is putting it off in payment or exchange.³ To constitute the offence of uttering and publishing it is necessary that there should be a knowledge of the falsity of the document; and this is in itself implied in an intent to defraud.⁴

§ 704. Uttering forged bank notes, as a rule, is indictable at common law under the limitations already given as to forgery.⁵ Under statute, passing a counterfeit note in the name of a fictitious person, under an assumed name, or on a bank which never existed, has been made indictable. It is not necessary, it has been held under statute, that the note, if genuine, should be valid, if, on its face, it purports to be good.⁶

Com. v. Sankey, 22 Pa. 390, 1853; Smith v. State, 20 Nebr. 284, 1886. Hill v. State, 1 Yerg. 76, 1824; Under the federal statute, delivering Putnam v. Sullivan, 4 Mass. 53, 1808; spurious note as spurious to a third Wells v. State, 89 Ga. 788, 1892; People v. Underhill, 142 N. Y. 38, 1894. public is "uttering." U. S. v. Nelson, 1 Abb. U. S. 135, 1867; State v. See Graham v. Richardson, 11 N. Y. Sup. 328, 1890. See *infra*, § 1131. Patterson, 116 Mo. 505, 1893.

¹ See Weed v. Carpenter, 4 Wend. 219, 1830. *Supra*, §§ 147, 668.

² Com. v. Searle, 2 Binney, 332, 1810. See R. v. Green, Jebb's C. C. 281, 1839; State v. Redstrake, 39 N. J. L. 365, 1877; Leonard v. State, 29 Ohio St. 408, 1876; Gibson v. State, 79 Ga. 344, 1887; Lockard v. Com., 87 Ky. 201, 1888; People v. Dane, 79 Mich. 361, 1890; State v. Calkins, 73 Iowa 128, 1887. *Infra*, § 706.

³ U. S. v. Mitchell, 1 Bald. C. C. 367, 1831. See *infra*, § 752. The mere offering is enough; see R. v. Welch, 4 Cox C. C. 430, 1851; People v. Caton, 25 Mich. 388, 1872; State v. Sherwood, (Iowa) 58 N. W. Rep. 911, 1894;

Pledging a counterfeit note, which was to be redeemed at a future day, is not a passing within the meaning of the act in force in Tennessee. Gentry v. State, 3 Yerg. 451, 1832, Catron, J. diss. But see R. v. Birkett, R. & R. 86, 1805; Thurmond v. State, 25 Tex. App. 366, 1888.

⁴ *Infra*, §§ 713, 742. For passing bad notes as a cheat, see *infra*, § 1123.

⁵ Lewis v. Com., 2 S. & R. 551, 1816; Com. v. Seer, 2 Va. Cas. 65, 1817; State v. Stroll, 1 Rich. 244, 1844.

⁶ U. S. v. Mitchell, 1 Bald. C. C. 367, 1831; Butler v. Com., 12 S. & R. 237, 1825. See *supra*, §§ 660, 700.

§ 705. The uttering of a forged instrument, the forgery of which is only a forgery at common law, it has been said in England, is no offence, unless some fraud was actually perpetrated by it; and where, in such a case, the indictment contained some counts for forging the instrument and others for uttering it, and the defendant was acquitted on the counts for the forgery, and convicted on the counts for the uttering, the judgment was arrested.¹ Such, however, seems no longer to be the law, when there is an intent to defraud some person, known or unknown,² which intent it is the duty of the prosecution to prove.³ And the intent to defraud, as will presently be seen more fully, is to be inferentially proved.⁴

To uttering
an intent
to defraud
is neces-
sary.

§ 706. Uttering has been held to be proved by staking at a gaming table;⁵ paying to a woman as the price of illicit connection;⁶ leaving on a shop counter, when this was preceded by the offer of the forged instrument in payment for goods, and the detection of its spuriousness by the shop-keeper;⁷ exhibiting to others forged testimonials of character for the purpose of fraudulently obtaining an office of emolument;⁸ putting a forged deed on record;⁹ pledging with another a forged note payable to defendant's order, though such note is not indorsed, and hence not negotiable;¹⁰ exhibiting to another, for the purpose of obtaining credit, a forged receipt, though the defendant refused to permit the paper to pass out of his hands;¹¹ passing a forged instrument on a creditor, though only conditionally;¹² exhibiting a forged note for the purpose of bringing suit;¹³ and handing back to the prosecutor a bad shilling in place of a good one given defendant, pretending they were the same.¹⁴

Uttering
may be in-
ferentially
proved.

¹ *R. v. Boulton*, 2 C. & K. 604, 1848.

People v. Baker, 100 Cal. 188, 1893;

² *R. v. Sharman*, Dears. C. C. 285, 1854; 6 Cox C. C. 312; 24 Eng. L. & Eq. 553.

People v. Swetland, 77 Mich. 53, 1889. See *Paige v. People*, 3 Abb. App. Dec. 441.

³ *Infra*, § 713.

¹⁰ *R. v. Birkett*, R. & R. 86, 1805. See *R. v. Wicks*, *Ibid.* 149, 1809. But see note to § 705, *supra*.

⁴ *Ibid.*

⁵ *State v. Beeler*, 1 Brev. 482, 1805.

⁶ *R. v. —*, 1 Cox C. C. 250, 1845.

¹¹ *R. v. Radford*, 1 C. & K. 707, 1844; 1 Den. C. C. 59. See *R. v. Ion*, 2 *Ibid.* 475; 6 Cox C. C. 1, 1852.

⁷ *R. v. Welch*, 1 Eng. L. & Eq. 588, 1851; 2 Den. C. C. 78; 4 Cox C. C. 430.

⁸ *R. v. Sharman*, Dears. C. C. 285, 1854; 6 Cox C. C. 312; 24 Eng. L. & Eq. 553, 1877.

¹² *R. v. Cooke*, 8 C. & P. 582, 1838.

¹³ *Chahoon v. Com.*, 20 Gratt. 734, 1871.

⁹ *U. S. v. Brooks*, 3 MacA. 315, 1878; *Perkins v. People*, 27 Mich. 387, 1873;

¹⁴ *R. v. Franks*, 2 Leach, 644, 1794. *Infra*, § 752.

§ 707. It is not a defence that the forged instrument was obtained from the defendant by a trap by a detective employed for the purpose.¹

No defence that instrument was obtained by a trap.

§ 708. But uttering is not constituted by giving a forged engraving to another as a specimen of skill, there being no intention that it should be put in circulation;² nor by leaving forged notes sealed up as a deposit;³ nor by exhibiting such notes to another when the object is not to obtain money, but to create a false idea of wealth or professional standing.⁴

But there must be an offering of the instrument *lucris causa*.

But offering with intent to defraud is uttering, though there be no acceptance.⁵

We may therefore hold that an exhibition of a forged instrument, *lucris causa*, is uttering, though possession be retained; but that the mere exhibition of a forged instrument to another, or even passing it to another, not *lucris causa*, or with intent to defraud, is not uttering.⁶

So of capacity to injure.

§ 709. There must also be a capacity to injure. It is not an indictable offence to utter a paper which could in no case be the subject of suit.⁷

§ 710. When the offence is a felony by statute, the defendant, to be a principal, must be either present when the act is done, privy to it, or aiding, consenting, or procuring it to be done under his immediate direction.⁸ In such case, proof of uttering by a guilty agent employed by the defendant for that purpose, the defendant being present at the time, is the same as proving the act to have been done by him-

When offence is felony, parties counselling are accessories before the fact.

¹ R. v. Holden, R. & R. 154, 1809; C. C. 430, 1851; 2 Den. C. C. 78; 2 Taunt. 334. See *infra*, §§ 766, 770, People v. Caton, 25 Mich. 388, 1872; 917, 1039; and *supra*, §§ 149, 231 a, to State v. Horner, 48 Mo. 520, 1871; general question of connivance and People v. Swetland, 77 Mich. 53, 1889, and prior notes to this section.

² R. v. Harris, 7 C. & P. 428, 1836.

⁶ See *supra*, § 691; R. v. Hodgson,

³ R. v. Shukard, R. & R. 200, 1811.

D. & B. C. C. 3, 1856; 7 Cox C. C.

⁴ *Supra*, § 688. R. v. Shukard, *ut supra*. Mr. Greaves, in his note to this case (2 Russ. on Cr. 828), says that the ruling does not warrant the statement in the text, since "what the prisoner did was to show so much only of the notes as should lead to the supposition that they were bank notes, which they were not."

122; 36 Eng. L. & Eq. 626, cited *supra*, § 688. See R. v. Page, and other cases cited *infra*, § 752.

⁷ *Supra*, § 691; State v. Anderson, 30 La. An. Pt. I. 557, 1878.

⁸ *Supra*, §§ 206-17, 655; U. S. v. Mitchell, 1 Bald. C. C. 367, 1831;

Chahoon v. Com., 20 Gratt. 734, 1871; Com. v. Clune, (Mass.) 38 N. E. Rep.

⁵ *Infra*, § 752; R. v. Welch, 4 Cox 435, 1891.

self.¹ But where several, by concert, are privy to the uttering of a forged note, which is uttered by one only in the absence of the others, he only who utters it, by the common law, is a principal; while the others are accessaries before the fact.² Under recent statutes, in many States, however, all are principals.³

§ 711. On the supposition that the crime of uttering and publishing is not complete until the paper is transferred and comes to the hands or possession of some person other than the forger, his agent or servant,⁴ where a forged document is sent by the forger from one jurisdiction to an individual in another jurisdiction, the crime may be prosecuted both in the jurisdiction of uttering and in the jurisdiction in which the document is received by the person to whom it is sent.⁵

Venue is place where forged instrument was passed.

§ 712. To constitute the offence of uttering, it is in no case requisite to show that the defendant had been implicated in the forgery.⁶ Nor under an indictment for forgery can there be a conviction of uttering.⁷

Uttering is an independent offence.

¹ *Supra*, §§ 209, 246; *R. v. Palmer*, *People v. Rathbun*, 21 Wend. 509, 1 N. R. 96, 1804; *R. & R.* 72; U. S. 1839.

v. Morrow, 4 Wash. C. C. 733, 1825; *Com. v. Hill*, 11 Mass. 136, 1814; *Lockard v. Com.*, 87 Ky. 201, 1888; *State v. Rowlen*, 114 Mo. 626, 1893; *State v. Allen*, 116 Mo. 548, 1893.

State v. Rucker, 93 Mo. 88, 1887; *Hughes v. Com.*, 89 Ky. 227, 1889. The instigator is principal where the agent was unconscious of the fraud. *R. v. Giles*, 1 Mood. C. C. 166, 1827; *Strang v. State*, 32 Tex. Cr. 219, 1893. *Supra*, § 206.

² *R. v. Soares*, *R. & R.* 25, 1802; *R. v. Badcock*, *Ibid.* 249, 1812; *R. v. Stewart*, *Ibid.* 363, 1818; *R. v. Davis*, *Ibid.* 113, 1806. See *R. v. Morris*, *Ibid.* 270, 1814; 2 Leach, 1096; see, also, *R. v. Harris*, 7 C. & P. 416, 1835. *Supra*, § 217.

³ *Supra*, § 205.

⁴ *Supra*, §§ 287-9. *Com. v. Searle*, 2 Binn. 332, 1810; see *Perkins's Case*, 2 Lew. C. C. 150, where it was held that mailing is proof of uttering in the place mailed; *supra*, § 706, where exhibition to another was held enough.

⁵ *Supra*, §§ 287-9. *Infra*, § 747.

⁶ *Brown v. Com.*, 8 Mass. 59, 1811; *State v. Snow*, 80 La. An. Pt. I. 401, 1878. But see *contra*, *Gardner v. State*, 96 Ala. 12, 1891. See *State v. Burgson*, 58 Iowa, 818, 1880. That the offences cannot be joined in one indictment, see *State v. McCormack*, 56 Iowa, 585, 1881; *Ball v. State*, 48 Ark. 94, 1886; *People v. Parker*, 67 Mich. 222, 1887; *State v. Henry*, 59 Iowa, 391, 1882. But see *contra*, *Whart. Cr. Pl. & Pr.* §§ 285 *et seq.* *In re Adutt*, 55 Fed. Rep. 376, 1893; *Luttrell v. State*, 85 Tenn. 232, 1886; *Chester v. State*, 23 Tex. App. 577, 1887; *Williams v. State*, 24 Tex. App. 342, 1887; *Crawford v. State*, 31 Tex. Cr. 51, 1892; *People v. Kemp*, 76 Mich. 410, 1889; *State v. Zimmerman*, 47 Kans. 242, 1891.

That a former acquittal of forgery, under the same facts, is no bar to a conviction for "passing as true a

§ 713. The intention to defraud¹ is at common law an essential to the completion of the offence,² though it is not necessary to show that the prosecutor was actually defrauded.³ If the jury can infer from the circumstances that it was the defendant's intention to defraud the party averred, known or unknown,⁴ there being an apparent possibility of fraud, it is sufficient to satisfy such allegation in the indictment,⁵ though, from circumstances of which the defendant is not apprised, he could not have succeeded in the fraud;⁶ though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him;⁷ and though the object was to defraud whoever might take the instrument, and the intention of defraud-

forged instrument." *Reddick v. State*, Stra. 901, 1740; *R. v. Goate*, 1 *Ld.* 31 *Tex. Cr.* 587, 1893; *Hooper v. State*, 30 *Tex. App.* 412, 1891. *Raym.* 737; *Com. v. Ladd*, 15 *Mass.* 526, 1819; *Hess v. State*, 5 *Ohio*, 12, 1833;

¹ *R. v. Hodgson*, 36 *Eng. L. & Eq.* 626, 1856; 7 *Cox C. C.* 122. See *supra*, § 694, that *immediate* effect is not necessary. *State v. Washington*, 1 *Bay*, 120, 1791; *Snell v. State*, 2 *Humph.* 347, 1841; *State v. Lurch*, 12 *Oreg.* 99, 1885.

In Pennsylvania, under an indictment for forgery under the Act of March 31, 1860, § 169, it is unnecessary to prove an intent to defraud any particular person, a general intent to defraud being sufficient. *McClure v. Com.*, 86 *Pa.* 353, 1878.

Where the offence charged is the uttering of a false draft purporting to be issued by an incorporated bank, felonious intent is not necessary, under statute of Missouri, for conviction. *State v. Taylor*, 117 *Mo.* 181, 1893.

² *R. v. Powell*, 2 *W. Bl.* 787; *R. v. Holden*, 2 *Taunt.* 334, 1810; *State v. Redstrake*, 39 *N. J. L.* 365, 1877; *Couch v. State*, 28 *Ga.* 367, 1859; *Stephens v. State*, 56 *Ibid.* 604, 1876; *Gibson v. State*, 79 *Ga.* 344, 1887; *State v. Jackson*, 89 *Mo.* 561, 1886; *State v. Patterson*, 116 *Mo.* 505, 1893. Intent is an essential element of the crime of passing counterfeit money. *U. S. v. Hopkins*, 26 *Fed. Rep.* 443, 1885; *U. S. v. Otey*, 31 *Fed. Rep.* 68, 1887.

³ *Supra*, §§ 695, 705; *R. v. Crook*, 2

⁴ See *infra*, § 714.

⁵ *R. v. Jones*, 12 *East P. C.* 991; *R. v. Hill*, 8 *C. & P.* 274, 1838; *R. v. Vaughan*, *Ibid.* 276, 1838; *R. v. Cooke*, *Ibid.* 582, 586, 1838; *R. v. Geach*, 9 *Ibid.* 499, 1840; *U. S. v. Moses*, 4 *Wash. C. C.* 726, 1825; *Schroeder v. Harvey*, 75 *Ill.* 638, 1874; *Timmons v. State*, 80 *Ga.* 216, 1887; *Hennessy v. State*, 23 *Tex. App.* 340, 1887; *State v. Patterson*, 116 *Mo.* 505, 1893; *U. S. v. Long*, 30 *Fed. Rep.* 678, 1887; *Anson v. People*, 148 *Ill.* 494, 1893; *Kotter v. People*, 150 *Ill.* 441, 1894; *State v. Williams*, 66 *Iowa*, 573, 1885. See *Whart. Crim. Ev.* § 34, as to inductive proof in such cases.

⁶ *R. v. Holden*, *R. & R.* 154, 1809; *Jervis's Arch.* (9th ed.) 370; *R. v. Marcus*, 2 *C. & K.* 356, 1846.

⁷ *R. v. Sheppard*, *R. & R.* 169, 1809. That fraud in such cases is to be inferred from facts, see *Whart. Crim. Ev.* § 53; and see *People v. Marion*, 29 *Mich.* 31, 1873. *Infra*, §§ 718, 743.

ing the person specially liable on the instrument if genuine, did not enter into the prisoner's contemplation.¹ And both intent (an intent to defraud the person whose name is forged, and an intent to defraud the person on whom the forgery is to be passed) may be laid in the same indictment, to meet either phase of proof,² and so may the intent to defraud any party actually defrauded,³ or even to defraud an unknown person on whom the counterfeit might be passed.⁴ An allegation of an intent to defraud an individual may be sustained, also, by proof of fraud on a firm of which the individual was a member.⁵ Other forgeries, part of the same system, are admissible to prove intent.⁶

§ 714. The fact that no person is at the time legally in a situation to be defrauded by the act, is no defence,⁷ if there is a pos-

¹ *R. v. Mazagora*, R. & R. 291, 1815; the meaning of the statute. *R. v. R. v. Crowther*, 5 C. & P. 316, 1832; *Birkett*, R. & R. 86, 1805. *R. v. Nash*, 2 Den. C. C. 493, 1852; A forged check, drawn on Worcester U. S. v. Shelmire, 1 Bald. C. C. 371, Old Bank, was presented by the prisoner to Rufford's Bank, at Stourbridge, 1831; *State v. Gavigan*, 36 Kans. 322, and refused; and, upon an indictment 1887. *Supra*, § 695.

² *R. v. Hill*, 8 C. & P. 274, 1838; *Com. v. Carey*, 2 Pick. 47, 1823; *Brown v. Com.*, 2 Leigh, 769, 1830. *Infra*, §§ 742-6; *Whart. Cr. Ev.* § 135.

³ *R. v. Hanson*, 2 Wood C. C. 245, 1841.

⁴ *State v. Phillips*, 78 Mo. 49, 1883.

⁵ *State v. Hastings*, 53 N. H. 452, 1873; *Stoughton v. State*, 2 Ohio St. 562, 1853. See, also, *State v. Flora*, 109 Mo. 293, 1891.

It must be noticed, however, that there may be circumstances, the existence of which will tend to rebut the inference of guilty intention. Thus, a co-obligor may be guilty of forgery, as assigning a bill given by himself and another; but his having it in his possession may be evidence of authority over it; and if there be no intention to defraud, it is not forgery. *Pennsylvania v. Misner*, Addis. 44, 1792.

Where a forged bill of exchange, payable to the order of the defendant, while given as a pledge only, was given to obtain credit, it was held that there was a fraudulent intent, within

for forging and uttering a check, with intent to defraud the Messrs. Rufford, it was objected that, as it was not drawn upon them, it could not defraud them; but *Bosanquet, J.*, held that, as it was presented at their bank for payment, it was evidence of an intent to defraud them. *R. v. Crowther*, 5 C. & P. 316, 1832.

⁶ *Infra*, §§ 715, 717; *Whart. Crim. Ev.* §§ 39, 844; *U. S. v. Brooks*, 3 MacA. 315, 1877; *U. S. v. Houghton*, 14 Fed. Rep. 544, 1882; 4 *Crim. Law Mag.* 243; *State v. Minton*, 116 Mo. 605, 1893; *Strang v. State*, 32 Tex. Cr. 219, 1893; *People v. Molins*, 10 N. Y. Sup. 130, 1888; *Com. v. Russell*, 156 Mass. 196, 1892; *Anson v. People*, 148 Ill. 494, 1893; *People v. Bibby*, 91 Cal. 470, 1891; *McDonald v. State*, 83 Ala. 46, 1887.

⁷ *Supra*, §§ 693 *et seq.*; *R. v. Nash*, 2 Den. C. C. 493, 1852; *R. v. Dodd*, 18 L. T. (N. S.) 89, 1868; *R. v. Crowther*, 5 C. & P. 316, 1832. In *R. v. Tylney*, 1 Den. C. C. 319, 1848 (*supra*, § 682), there was a division of opinion

No defence
that there
was no
party at
the time
to be de-
frauded.

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may be
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sibility of such fraud. It is sufficient if the intent be laid to defraud persons unknown, or any person on whom the counterfeit is passed, or the public generally.¹

§ 715. As has been elsewhere shown,² if a party be charged with knowingly making, holding, or passing forged instruments, and the fact of his possession of the instruments be shown, but his knowledge of their character is disputed, it is admissible to prove that about the same time he held or uttered similar forged instruments to an extent which makes it improbable that he was ignorant of the forgery.³ Nor, as it is now ruled, does it exclude such evidence if the offence thus introduced has been the subject of another indictment;⁴ nor that it occurred subsequently to that under trial, if the two appear to be part of a common system.⁵ But when the illustrative offence is a forgery of another class, perpetrated several years before, it is inadmissible.⁶ It is not, however, made inadmissible,

as to whether a count charging an intent to defraud a person unknown to the grand jurors could be sustained. In *R. v. Hodgson*, D. & B. 3, 1856; 7 Cox C. C. 714, noticed *infra*, § 718, it was said that there must be some person capable of specification, who would have been defrauded or injured by the forgery. But see *supra*, §§ 688, 713. *Infra*, § 743 a.

¹ *State v. Keneston*, 59 N. H. 36, 1879. See *State v. Gavigan*, 36 Kans. 822, 1887; *State v. Adams*, 39 La. An. 288, 1887.

² Whart. Cr. Ev. § 39.

³ *R. v. Ball*, R. & R. 132, 1807; 1 Camp. 324; *R. v. Hough*, R. & R. 120, 1806; *R. v. Balls*, 1 Mood. C. C. 470, 1836; *R. v. Moore*, 1 F. & F. 73, 1858; *R. v. Salt*, 3 Ibid. 834, 1862; *U. S. v. Craig*, 4 Wash. C. C. 729, 1825; *U. S. v. Hinman*, 1 Bald. 292, 1831; *U. S. v. Doeblor*, 1 Bald. 519, 1832; *State v. McAllister*, 24 Me. 139, 1844; *Com. v. Stearns*, 10 Metc. 256, 1845; *Com. v. Hall*, 4 Allen, 305, 1862; *Com. v. Edgerly*, 10 Ibid. 184, 1865; *Spencer v. Com.*, 2 Leigh, 751, 1830; *Hendricks v. Com.*, 5 Ibid. 707, 1834; *Wash. v. Com.*, 16

Gratt. 530, 1861; *State v. Twitty*, 2 Hawks. 248, 1822; *State v. Odel*, 3 Brev. 552, 1816; *State v. Williams*, 2 Rich. 418, 1846; *Mason v. State*, 42 Ala. 532, 1842; *Reed v. State*, 15 Ohio, 217, 1846; *McCartney v. State*, 3 Ind. 853, 1852; *Steele v. State*, 45 Ill. 152, 1867; *Peek v. State*, 2 Humph. 78, 1840; *People v. Frank*, 28 Cal. 507, 1865; *Insurance Co. v. P. G. & N. R. Co.*, 153 Pa. 160, 1898; *People v. Molins*, 10 N. Y. Sup. 130, 1888; *Com. v. Russell*, 156 Mass. 196, 1892; *Anson v. People*, 148 Ill. 494, 1893; *Com. v. White*, 145 Mass. 392, 1888; *People v. Kemp*, 76 Mich. 410, 1889; *People v. Bibby*, 91 Cal. 470, 1891.

⁴ *R. v. Forster*, Dears. C. C. 456, 1855; 6 Cox C. C. 521; *Com. v. Stearns*, 10 Metc. 256, 1845; *Hoskins v. State*, 11 Ga. 92, 1852; though see *R. v. Smith*, 2 C. & P. 633, 1827; *R. v. Smith*, 4 Ibid. 411, 1831.

⁵ *R. v. Forster*, *ut supra*; *Com. v. Price*, 10 Gray, 472, 1858.

⁶ *Morris v. State*, 8 S. & M. 762, 1847. See *R. v. Salt*, 3 F. & F. 834, 1865.

if it were part of the same system, by the fact that it is different as to parties injured from the case on trial.¹ The same inference is to be drawn from the possession of the machinery for forgery or coining by the defendant or his confederates.²

V. PROOF OF CHARTER OF BANK.

§ 716. So far as concerns *pleading*, this question is discussed in other volumes.³ On the topic of evidence, the following points may be regarded as established :

If the indictment charge the intent to be simply to defraud the bank, and if by the statutes *delicti commissi* the bank must be one duly incorporated, then not only must the indictment aver, but the evidence must show the bank to have been so incorporated. So far as concerns *home* banks, this is done by implication of law. Each court takes notice of the statutes of its particular legislature as a matter of law.⁴

When bank is defrauded, existence of bank must be proved or judicially noticed.

With regard to foreign banks, however, the divergence of opinion is marked. Can the charters of such banks be proved by parol? To this incline some courts, though in States where the statutory exactions on this point are not stringent.⁵ But by strict practice it is necessary to prove such foreign charters by certified copies of the acts of incorporation;⁶ though in many States the authorized statutes of other States are admissible evidence.⁷

But if the intent be laid to be to defraud some third person, then all this strictness vanishes; and even though on the face of the record the bank is a myth, and though the prosecution fails to

¹ *R. v. Harris*, 7 C. & P. 429, 1836.

⁵ *People v. Davis*, 21 Wend. 309,

² *U. S. v. Hinman*, 1 Bald. 292, 1831; 1839; *People v. Peabody*, 25 Ibid. 472, *U. S. v. Craig*, 4 Wash. C. C. 729, 1825; 1841; *Dennis v. People*, 1 Parker C. R. 469, 1854; *Reed v. State*, 15 Ohio, 1855; *People v. Farrell*, 30 Cal. 316, 217, 1846; *Sasser v. State*, 13 Ibid. 1866; *People v. Page*, 1 Idaho, 114, 453, 1844; *Cady v. Com.*, 10 Gratt. 1867.

776, 1854; *People v. Hughes*, 29 Cal. 257, 1865. Whart. Crim. Ev. §§ 102 *a et seq.*

³ Whart. Cr. Pl. & Pr. §§ 110, 167; Whart. Crim. Ev. § 102 *a*.

⁴ See *Com. v. Carey*, 2 Pick. 47, 1823; *Calkins v. State*, 18 Ohio St. 236, 1868; *Owen v. State*, 5 Sneed, 493, 1858. As to analogy of larceny, see *Smith v. State*, 28 Ind. 321, 1867. See,

⁶ *Stone v. State*, 20 N. J. L. 401, 1845; *Jones v. State*, 5 Sneed, 346, 1858; *State v. Morton*, 8 Wis. 352, 1859. See *State v. Newland*, 7 Iowa, 242, 1858.

as to a business corporation, *State v. Murphy*, 17 R. I. 698, 1892; *State v. Shaw*, 92 N. C. 768, 1885.

⁷ Whart. Confl. of Laws, § 779.

prove that any such bank exists; yet, if the *bank note* be correctly described and proved according to the description, and if the person intended to be defrauded be also accurately described and adequately proved, then the prosecution can be sustained. For, if these last two conditions hold good, it matters not that the bank was extinct, or even that such a bank never existed at all.¹

VI. INTENTION.

§ 717. As has been already seen,² it is not forgery for a party to insert in a contract executed by the other side as well as by himself, a clause he understood the other side to have agreed to.³ It is the essence of forgery that it should be with fraudulent intention.⁴ It has also been shown that such intention is to be inferred from facts;⁵ and that *scienter* may be shown by other forgeries and fraudulent utterings.⁶ A general intent to defraud is enough. It is not necessary that it should appear that the intent was pointed at any particular person.⁷

§ 718. When the intention to give effect to the forged document is established, it is no defence that the party intended to pay the debt secured thereby, or to save harmless the injured party,⁸ or that

¹ *Supra*, § 660; *infra*, § 742; and also *supra*, § 715; and see *Francis v. State*, 7 Tex. App. 501, 1880; *Heard v. State*, 9 Ibid. 1, 1880; *Robinson v. State*, 66 Ind. 331, 1879; *Carver v. People*, 39 Mich. 786, 1878; *People v. Molins*, 10 N. Y. Sup. 130, 1888; *Com. v. White*, 145 Mass. 392, 1888.

² *Supra*, § 653 *et seq.*, 699; and see *Com. v. Henry*, 118 Mass. 400, 1875.

³ *Pauli v. Com.*, 89 Pa. 432, 1879.

⁴ See *Montgomery v. State*, 12 Tex. App. 323, 1882; *State v. Hall*, 108 N. C. 776, 1891; *State v. Jackson*, 89 Mo. 561, 1886; *State v. Murphy*, 17 R. I. 698, 1892; *Kotter v. People*, 150 Ill. 441, 1894; *State v. Gavigan*, 36 Kans. 322, 1887; *McDonald v. State*, 83 Ala. 46, 1887; *State v. Warren*, 109 Mo. 430, 1891.

⁵ *Supra*, § 701. *Whart. Crim. Ev.* §§ 149, 734; *R. v. Beard*, 8 C. & P. 582, 1838; *State v. Wooderd*, 20 Iowa, 541, 1866; *McClure v. Com.*, 86 Pa. 353, 1878; *State v. Hall*, 108 N. C. 776, 1891; *Luttrell v. State*, 85 Tenn. 232, 1886.

⁶ *Supra*, § 119. *R. v. Forbes*, 7 C. & P. 224, 1835; *R. v. Cooke*, 8 Ibid. 582, 1838; *R. v. Geach*, 9 Ibid. 449, 1840; *Com. v. Henry*, 118 Mass. 400, 1875; *Perdue v. State*, 2 Humph. 494, 1841. As to larceny, *infra*, § 906.

⁷ *Supra*, § 713.

⁸ See *Whart. Crim. Ev.* §§ 39, 844;

he agreed to take it back if not genuine;¹ or that the claim to support which the document was forged was just.² But the intention must in some way be proved. Thus, in an English case already noticed, A. forged a diploma of the College of Surgeons, intending to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and showed it to two persons with intent to induce that belief in them. This was held not to be an intent to defraud, though there was an intent to deceive.³

No defence that the party intended no harm, or that the claim was just.

VII. HANDWRITING.

§ 719. The subject of Handwriting is discussed in an independent treatise, to which reference is now made.⁴

VIII. HAVING COUNTERFEIT MONEY IN POSSESSION.

§ 720. *Having counterfeit money in possession with intent to pass the same* is a statutory offence in most jurisdictions in this country, and by some courts has been held an offence at common law.⁵ To constitute this offence, it is not ordinarily necessary to prove that the intent in keeping the notes or coin is to pass them as *genuine*. It will be enough if it appear that the ultimate object is fraud; though the intermediate object may have been the supply of a co-conspirator.⁶ But when the statute contains the words, "as true," the intent to utter as true must be averred and proved;⁷ and under the federal statute, which requires that the counterfeit money should

Having counterfeit money in possession with intent a statutory offence.

¹ Ibid. *R. v. Portis*, 40 Up. Can. 228; and see *U. S. v. Williams*, Q. B. 214. 14 Fed. Rep. 550, 1882; *Com. v.*

² *R. v. Wilson*, 2 C. & K. 527, 1847. *Morse*, 2 Mass. 138, 1805; *U. S. v. See R. v. Forbes*, 7 C. & P. 224, 1835; *Stevens*, 52 Fed. Rep. 120, 1891. As *R. v. Cooke*, 8 Ibid. 582, 1838; *State v. Kimball*, 50 Me. 409, 1861; *State v. Cole*, 19 Wis. 129, 1865. See *supra*, § 119. cases on the statutory offence, in addition to those cited below, see *Com. v. Price*, 10 Gray, 472, 1858; *State v. Benham*, 7 Conn. 414, 1829; *Stone v. State*, 20 N. J. L. 401, 1845; *Sasser v. State*, 13 Ohio, 453, 1844; *People v. Ah Sam*, 41 Cal. 645, 1871.

³ *R. v. Hodgson*, D. & B. 3, 1856; 7 Cox C. C. 122; cited Steph. Dig. art. 356. *Supra*, §§ 688, 714. *Hopkins v. Com.*, 3 Metc. 460, 1842; *State v. Harris*, 5 Ired. 287, 1844. See *Bevington v. State*, 2 Ohio St. 160, 1853; *People v. Ah Sam*, 41 Cal. 645, 1871.

⁴ See Whart. Cr. Ev. §§ 546 *et seq.*

⁵ *R. v. Sutton*, 2 Stra. 1074, 1747; 1 East P. C. 172; *R. v. Williams, Jebb*, 48, note, 1797; *Dugdale v. R.*, 1 E. & B. 435, 1853; but see *contra*, as to common law, *R. v. Stewart*, R. & R. 1857.

⁶ *Hopkins v. Com.*, 3 Metc. 460, 1842; *State v. Harris*, 5 Ired. 287, 1844. See *Bevington v. State*, 2 Ohio St. 160, 1853; *People v. Ah Sam*, 41 Cal. 645, 1871.

⁷ *People v. Stewart*, 4 Mich. 655,

be after "the similitude" of an obligation of the United States, this similitude must extend to the signature.¹ The "similitude," under the statute, need not be perfect. It is enough if deception of non-experts is probable.²

§ 721. *Coin*, it has been said, may be generically described (e. g., "a false and counterfeit coin, so in the similitude of the good and legal silver coin, etc., current in this commonwealth by the laws and usages thereof, called a dollar");³ but if the indictment undertake to describe *notes* (without giving any reason, such as possession by the defendant, to excuse generality), it must describe the notes accurately, as in an indictment for forgery.⁴

Of course, when the forged money remains in the defendant's hands, or has been disposed of by him, this may be averred in the indictment;⁵ and secondary evidence may be then offered at the trial. As is elsewhere seen,⁶ there are authorities to indicate that in such case the indictment is by itself notice to produce. But by strict practice, notice to produce is necessary.⁷ Where the notes are of a fictitious bank, it would seem that close description of the bank is unnecessary; and so has it been held.⁸

The names of the persons intended to be defrauded need not be given.⁹

§ 722. The *scienter* is material, and should, independently of the statute, be both alleged and proved.¹⁰ It

¹ U. S. v. Williams, 14 Fed. Rep. 550, 1882. So as to unexecuted bonds, which do not fall under the statute. U. S. v. Sprague, 11 Biss. 376, 1882; 48 Fed. Rep. 828, 1882. See as to counterfeit coin, U. S. v. Bicksler, 1 Mackey, 341, 1881.

² U. S. v. Sprague, 11 Biss. 376, 1882; 48 Fed. Rep. 828, 1882. It is for the jury to decide whether the similitude exists or not. U. S. v. Stevens, 52 Fed. Rep. 120, 1891. *Supra*, § 695.

³ Com. v. Stearns, 10 Metc. 256, 1845; *Fight v. State*, 7 Ohio, 180, 1835; *Peek v. State*, 2 Humph. 78, 1840. Still more liberal are *State v. Williams*, 8 Iowa, 534, 1859, and *State v. Griffin*, 18 Vt. 198, 1846; and see *infra*, § 751. In *Com. v. Stearns*, it was held

that under the term "dollar," a *Mexican* dollar could be proved.

⁴ Whart. Cr. Pl. & Pr. §§ 167 *et seq.*; *State v. Callendine*, 8 Iowa, 288, 1859; and see *McMillin v. State*, 5 Ohio, 268, 1831.

⁵ Whart. Cr. Pl. & Pr. § 176.

⁶ *Ibid.*; *infra*, § 730.

⁷ See Whart. Crim. Ev. §§ 212 *et seq.*; *People v. Stewart*, 4 Mich. 655, 1857; *Armitage v. State*, 13 Ind. 441, 1859.

⁸ *People v. Peabody*, 25 Wend. 472, 1841; *Sasser v. State*, 13 Ohio, 453, 1844.

⁹ U. S. v. Bicksler, 1 Mackey, 341, 1881.

¹⁰ Whart. Cr. Pl. & Pr. § 164; *Owen v. State*, 5 Sneed, 493, 1858; *Powers v. State*, 87 Ind. 97, 1882.

is a good defence that the money was received innocently in the course of business.¹

§ 723. *Intent* may be inferred in the same way as intent in cases of uttering.² Mere possession of the document as a curiosity will not sustain a conviction.³ But fraudulent selling is proof of fraudulent possession.⁴

Intent to be inferred

§ 724. It has been ruled that having in possession several forged bank notes, of different banks, at one time, with intent to pass them, and thereby to defraud the person taking them, constitutes but one offence; and that the defendant cannot be pursued severally on each note.⁵

Having in possession several kinds of notes is one offence.

IX. INFERENCES OF FORGERY FROM EXTRINSIC FACTS.

§ 725. It need scarcely be repeated, that collateral mechanical evidences of forgery are always to be received for what they are worth. Thus it is admissible to show by an expert that the writing was traced over pencil;⁶ that the water-mark of the paper is repugnant; or that other circumstances exist which make it improbable that the writing is genuine.⁷

Collateral mechanical evidences of forgery.

§ 726. Does the *uttering* of a forged instrument by a particular person justify a jury in convicting such person of *forgery*? This question, if put nakedly, must, like the kindred one as to the proof of larceny by evidence of possessing stolen goods, be answered in the negative. The defendant is presumed to be innocent until otherwise proved. In larceny this presumption is overcome by proof that the possession is so *recent* that it becomes difficult to conceive how the defendant could have got the property without being in some way concerned

Presumption of forgery from uttering.

¹ U.S. v. Kenneally, 5 Biss. 122, 1870. C. R. 66, 1860. See State v. Eggesht,

² See *supra*, §§ 713 *et seq.* Hopkins 41 Iowa, 574, 1875; Whart. Cr. Pl. & v. Com., 3 Metc. 460, 1842; Hutchins Pr. §§ 468 *et seq.*

³ R. v. Williams, 8 C. & P. 434, 1838. v. State, 13 Ohio, 198, 1844; Miller v. State, 51 Ind. 405, 1875; Perdue v. State, 2 Humph. 494, 1841; U. S. v. Hopkins, 26 Fed. Rep. 443, 1885. See Whart. Crim. Ev. §§ 844 *et seq.*, and compare article on Whittaker's Case, 2 Crim. Law Mag. 139.

⁴ R. v. Harris, 7 C. & P. 429, 1836; Fox v. People, 95 Ill. 71, 1880. Whart. Crim. Ev. §§ 559, 764 *et seq.*, 844 *et seq.*; Crisp v. Walpole, 2 Hagg.

⁵ U. S. v. Biebusch, 1 McCr. 42, 1880. 52; Warren's Miscell. 256; Wills. Circ. Ev. 111; Mossam v. Joy, 10 St. Tr.

⁶ State v. Benham, 7 Conn. 414, 666. As to proof of other forgeries, 1829; People v. Van Keuren, 5 Parker see Whart. Crim. Ev. § 39.

in the stealing. So it is with uttering. The uttering may be so closely connected in time with the forging, the utterer may be proved to have such capacity for forging, or such close connection with the forgers, that it becomes, when so accompanied, probable proof of complicity in the forgery.¹

X. INDICTMENT IN FORGERY AND UTTERING.²

§ 727. A crime which may be committed by the agency of several means is well described if charged to be by the agency of any one.³ Thus the indictment which charges a prisoner with the offences of falsely making, forging, and counterfeiting, of causing and procuring to be falsely made, forged, and counterfeited, and of willingly acting and assisting in the said false making, forging, and counterfeiting, is a good indictment, though all of those charges are contained in a single count, the words of the statute being pursued; and where there is a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct.⁴ The descrip-

Not duplicity to state the offence in varying phases.

¹ *Supra*, §§ 713-15; *infra*, §§ 747, refer, however, to the same transaction. *Territory v. Poulier*, 8 Mont. 848. See, as in the main substantiating this view, *U. S. v. Britton*, 2 Mason, 464, 1826; *Spencer v. Com.*, 2 Leigh, 751, 1830; *State v. Morgan*, 2 Dev. & Bat. 348, 1837; *State v. Outs*, 30 La. An. Pt. II. 1155, 1878; *Cohn v. People*, (Colo.) 2 West Coast Rep. 528, 1884. In Massachusetts the mere fact of *uttering* is properly held not to be proof of *forging*. *Com. v. Parmenter*, 5 Pick. 279, 1827. In England the presumption of complicity is even more severely guarded. *R. v. Parkes*, 2 East P. C. 992, 1796.

Where, however, the indictment seems to charge two offences, but the second is not known to the law of the State, it is discharged as surplusage, and the indictment is not bad for duplicity. *People v. Harrold*, 84 Cal. 567, 1890.

² See, for forms of indictment, Whart. Prec., tit. FORGERY. *Borrisford v. State*, 66 Ga. 157, 1880.

³ See Whart. Cr. Pl. & Pr. §§ 243 *et seq.* Compare *State v. Haney*, 2 Dev. & Bat. 390, 1837; *Hoskins v. State*, 11 Ga. 92, 1852; *Perkins v. Com.*, 7 Gratt. 651, 1851.

If there are two modes of committing a crime, each mode may be given in a separate count; they must both

⁴ *R. v. Middlehurst*, 1 Burr. 399; *State v. Hastings*, 53 N. H. 452, 1873; *State v. Morton*, 1 Williams, (Vt.) 310, 1855; *Com. v. Thomas*, 10 Gray, 483, 1858; *Rasnick v. Com.*, 2 Va. Cas. 356, 1823; *Hoskins v. State*, 11 Ga. 92, 1852; *People v. Harrold*, 84 Cal. 567, 1890; *Johnson v. Com.*, 90 Ky. 488, 1890. See Whart. Crim. Ev. §§ 134, 138; Whart. Cr. Pl. & Pr. §§ 251, 742.

tion, also, of a bank note as "false, forged, and counterfeited" is not repugnant.¹ But where two distinct offences, separate as to operation, requiring different punishments, are charged in the same count, and the defendant is convicted, the judgment must be arrested.² It is otherwise when the several terms used are such as may each severally describe the instrument, as in the case of "bond and obligation," or "warrant and order,"³ or when one offence is an antecedent or corollary of the other.⁴

§ 728. If the indictment declare the instrument to be of a particular class, a variance between the evidence and the indictment in this respect is, it seems, fatal.⁵ In another volume the meaning of the designations in most general use is considered as follows:

Variance
as to gene-
ral desig-
nation of
instru-
ment fatal.

(a) "Purporting to be," Whart. Cr. Pleading & Practice, § 184. Compare *infra*, § 737.

(b) "Receipt," "Acquaintance," Ibid. §§ 185-6.

(c) "Bill of exchange," Ibid. § 187.

(d) "Promissory note," Ibid. § 188.

(e) "Bank note," Ibid. § 189.

(f) "Money," Ibid. § 190.

(g) "Goods and chattels," Ibid. § 191.

(h) "Warrant, order, or request for the payment of money," Ibid. §§ 192-3-4.

(i) "Deed," Ibid. § 196.

(j) "Obligation," "Undertaking," "Guaranty," Ibid. §§ 198-200.

Where a full setting out of the instrument is given, a technical designation of its character may, in common law, be dispensed with,⁶

¹ Mackey v. State, 3 Ohio St. 362, Hart v. State, 20 Ohio, 49, 1851. See, 1854, overruling Kirby v. State, 1 Ibid. as indicating extent of this rule, People v. Marion, 29 Mich. 31, 1873; 185, 1853; Whart. Cr. Pl. & Pr. §§ 243, 283. State v. Maupin, 57 Mo. 205, 1874;

² People v. Wright, 9 Wend. 193, Powers v. State, 87 Ind. 97, 1882; 1832. See Page v. Com., 9 Leigh, 683, Townsend v. State, 92 Ga. 732, 1898.

³ The same count cannot charge both forgery and uttering. People v. Parker, 67 Mich. 222, 1887; Whart. Cr. Pl. & Pr. § 243. ⁶ Whart. Cr. Pl. & Pr. §§ 184-198; People v. Ah Woo, 28 Cal. 205, 1865. An indictment, under Section 164, Act of March 31, 1890, in Pennsyl-

⁴ R. v. Dunnett, 2 East P. C. 985, 1792; State v. Jones, 1 McMull. 236, 1841. For other cases, see *infra*, § 728. vania for an attempt to utter a fraudulently altered bank note is not sustained by proof of the alteration of a national bank note. Com. v. Shiber,

⁵ Whart. Cr. Pl. & Pr. § 291.

⁶ Whart. Cr. Pl. & Pr. §§ 183 *et seq.*; (Pa.) 4 Kulp, 264, 1887.

and when several designations are given, one of which is correct, those which are incorrect may be rejected as surplusage.¹ But when a statute makes the forgery of a particular kind of instrument indictable, the indictment must aver the instrument to be such, if it be intended to bring the case within the statute.²

§ 728 a. The indictment should not only set forth the tenor of the instrument forged, but should profess to do so.³ And the

¹ State v. Crawford, 13 La. An. 300, 1858; R. v. Williams, 2 Den. C. C. 61, 1850; 1 T. & M. C. C. 382; 4 Cox C. C. 256; 2 Eng. Law & Eq. 533; U. S. v. Marcus, 53 Fed. Rep. 784, 1893; People v. Kemp, 76 Mich. 410, 1889. In this case the indictment charged the defendant with having forged "a certain warrant, order, and request, in the words and figures following," etc. It was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order, and request. But it was held that there was no variance, as the document being set out in full in the indictment, the description of its legal character became immaterial. Parke, B., suggested that the correct course would have been to have alleged the uttering of one warrant, one order, and one request. "The principle of this decision seems to be," says the reporter, "that where an instrument is described in an indictment by several designations, and then set out according to its tenor, either with or without a *videlicet*, the court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material only such designations as the tenor of the indictment shows to be really applicable. And where the indictment is so drawn as to enable the court to treat as material only the tenor of the instrument itself, all the descriptive averments may be treated as surplusage. The case seems reconcilable with R. v. Newton, 2 Mood. C. C. 59, but

to overrule R. v. Williams, 2 C. & K. 51." See Bristow v. Wright, Doug. 665. In R. v. Charretie, 3 Cox C. C. 503, 1849, Davison, *amicus curiæ*, mentioned that Cresswell, J., in a subsequent case, had declined to act upon the authority of R. v. Williams, 2 C. & K. 51, 1847. See Tr. & H. Pr. 222; Whart. Cr. Pl. & Pr. §§ 183 *et seq.*

² 1 Stark. C. P. 104; R. v. Hunter, R. & R. 511, 1823; R. v. Birkett, Ibid. 251, 1813. See U. S. v. Trout, 4 Biss. 105, 1865; State v. Tingler, 32 W. Va. 546, 1889; Terry v. Com., 87 Va. 672, 1891. And a variance is fatal. Whart. Crim. Ev. § 114; Sharley v. State, 54 Ind. 168, 1876; State v. Bean, 19 Vt. 530, 1847; State v. Farrand, 3 Halst. 336; State v. Houseall, 2 Brev. 219, 1807; People v. Marion, 28 Mich. 255, 1873; State v. Horan, 64 N. H. 548, 1888.

³ As to pleading of instrument, see Whart. Cr. Pl. & Pr. §§ 168 *et seq.*; Whart. Crim. Ev. § 114; U. S. v. Corbin, 11 Fed. Rep. 238, 1882; U. S. v. Schoyer, 2 Blatch. 59, 1853; State v. Morton, 1 Williams, (Vt.) 310, 1855; Com. v. Wilson, 2 Gray, 70, 1854; State v. McMillen, 5 Ohio, 269, 1831; Dana v. State, 2 Ohio St. 91, 1853; State v. Twitty, 2 Hawks, 248, 1823; State v. Bibb, 68 Mo. 286, 1878; Ham v. State, 4 Tex. App. 645, 1878; Labbaite v. State, 6 Ibid. 257, 1879; Murphy v. State, Ibid. 554, 1879; Luttrell v. State, 85 Tenn. 232, 1886; Hennessey v. State, 23 Tex. App. 340, 1887; Trask v. People, (Ill.) 38 N. E. Rep. 248, 1894; State v. Henderson,

setting forth must be in words and figures, so that the court may be able to judge from the record whether it is an instrument which can be forged.¹

Instrument must be accurately set forth.

§ 729. If the instrument forged be in a foreign language, it must be set out in that language, and with it a complete and accurate translation.² But in California, when the writing is in Chinese, it is sufficient to set forth the translation.³ And a signature in German handwriting may be given as it is.⁴

Of a foreign language translation must be given.

§ 730. If the forged writing is not set forth, a sufficient reason should be given in the indictment why such is not done; *e. g.*, that the instrument has been destroyed, or is in the possession of the defendant.⁵ But an omission to set forth the names of the signers of an uncurrent bill is not cured by a mere averment that the jurors cannot give a more particular description.⁶

Lost or non-producible instruments.

§ 731. The number of a bank bill or note, its vignettes, mottoes, and devices, and the words and figures⁷ in the margin, need not

29 W. Va. 147, 1886; *Cohn v. People*, C. 429, 1834; *R. v. Warshaner*, Ibid. (Colo.) 2 W. Coast Rep. 528, 1884; 466, 1835; *R. v. Goldstein*, R. & R. State v. Wright, 9 Wash. 96, 1894; 473, 1821; *R. v. Harris*, 7 C. & P. 416, State v. Sherwood, 41 La. An. 316, 429, 1836; Whart. Cr. Pl. & Pr. § 181. 1889; *State v. Clement*, 42 La. An. 588, 1891; *Dooley v. State*, 21 Tex. App. 549, 1886; *Alexander v. State*, 28 Tex. App. 186, 1889.

³ *People v. Ah Woo*, 28 Cal. 205, 1865.

⁴ *Duffin v. People*, 107 Ill. 113, 1883.

¹ *U. S. v. Fissler*, 4 Biss. 59, 1865; *Burress v. Com.*, 37 Gratt. 934, 1876; *Brown v. People*, 66 Ill. 344, 1872; *State v. Cook*, 52 Ind. 574, 1875; *Sharley v. State*, 54 Ibid. 168, 1876; *State v. Jones*, 1 M'Mull. 236, 1841; *Haslip v. State*, 10 Nebr. 590, 1880; *Fomby v. State*, 87 Ala. 36, 1889; *Smith v. State*, 25 Fla. 517, 1892; *State v. Minton*, 116 Mo. 605, 1893; *Burks v. State*, 24 Tex. App. 326, 1887. As to pleading, see Whart. Cr. Pl. & Pr. §§ 167 *et seq.* As to variance, see Whart. Crim. Ev. §§ 114 *et seq.* And see, as to undecipherable inscriptions, *U. S. v. Mason*, 12 Blatch. 497, 1878; Whart. Crim. Ev. § 117.

⁵ *R. v. Haworth*, 4 C. & P. 254, 1830; *R. v. Hunter*, Ibid. 128, 1829;

Com. v. Houghton, 8 Mass. 107, 1811; *Com. v. Ross*, 2 Ibid. 373, 1807; *Com. v. Hutchinson*, 1 Ibid. 7, 1806; *People v. Badgeley*, 16 Wend. 53, 1836; *State v. Potts*, 4 Halst. 26, 1827; *Pendleton v. Com.*, 4 Leigh, 694, 1834; *State v. Davis*, 69 N. C. 313, 1873; *U. S. v. Doeblor*, 1 Bald. 519, 1883; *State v. Munson*, 79 Ind. 541, 1881; *Luttrell v. State*, 85 Tenn. 232, 1886; *State v. Callaghan*, 124 Ind. 364, 1890. See fully Whart. Cr. Pl. & Pr. § 176.

⁶ *Com. v. Clancy*, 7 Allen, 537, 1862.

⁷ Whart. Cr. Pl. & Pr. § 167; Whart. Crim. Ev. § 114; *U. S. v. Bennett*, 17 Blatch. 357, 1880; *State v. Flye*, 26 Me. 312, 1846; *State v. Carr*,

Vignettes
and mot-
toes need
not be
given.

be set forth in the indictment. When, however, descriptive devices are given, a variance is fatal.¹ The copy of a bank bill must give the name of the State on the margin of the bill.²

Nor
stamps.

§ 732. *Stamps*, though required by the local government to be affixed, need not, it would seem, be copied in the indictment, when their omission does not destroy the legal capacity of the instrument.³

Indorse-
ments
need not
be given;
nor sur-
plusage.

§ 733. Matter purely extraneous need not be set forth.⁴ Thus, in setting forth a counterfeit bank note literally, in an indictment for feloniously passing the same, it was held that the omission of an indorsement appearing to have been made on the note after it was issued was no variance.⁵ And so of the omission of an irrelevant indorsement on a promissory note.⁶ And the reason of this is obvious. As each obligor on a note is suable independently on his particular obligation, so an indictment for forgery lies for the forgery of each such obligation, all the rest of the note being surplusage. The same rule applies to the forgery of one of several obligors of a bond.⁷ And whatever is surplusage need not be set out.⁸

5 N. H. 367, 1831; *State v. Wheeler*, 732, 1837; *Whart. Crim. Ev.* § 114. 35 Vt. 261, 1862; *Com. v. Bailey*, 1 That such devices may be material, Mass. 62, 1804; *Com. v. Stevens*, Ibid. see *R. v. Keith*, cited *supra*, § 682. 203, 1806; *Com. v. Taylor*, 5 Cush. 605, ² *Com. v. Wilson*, 2 Gray, 70, 1854. 1850; *People v. Franklin*, 3 Johns. ³ *Supra*, § 697. See *Com. v. McKean*, Cas. 299, 1803; *State v. Van Hart*, 2 98 Mass. 9, 1867. Harrison, 327, 1839; *Com. v. Searle*, ⁴ *Whart. Cr. Pl. & Pr.* § 180. 2 Binn. 332, 1810; *Griffin v. State*, 14 ⁵ *Com. v. Ward*, 2 Mass. 397, 1808; Ohio St. 55, 1862; *Butler v. State*, 22 Buckland's Case, 8 Leigh, 732, 1837; Ala. 43, 1852; *Trask v. People*, 151 *Whart. Cr. Pl. & Pr.* § 180. Ill. 523, 1894; *White v. Territory*, 1 ⁶ *Com. v. Ward*, 2 Mass. 397, 1808; Wash. 279, 1890; *Smith v. State*, 29 Perkins v. Com., 7 Gratt. 651, 1851; Fla. 408, 1892. Hess v. State, 5 Ohio, 5, 1831; Buckland v. Com., 8 Leigh, 732, 1837; Cocke v. Com., 13 Gratt. 750, 1855. See *Com. v. Adams*, 7 Metc. 50, 1843; *Smith v. State*, 20 Nebr. 284, 1886; *Whart. Cr. Pl. & Pr.* § 180. As to omitting the indorsement of a witness upon a receipt, see *State v. Henderson*, 29 W. Va. 147, 1886. In general as to witnesses, *People v. Sharp*, 53 Mich. 523, 1884.

It has been even ruled that an omission of the figures given in the margin of an order is not fatal when the amount is rightly given in the copy of the body of the document. *Langdale v. State*, 100 Ill. 263, 1881.

It is not a fatal variance to omit the middle initial in setting out the name alleged to have been forged. *Langdon v. People*, 133 Ill. 382, 1890.

¹ *Griffin v. State*, 14 Ohio St. 55, 1862. See *Buckland's Case*, 8 Leigh,

⁷ *State v. Davis*, 69 N. C. 313, 1873.

⁸ *State v. Ballard*, 2 Murphy, 186,

§ 734. An omission of part of the date may be fatal.¹ Otherwise as to date.

§ 735. Where the forgery is charged to consist in the insertion of words in a genuine document, the indictment must distinctly set forth the position of the inserted words, so that their effect upon the original meaning of the document may appear.² But the pleader may charge the whole document as a forgery, when this particularity is not required. The same distinction is applicable to alterations in a document.³ Altered and inserted words, when material, must be averred.

§ 736. *Sewing to the paper* on which the indictment is written impressions of forged notes taken from engraved plates is not a legal mode of setting out the notes in the indictment.⁴ Sewing to the paper not sufficient.

§ 737. "*Tenor*" binds the pleader to the severest accuracy,⁵ though mere clerical variations, if the sound be retained, do not vitiate.⁶ "*Purport*" means the legal title of the instrument as a whole. Whenever it is declared that a certain paper "*purports*" to be a "*bill*" or a "*bond*," "Tenor" means words, "purport," character.

1812; *State v. Gardiner*, 1 Ired. 27, 1840; *Burks v. State*, 24 Tex. App. 326, 1887; *U. S. v. Marcus*, 58 Fed. Rep. 784, 1893; *People v. Sharp*, 53 Mich. 523, 1884; *People v. Baker*, 100 Cal. 188, 1893.

The value of the property sought to be obtained, under an order for goods alleged to be forged, need not be set out. *Stewart v. State*, 113 Ind. 505, 1887. See, also, as to alleging value, *State v. Adamson*, 43 Minn. 196, 1890; *State v. Phillips*, 78 Mo. 49, 1883; *State v. Clement*, 42 La. An. 583, 1890.

¹ *Com. v. Stow*, 1 Mass. 54, 1807. As to date, see *State v. Blanchard*, 74 Iowa, 628, 1888.

² *Supra*, § 678; *State v. Flye*, 26 Me. 312, 1846; *State v. Bryant*, 17 N. H. 323, 1846; *Com. v. Butterick*, 100 Mass. 12, 1868; *Com. v. Boutwell*, 129 Mass. 124, 1881; *Bittings v. State*, 56 Ind. 101, 1877; *State v. Fisher*, 58 Mo. 256, 1874. See *Com. v. Shissler*, 9 Phila. 587, 1872. As to Virginia statute, see *Coleman v. Com.*, 25 Gratt. 865, 1874.

³ *State v. Flye*, 26 Me. 312, 1846; *Com. v. Butterick*, 100 Mass. 12, 1868; *Com. v. Boutwell*, 129 Ibid. 124, 1881; *State v. Weaver*, 13 Ired. 491, 1852; *State v. Rowley*, Brayt. 76, 1816; *State v. Greenlee*, 1 Dev. 523, 1828; *Kahn v. State*, 58 Ind. 168, 1877; *White v. Territory*, 1 Wash. 279, 1890.

⁴ *Whart. Cr. Pl. & Pr.* §§ 168, 173; *Whart. Crim. Ev.* § 114; *R. v. Harris*, 7 C. & P. 429, 1836; *R. v. Warshaner*, 1 Mood. C. C. 466, 1835.

⁵ *R. v. Powell*, 2 East P. C. 976, 1771; *State v. Morton*, 1 Williams, (Vt.) 310, 1855; *Com. v. Parmenter*, 5 Pick. 279, 1827; *State v. Weaver*, 13 Ired. 491, 1852; *Becker v. State*, (Tex.) 18 S. W. Rep. 550, 1892; *Roberts v. State*, (Tex.) 18 S. W. Rep. 94, 1891; *Smith v. State*, 29 Fla. 408, 1892. But see *Trask v. People*, 151 Ill. 523, 1894; *Langdon v. People*, 133 Ill. 382, 1890; *State v. Curtis*, 39 Minn. 357, 1888; *State v. Blanchard*, 74 Iowa, 628, 1888.

⁶ See *Whart. Cr. Pl. & Pr.* §§ 167, 173; *Whart. Crim. Ev.* § 114; *People v. Phillips*, 70 Cal. 61, 1886; *State v. Gryder*, 44 La. An. 962, 1892.

then if, on giving its tenor, it is not shown to possess this legal character, there is some authority to declare that the variance is fatal. But the preponderance of authority in such cases is that where the tenor is exact and complete, and sufficiently shows the purport, then the "purporting" clause may be rejected as surplusage.¹ But even when the courts are disinclined to reject the "purporting" clause as surplusage, they will not be strict, in a purely arbitrary matter, in holding to an exact accordance between the "purport" and the "tenor."²

§ 738. If we look at the point closely, there is a repugnancy on the face of an indictment which avers that the defendant "Purporting to be" "forged" the "note of A. B.," for, if the note is forged, it is not the note of A. B.; and if it is the note of A. B., it is not forged.³ Hence, in the old practice, there

have been cases in which the courts, following a strict logical necessity, have declared that the omission of "purporting to be" is fatal.⁴ Yet this sharpness of criticism is not now pressed; and the present rule is, that if "purporting to be" is omitted, yet the court, assuming it to be meant, will intend it, if the question of repugnancy be raised.⁵ And it is now settled that "As follows" is a sufficient averment of citation in an indictment.⁶

§ 739. It has been already seen that it is necessary, in order to make an instrument the subject of an indictment for forgery, that it should be capable of being used as a proof in a legal action.⁷

Indictment must show instrument We are not, however, to confine such capacity to suits in which the person whose name is forged is summoned as

¹ *Supra*, § 728. See *Chamberlain v. State*, 5 Blackf. 573, 1841; *State v. Crawley*, 13 La. An. 300, 1858; *Garmire v. State*, 104 Ind. 444, 1885. But where a single designation only is indictable by statute, then this must be accurately given. *Supra*, § 728; *infra*, § 738.

² *State v. Jones*, 1 M'Mull. 236, 1841; *Fogg v. State*, 9 Yerg. 392, 1836; *State v. Vincent*, 91 Mo. 662, 1887. But see *State v. Horan*, 64 N. H. 548, 1888; *People v. Kemp*, 76 Mich. 410, 1889; *State v. Shaw*, 92 N. C. 768, 1885; *State v. Murphy*, 46 La. An. 415, 1894.

³ For a similar logical distinction between a "forged" instrument and a "counterfeited" instrument, see *Johnson v. Com.*, 90 Ky. 488, 1890.

⁴ See *R. v. Carter*, 2 East P. C. 985, 1800.

⁵ *R. v. Birch*, 1 Leach, 79, 1871; 2 W. Bl. 790; *State v. Gardiner*, 1 Ired. 27, 1840. See Whart. Cr. Pl. & Pr. § 184.

⁶ *Clay v. People*, 86 Ill. 147, 1877. See *McDonnell v. State*, 58 Ark. 242, 1893; Whart. Cr. Pl. & Pr. § 168.

⁷ See, also, *State v. Cook*, 52 Ind. 574, 1876; and see, generally, Whart. Cr. Pl. & Pr. §§ 184-8.

defendant—*e. g.*, actions on bills, bonds, etc. It equally answers the question if the forged instrument is, *prima facie*, capable of being used as a defence (*e. g.*, as a receipt) in a suit against the forger by the person whose receipt is forged. But unless the instrument forged appears by the indictment to be capable of being used as legal proof, at some time, or in some way, or at some place, the indictment is bad.¹

At some time.—It is not necessary, therefore, to the validity of the indictment that the forged instrument should appear to be one which could be used immediately as legal proof. It is enough if it can be so used at some future period. Thus, an indictment is good which charges the forgery of a will of a living person, although such will could not be the foundation of legal process until after the death of the person whose name is forged.²

In some way.—Nor need the indictment set out an instrument which is capable of being used against the party whose name is forged in an ordinary suit at common law. It is enough, as has been seen, if the instrument be one (*e. g.*, a receipt) which can be used against such party when suing for a debt; or if by any process of equity it can be used against him directly or indirectly.³

At some place.—And even if it appear that the instrument is one which could never be used by the *lex fori* against the prosecutor, yet the indictment will be sustained if the instrument is one which, in any foreign jurisdiction, could be sued upon.⁴

§ 740. Where an instrument is incomplete on its face, so that as it stands it cannot be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force.⁵ Thus, where an indictment charged that A. did feloniously and fraudulently forge a

to be capable of being used in legal process.

Must aver extraneous facts when necessary for this purpose.

¹ See *supra*, §§ 680–696; *R. v. Wilcox*, R. & R. 50, 1802; *Com. v. Ray*, 3 Gray, 441, 1858; *People v. Shall*, 9 Cow. 778, 1829; *Williams v. State*, 51 Ga. 535, 1874.

An indictment for the forgery of an indorsement upon a note must contain an averment that the words alleged to have been forged bore such a relation to the note as to be the subject of forgery; and the necessity of such averment is not obviated by an

² *R. v. Sterling*, *R. v. Coogan*, *supra*, § 695.

³ See remarks of Ludlow, J., in *Biles v. Com.*, 32 Pa. 529, 1859. *Supra*, § 667.

⁴ *Supra*, § 693; Whart. Conf. of Laws, § 685.

⁵ See, fully, Whart. Cr. Pl. & Pr. §§ 184–190; *Henry v. State*, 35 Ohio St. 128, 1878; *Sanabria v. People*, 24

certain writing, as follows: "Mr. Bostick, charge A.'s account to us, B. and C.," with intent to defraud B. and C., it was held that the indictment was not valid without charging that A. was indebted to Bostick, as there could be no fraud unless a debt existed.¹ The same rule applies to a forged railway pass, when the alleged pass itself does not distinctly state its object,² and to a forged indorsement, which the indictment must aver to have been put on a document in such a way as to have a *primâ facie* binding effect.³

But if the meaning of the transaction can be sufficiently extracted from the instrument itself, it will not be necessary to state matters of evidence so as to make out more fully the charge.⁴ Thus, it is not necessary, in an indictment for forging an indorsement, to aver the maker's name, nor the qualities of the original note;⁵ nor, in averring the causing "uttering," to aver how the uttering was caused;⁶ nor, in an indictment for forging a receipt, to aver indebtedness of the defendant to the person whose name was forged;⁷ nor need the indictment, in case of acquittance, aver presentation or delivery to any person as a genuine acquittance for goods delivered, and in consideration thereof;⁸ nor, in case of sale of counterfeit notes, need it be averred that the sale was for a consideration, or the injury of any one, or that the notes were indorsed.⁹ And where the indictment sets forth the instrument or writing alleged to

Hun, 270, 1881; *Com. v. Mulholland*, 12 Phila. 608, 1878; *Terry v. Com.*, 87 Va. 672, 1891; *Hendricks v. State*, 26 Tex. App. 176, 1888; *Stewart v. State*, 113 Ind. 505, 1887; *Shannon v. State*, 109 Ind. 407, 1886; *Fomby v. State*, 87 Ala. 36, 1888; *Dixon v. State*, 81 Ala. 61, 1886; *Williams v. State*, 91 Ala. 14, 1890.

¹ *State v. Humphreys*, 10 Humph. 442, 1850; *State v. Murphy*, 46 La. An. 415, 1894; *Simms v. State*, 32 Tex. Cr. 277, 1893. See *Hooper v. State*, 30 Tex. App. 412, 1891. *Supra*, §§ 695 *et seq.*

² *Com. v. Ray*, 3 Gray, 441, 1855; and see *Clark v. State*, 8 Ohio St. 630, 1858. *Supra*, § 685; *infra*, § 745. For other cases as to receipts, see Whart. Cr. Pl. & Pr. §§ 85-6.

³ *Com. v. Spilman*, 124 Mass. 327, 1878.

⁴ *Dixon v. State*, (Tex.) 26 S. W. Rep. 500, 1889; *Roberts v. State*, 92 Ga. 451, 1893; *State v. Schwartz*, 64 Wis. 432, 1885; *Reddick v. State*, 31 Tex. Cr. 587, 1893.

⁵ *Cocke v. Com.*, 13 Gratt. 750, 1855. But see *Com. v. Spilman*, *supra*, § 739.

⁶ *Brown v. Com.*, 2 Leigh, 769, 1830; *Ellis v. State*, (Tex.) 22 S. W. Rep. 678, 1893. Similarly as to averring how the forgery was effected. *State v. Wingard*, 40 La. An. 733, 1888.

⁷ *Snell v. State*, 2 Humph. 347, 1841; *State v. Henderson*, 29 W. Va. 147, 1886; though see *Rice v. State*, 1 Yerg. 482, 1830. As to forged release of liens, see *Williams v. State*, 91 Ala. 14, 1890.

⁸ *Com. v. Ladd*, 15 Mass. 526, 1819.

⁹ *Hess v. State*, 5 Ohio, 5, 1831.

have been forged, averring it to have been falsely made, with the intent to injure or defraud some person or body corporate, it is not necessary that the facts and circumstances of the case showing the intent should be specially set forth in the indictment.¹

§ 741. As general rules, subject to modification in local practice by the applicatory statutory law, the following may be here announced :

(1) When the object is to charge the forgery of a bank note as a statutory offence, to be visited by the statutory penalty, and where the statute includes within its range only banks duly incorporated, then the indictment must aver the bank whose notes have been forged to have been duly incorporated. This allegation is material, and any variance in this respect is fatal.²

In setting forth charters of banks, indictments must conform to statute.

(2) Where, however, the statute does not thus make incorporation an essential requisite in the case of the prosecution, then it would seem that it is enough to describe the bank, if a home institution, simply as a bank by its title. This, however, is loose pleading, and by strict practice would be condemned. And of foreign banks, if the intent be laid to defraud the bank, the charter should be averred.³

(3) But if the pleader elect to pursue the defendant on a count charging the offence to be the forging or uttering a certain bank note with the intent to defraud A. B., the party on whom the note was passed, then it is not necessary to aver the incorporation of the bank. The bank may be no bank at all either technically or potentially, and yet the offence is made out.⁴

How the incorporation of a bank may be proved has been already shown.⁵

§ 742. Intent to defraud is necessary to be averred even under statutes not prescribing such requisite.⁶

¹ *People v. Stearns*, 21 Wend. 409, Sneed, 346, 1858; *Owen v. State*, Ibid. 1839. See, as to general pleading 493, 1858.

of intent, Whart. Cr. Pl. & Pr. ² *State v. Van Hart*, 2 Harrison, 327, 1839; *Owen v. State*, 5 Sneed, 493, 1858; *Jones v. State*, Ibid. 346, §§ 164-5.

³ *Supra*, § 716; *State v. Wilkins*, 17 Vt. 151, 1845; *Com. v. Simonds*, 11 1858.

Gray, 306, 1858; *People v. Stearns*, 21 Wend. 409, 1839; *State v. Van Hart*, 2 Harrison, 327, 1839; *Murry's Case*, 1882; *Roush v. State*, 34 Nebr. 325, 5 Leigh, 720, 1835; *Cady v. Com.*, 10 1892.

Gratt. 776, 1854; *State v. Ward*, 2 ⁴ *Infra*, § 749; *supra*, § 716. See

Hawks, 443, 1833; *Jones v. State*, 5 ⁵ *Supra*, § 716.

⁶ Whart. Cr. Pl. & Pr. §§ 164-5;

“Falsely” is not necessary when “forged” is used.¹

At common law, to constitute forgery, the intent to defraud must either be apparent from the false making, or become so by extrinsic facts. Therefore an indictment which charged the false making to have been in the alteration of an order given by the defendant, without charging that the alteration was made after it was circulated and had been taken up by him, has been held to be fatally defective.²

In cases of uttering and publishing a *scienter* must be averred; though it is sufficient that this averment should be given in general terms.³

§ 743. *Possibility of fraud*, as has been heretofore shown,⁴ is enough to complete the offence.⁵ Thus, even the forgery of a name to an assignment of a bond is indictable though there is no seal to the bond, as there still is a chance of fraud.⁶ As has already been mentioned, it is not essential that an actual fraud should have been committed.⁷ If, from circumstances, the jury can presume that it was the defendant's intention to defraud V., or if, in fact, V. might have been defrauded if the forgery had succeeded, it is sufficient to satisfy this allegation in the indictment; for where the intent to defraud exists in the mind of the defendant, it is sufficient, though, from circumstances of which he is not apprised, he could not in fact defraud the prosecutor;⁸ and this even though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him.⁹ On the other hand, if the instrument is one

Whart. Crim. Ev. § 135; *R. v. Powner*, 12 Cox C. C. 235, 1872; *State v. Gavigan*, 36 Kans. 322, 1887; *Gibson v. State*, 79 Ga. 344, 1887; *State v. Jackson*, 89 Mo. 561, 1886; *Roush v. State*, 34 Nebr. 325, 1892. See *infra*, § 746.

¹ *State v. McKiernan*, 17 Nev. 224, 1882; *Cohen v. People*, 7 Colo. 274, 1883.

² *State v. Greenlee*, 1 Dev. 523, 1828. *Supra*, §§ 696, 739-42; Whart. Cr. Pl. & Pr. §§ 164-5.

³ *U. S. v. Carll*, 105 U. S. 611, 1881; *State v. Burgson*, 53 Iowa, 318, 1880; *People v. Page*, 1 Idaho, 114, 1867;

Powers v. State, 87 Ind. 97, 1882; *State v. Williams*, (Ind.) 38 N. E. Rep. 339, 1894.

⁴ *Supra*, §§ 695 *et seq.*

⁵ *People v. Rathbun*, 21 Wend. 509, 1839; *Travis v. State*, 83 Ga. 372, 1889; *Billups v. State*, 88 Ga. 27, 1891;

State v. Gryder, 44 La. An. 962, 1892.

⁶ *Pennsylvania v. Misner*, Addis. 44, 1792.

⁷ *R. v. Crooke*, 2 Stra., 901, 1740; *R. v. Goate*, 1 Ld. Raym. 737. *Supra*, §§ 653, 694.

⁸ *R. v. Holden*, R. & R. 154, 1809.

⁹ *R. v. Sheppard*, R. & R. 169, 1809. See *R. v. Harvey*, 2 B. & C. 257, 1825.

which could not possibly be used for fraud, the indictment cannot be sustained.¹

§ 743 a. At common law, indictments for forgery or uttering forged instruments must charge the offence to have been done with intent to defraud some particular person or corporation, when this is practicable.² How this averment is sustained has been already seen.³ Although the party actually defrauded was a firm, yet, under the rule just stated, it is enough to aver an intent to defraud a member of the firm.⁴ It is not necessary that the person primarily defrauded should be averred in the indictment. It is enough if the party averred as intended to be defrauded were in the scope of the fraud, and might possibly have been defrauded if the forgery succeeded.⁵

Party defrauded must be specified.

¹ See *supra*, §§ 696, 739 *et seq.*; and, also, *People v. Stearns*, 21 Wend. 409, 1839; s. c. 23 Wend. 634, 1840; *Pennsylvania v. Misner*, Addis. 44, 1792; *West v. State*, 2 Zab. 212, 1849; *Clarke v. State*, 8 Ohio St. 630, 1858.

proper to charge that the intent was to defraud his estate. *Billings v. State*, 107 Ind. 54, 1886.

² *Supra*, § 714; *infra*, § 746; 3 Ch. C. L. 1042; *R. v. Marcus*, 2 C. & K. 356, 1847; *State v. Odel*, 2 Tr. Con. Rep. 758; 3 Brev. 552, 1816; *State v. Greenlee*, 1 Dev. 523, 1828; *State v. Harrison*, 69 N. C. 143, 1873; *Cunningham v. State*, 49 Miss. 685, 1874; *West v. State*, 2 Zab. 212, 1849; *Buckley v. State*, 2 Greene, 162, 1849; *State v. Murphy*, 17 R. I. 698, 1892; *U. S. v. Long*, 30 Fed. Rep. 678, 1887; *State v. Gavigan*, 36 Kans. 322, 1887; *Goodson v. State*, 29 Fla. 511, 1892. See, as to general averment of intent, Whart. Cr. Pl. & Pr. §§ 164-5. As to practice under Georgia statute, see *State v. Calvin*, Charlton, 151, 1822. And see generally, *State v. Jones*, 1 McMull. 236, 1841; *Com. v. Smith*, 6 S. & R. 568, 1819; *People v. Davis*, 21 Wend. 309, 1839; *People v. Peabody*, 25 Wend. 472, 1806; *State v. Taylor*, 117 Mo. 181, 1893; *Roush v. State*, 34 Nebr. 325, 1892. If the name forged is that of a man who was dead at the time the offence was committed, it is

That intent to defraud the town or county is sufficient, see *Com. v. Brown*, 147 Mass. 585, 1888. See *Moore v. Com.*, 92 Ky. 630, 1892.

That it need not be alleged in the indictment that the party defrauded was a corporation, see *State v. Shaw*, 92 N. C. 768, 1885; *Roberts v. State*, 92 Ga. 451, 1893.

³ *Supra*, §§ 713, 714.

⁴ *R. v. Hanson*, C. & M. 334, 1841; *People v. Curling*, 1 Johns. 320. *Supra*, §§ 717, 718; *infra*, § 1226.

⁵ *Supra*, §§ 713, 714, 743.

In *U. S. v. Morris*, before Benedict, J., 1879, 19 Alb. L. J. 403, (7 Rep. 581) the prisoner was indicted under Section 5443 of the Revised Statutes, being charged with having forged a material indorsement upon a post-office money-order with intent to defraud C. M. Cady. This was sustained, the court saying: "In *United States v. Shellmire*, Bald. 377, 1831, it is said that an indictment for forging an order upon the Bank of the United States, with intent to defraud a private person, would lie in the courts of the United States."

§ 744. If a bank whose notes are forged be fictitious or extinct, the indictment must aver the person on whom the attempt is made to pass the notes as the person whom it was intended to defraud. Any variance as to the name of the person intended to be defrauded being fatal,¹ it is essential, if the bank whose name is forged be extinct or fictitious, to aver the fraud to be intended upon the person on whom the note was attempted to be passed.² In fact, in view of the danger of the misrecital of the names of corporations, it is always expedient to insert a count of this character. The party thus sought to be defrauded, if unknown, may be so described.³ The intent may be cumulatively varied in separate counts.⁴

When notes of fictitious bank are forged, party on whom notes are passed must be averred.

Actual damage need not be averred or proved.

§ 745. It is not necessary to aver or prove damage or injury to have accrued. It is enough if the instrument were calculated to defraud.⁵

Not always necessary to aver

§ 746. As a general rule, unless otherwise required by statutory construction, it is sufficient, when the party intended to be defrauded is in existence, to aver that the

In Iowa, under statute, it is not intent to defraud. *McClure v. Com.*, 86 Pa. 353, 1878
 necessary to specify the person intended to be defrauded. *State v. Maxwell*, 47 Iowa, 454, 1877; *State v. Hart*, 67 Iowa, 142, 1885. Similarly in *State v. Tingler*, 32 West Virginia, 320, 1889; *State v. Henderson*, 29 W. Va. 147, 1886; *Koontz's Case*, 31 W. Va. 127, 1888.

As to Louisiana, see *State v. Adams*, 39 La. An. 238, 1887.

As to North Carolina, see *State v. Hall*, 108 N. C. 776, 1891.

As to Missouri, see *State v. Rucker*, 93 Mo. 88, 1887; *State v. Flora*, 109 Mo. 293, 1891; *State v. Phillips*, 78 Mo. 49, 1883; *State v. Rowlen*, 114 Mo. 626, 1892; *State v. Warren*, 109 Mo. 430, 1891.

In Pennsylvania, under the 19th section of the Act of 31st of March, 1860, in an indictment for forgery under the 169th section of the same act, it is not necessary to prove an intent to defraud any particular person, but it is sufficient to prove a general

¹ See Whart. Cr. Pl. & Pr. §§ 164-65; Whart. Cr. Ev. §§ 94-102.

² *Supra*, §§ 660, 698. See *People v. Curling*, 1 Johns. 320, 1806; *Com. v. Carey*, 2 Pick. 47, 1823; *U. S. v. Shellmire*, Bald. 370, 1833.

³ See *supra*, § 716; *Buckley v. State*, 2 Greene, (Iowa) 162, 1849; 1 East P. C. 180.

⁴ *Supra*, § 713; *R. v. Hanson*, C. & M. 334, 1841; *People v. Curling*, 1 Johns. 320, 1806.

⁵ *R. v. Crooke*, 2 Stra. 901, 1740; *R. v. Goate*, 1 Ld. Raym. 737; *R. v. Holden*, R. & R. 154, 1809; *Com. v. Ladd*, 15 Mass. 526, 1819; *People v. Rynders*, 12 Wend. 425, 1834; *People v. Stearns*, 21 Ibid. 409, 1839; s. c. 23 Ibid. 634, 1840; *West v. State*, 2 Zab. 292, 1849; *Hess v. State*, 5 Ohio, 5, 1831; *Snell v. State*, 2 Humph. 347, 1841; *State v. McMackin*, 70 Iowa, 281, 1886; *State v. Hall*, 108 N. C. 776, 1891; *Crawford v. State*, 31 Tex. Cr. 51, 1892.

defendant uttered or forged the instrument as true, without saying to whom the uttering was made;¹ nor when forgery is charged, is it necessary to specify the parties whom it was intended to defraud when such parties cannot be individuated; due excuse being made.² When, however, an intent to defraud a particular person is a part of the case of the prosecution, the indictment must specify such person, or excuse his non-specification by the averment that he was unknown.³

The name of a corporation, when pleaded, must be accurately given.⁴

§ 747. To the general discussion of venue heretofore given⁵ it is now requisite to add a single observation as to the inference to be drawn in forgery, as to venue, from the proof of uttering in a particular place. Does *uttering* in a particular county justify a conviction of *forging* in such county? As thus baldly put, certainly not; and so has it been judicially held.⁶ A naked utterance in a particular county is not *per se* proof of forgery in such county. But, as has been already shown, there are inculpatory incidents which so strongly intensify in such cases the presumption of guilt as to compel a conviction of forgery; and when so, the conviction may be had for forgery as committed in the venue of the uttering.⁷

XI. COINING.⁸

§ 748. Whatever may be said on the vexed question of the exclusive jurisdiction of the federal government of the counterfeiting

¹ *R. v. Trenfield*, 1 F. & F. 43, 1858; 1796; *Com. v. Parmenter*, 5 Pick. 279, U. S. v. Bejandio, 1 Woods, 294, 1871. 1827.

² *Supra*, § 714.

³ *Buckley v. State*, 2 Greene, (Iowa) 162, 1849. *Supra*, §§ 292 a, 714, 743 a.

⁴ *Whart. Cr. Pl. & Pr.* § 110. *Supra*, § 741.

Charging the defendant with passing counterfeit coin in payment to A. will not be sustained by evidence that the defendant passed it in payment to B., through A., who was the innocent agent of the defendant in the transaction. *Rouse v. State*, 4 Ga. 136, 1848.

⁵ *Supra*, §§ 288, 711.

⁶ *R. v. Parkes*, 2 East P. C. 992,

⁷ *Supra*, § 726; *Lindsey v. State*, 38

Ohio, 507, 1882; *State v. Poindexter*, 23 W. Va. 805, 1884; *People v. Cohen*, 7 Colo. 274, 1883; *State v. Tingler*, 32 W. Va. 546, 1889; *State v. Rucker*, 93 Mo. 88, 1887; *State v. Burd*, (Mo.) 22 S. W. Rep. 377, 1893; *State v. Allen*, 116 Mo. 548, 1893; *State v. Blanchard*, 74 Iowa, 628, 1888; *State v. Gullette*, 121 Mo. 447, 1894. See *State v. Chamberlain*, 89 Mo. 126, 1886.

⁸ See, for forms of indictment, *Whart. Prec. tit. "FORGERY," "COINING."*

of federal currency! as such,¹ it may be safely declared that coining or uttering bad money, of whatever class, is an offence at common law in the State where the bad money is coined or uttered.² Such an offence, if not indictable as counterfeiting or uttering in the technical sense, in consequence of the absorption of the offence by federal statutes, is certainly indictable as a cheat, or attempt to cheat, at common law. Of jurisdiction of this aspect of the offence, the State courts cannot be deprived.³

In the federal courts the offence is to be prosecuted as a misdemeanor.⁴

§ 749. Coining (or counterfeiting), in its present sense, is the making of a false coin in the similitude of a genuine coin.⁵ In a prosecution for coining, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person using due caution, to be gauged by all the circumstances of the case.⁶ Thus in an English

¹ See this question discussed, *supra*, § 266; Whart. Com. Am. Law, § 524. And see *Com. v. Fuller*, 8 Metc. 313, 1844; *State v. Tutt*, 2 Bailey, 44, 1830; *Chess v. State*, 1 Blackf. 198, 1822; *Ex parte Geisler*, 50 Fed. Rep. 411, 1882. *Supra*, § 264.

² *Supra*, § 266. That a forged instrument or coin may be a false token, see *R. v. Inder*, 1 Den. C. C. 325, 1846; *R. v. Thorn*, C. & M. 206, 1840; *Com. v. Boynton*, 2 Mass. 77, 1806; *Com. v. Speer*, 2 Va. Cas. 65, 1817; *State v. Groome*, 5 Strob. 158, 1849; *infra*, §§ 1123, 1344.

³ See Whart. Com. Am. Law, § 524; *supra*, §§ 224-61; *U. S. v. Hargrave*, 17 Int. Rev. Rec. 39. That counterfeiting is but a misdemeanor at common law, see *supra*, §§ 22, 654; *R. v. Greenwood*, 2 Den. C. C. 453, 1852.

⁴ *U. S. v. Coppersmith*, 2 Flip. 546, 1881; 1 Crim. Law Mag. 741.

⁵ *U. S. v. Hopkins*, 26 Fed. Rep. 443, 1885. Punching out a hole is not coining, when none of the pure metal is removed; otherwise, when

pure metal is removed and base metal inserted. *U. S. v. Lissner*, 12 Fed. Rep. 840, 1882. *Infra*, § 755.

Intent to defraud need not be alleged in an indictment for counterfeiting under Section 5457 United States Revised Statutes, although intent is an essential element of the crime of passing counterfeit money. *U. S. v. Otey*, 31 Fed. Rep. 68, 1887.

It is not necessary to charge in an indictment for counterfeiting that the coin in question was made "in resemblance and similitude" of the coins coined at the mints of the United States. *U. S. v. Otey*, 31 Fed. Rep. 68, 1887.

⁶ *R. v. Varley*, 1 East P. C. 164, 1785; 2 W. Bl. 682; *R. v. Robinson*, Leigh & C. 604, 1865; 10 Cox C. C. 107; *U. S. v. Morrow*, 4 Wash. C. C. 733; *U. S. v. Burns*, 5 McLean, 24, 1849; *U. S. v. Bogart*, 9 Ben. 314, 1877; *U. S. v. Hopkins*, 26 Fed. Rep. 443, 1885; *Rasnick v. Com.*, *infra*. *Supra*, § 700. As to "due caution," see *infra*, §§ 1186 *et seq.*

case, where the defendant had counterfeited the resemblance of a half guinea upon a piece of gold previously hammered, but it was not round nor would it pass in the condition in which it then was, the judges held that the statutory offence was incomplete.¹ Where, also, the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely, immersion in diluted *aqua fortis*, before they could pass as shillings; the judges held that the statutory offence was not yet consummated.² The same general view has been taken in this country.³ But if there be a similitude likely to impose even on the simple or inattentive, this is enough.⁴

§ 750. All participants in the work of coinage are principals.⁵

All participants are principals.

¹ R. v. Varley, 1 East P. C. 164, 1771; 2 W. Bl. 682.

² 1 Leach, 175; and see R. v. Bradford, 2 Cr. & D. 41.

³ U. S. v. Burns, 5 McLean, 24, 1849.

⁴ R. v. Herman, L. R. 4 Q. B. D. 284, 1879; 14 Cox C. C. 279; U. S. v. Marigold, 9 How. 560, 1850; U. S. v. Abrams, 21 Blatch. 553, 1883; U. S. v. Bricker, 3 Phila. 426, 1859.

⁵ A person who takes base pieces of coin, which are brought to him ready made, having the impression and appearance of real coin, though of different color, and brightens them so as to give them the resemblance of real coin and render them fit for circulation, is guilty of counterfeiting. *Rasnick v. Com.*, 2 Va. Cas. 356, 1823. See R. v. Case, 1 East P. C. 165, 1795; R. v. Lavey, 1 Leach, 154, 1777. *Supra*, § 213.

The prisoner, with intent of coining counterfeit half dollars of Peru, procured dies in England for stamping and imitating such coin. He was apprehended before he had obtained the metal and chemical preparations necessary for making counterfeit coins. It was held that the procuring the dies was an act in furtherance of the

criminal purpose sufficiently proximate to the offence intended, and sufficiently evidencing the criminal intent, to support an indictment founded on it for a misdemeanor, although the same facts would not have supported an indictment for attempting to make counterfeit coin. *R. v. Roberts*, 33 Eng. L. & Eq. 553, 1855; 7 Cox C. C. 39; *Dears. C. C.* 539. (See R. v. Weeks, 8 Cox C. C. 455, 1861. *Supra*, §§ 152 *et seq.*)

The jury also found that the prisoner intended to make only a few counterfeit coins in England, with a view merely of testing the completeness of the apparatus before he sent it out to Peru. It was held that even to make a few coins in England with that object would be to commit the offence of making counterfeit coins within the statute. *R. v. Roberts*, *ut sup.*

If the process be carried far enough to deceive, the offence of making a false coin is complete. *U. S. v. Abrams*, 17 Rep. 56.

An indictment under the federal statute does not lie for forging a Spanish head pistareen, as it is not a coin of Spain made current by law in

General
description
enough.

§ 751. As a rule, *coin*, in an indictment for forgery, is to be described by general designation.¹

§ 752. Any offering of counterfeit coin with intent to defraud is uttering.² Thus, where a good shilling was given to a

the United States. *U. S. v. Gardner*, 10 Pet. 618, 1836. And so, under the Massachusetts statute, of an indictment for forging a coin of California coined in violation of law. *Com. v. Bond*, 1 Gray, 564, 1853.

But counterfeiting securities of a foreign nation is indictable as an offence against the law of nations. *U. S. v. White*, 27 Fed. Rep. 201, 1886.

A statute making it indictable to have in possession an instrument for the purpose of coining covers an instrument for the purpose of perfecting a portion of a coin. *Com. v. Kent*, 6 Metc. (Mass.) 221, 1843. See *R. v. Ridgeley*, 1 East P. C. 171, 1778; 1 Leach, 189.

Under the Connecticut statute, aiding in the act of counterfeiting is within both the letter and reason of the law, as much as assisting in making the implement. *State v. Stutson*, Kirby, 52. Gilding base coin is within the statute. *U. S. v. Russell*, 22 Fed. Rep. 390, 1884.

Milled money is money put through a mill or press, a mint being the building in which such milling or minting is carried on. *Jacob's Case*, 1 East P. C. 181, 1795; *R. v. Bunning*, 1 East P. C. 180, 1794.

¹ Whart. Cr. Pl. & Pr. § 218; Whart. Crim. Ev. § 122; *State v. Griffin*, 18 Vt. 198, 1846; *Com. v. Stearns*, 10 Metc. (Mass.) 256, 1845; *State v. Williams*, 8 Iowa, 534, 1859; *Daily v. State*, 10 Ind. 536, 1858; *Peek v. State*, 2 Humph. 78, 1840; *State v. Shoemaker*, 7 Mo. 177, 1841.

The indictment does not sufficiently describe the offence if it fails to allege the number of coins made. *U. S. v. Weikel*, 19 Pac. Rep. 396, 1888.

In an indictment for uttering counterfeit coins it is sufficient to describe them as "made and counterfeited" to the likeness and similitude of the good, true, and correct money and silver coins currently passing in the State and commonly called Spanish dollars. *Fight v. State*, 7 Ohio 181, 1835.

An indictment on the Virginia statute of 1834-35, c. 66, charging that the prisoner "did knowingly have in his custody, without lawful authority or excuse, one die or instrument, for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half dollar" (not further describing the die or instrument), is sufficient. *Scott's Case*, 1 Robinson, 695, 1842.

An indictment charging the defendant with having passed counterfeit "dollars" describes with sufficient certainty the character of the coin counterfeited. *Peek v. State*, 2 Humph. 78, 1840. See *U. S. v. Otey*, 81 Fed. Rep. 68, 1887.

An indictment which alleges that the defendant had in his possession a coin, counterfeited in the similitude of the good and legal silver coins of this Commonwealth, called a dollar, with intent to pass the same as true, knowing it to be counterfeit, is supported by proof that the defendant had in his possession a coin counterfeited in the similitude of a Mexican dollar, with such intent and knowledge. *Com. v. Stearns*, *supra*. But see, under later statute, *Com. v. Bond*, 1 Gray, 564, 1854.

² *Supra*, §§ 703, 705. *U. S. v. Nelson*, 1 Abb. U. S. 135, 1867; *State v. Horner*, 48 Mo. 520, 1871.

Jew boy for fruit, and he put it into his mouth, under pretence of trying whether it was good, and then taking instead of it, a bad shilling out of his mouth, gave the bad coin to the prosecutor saying it was not good; this (which is called ringing the changes) was held to be an uttering within the meaning of the statute 16 Geo. II. c. 28.¹ It has, however, been held by Lord Abinger that the giving of a piece of counterfeit coin in charity is not uttering within the statute, although the party knew it to be a counterfeit; but this case can no longer be regarded as law.² On the other hand, the staking counterfeit coin at a gaming table as good money is an attempt to utter or pass the same, and losing it at play is a passing of the same against law;³ and so is the giving of counterfeit coin to a woman, as the price of connection with her.⁴ And it is an “uttering and putting off,” as well as a “tendering,” if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered.⁵

Offering with intent to defraud is uttering.

Guilty knowledge to be inferred from facts.

§ 753. The presumption to be drawn from other attempts to pass counterfeit coin, or its possession on the person, has been already noticed.⁶

Existence of genuine original not necessary to be proved.

§ 754. If the coin forged be a common coin, legal in the United States, it is not necessary to prove that there is an original which the forged coin counterfeits.⁷

§ 755. A genuine sovereign reduced in weight by filing off nearly all the original milling, and fraudulently making a new milling, is a “false and counterfeit coin.”⁸

Fraudulent diminution is coining.

¹ R. v. Franks, 2 Leach, 644. *Supra*, § 706.

⁵ R. v. Welch, 2 Den. C. C. 78, 1851. See R. v. Radford, 1 Ibid. 59, 1844,

² R. v. Page, 8 C. & P. 122, 1857, Lord Abinger, C. B. Mr. Greaves properly holds that R. v. Page cannot be sustained in reason; 1 Russ. on Cr.

R. v. Ion, 2 Ibid. 475, 1845. See *supra*, § 706.

126; and by Alderson, B., in R. v. Ion, 2 Den. C. C. 475, 1852, it is said to be overruled. See Anon., 1 Cox C.

⁶ *Supra*, § 715.

⁷ See Daily v. State, 10 Ind. 536, 1858; U. S. v. Burns, 5 McLean, 24, 1851.

C. 250, 1845; R. v. Heywood, 2 C. & K. 352, 1847. *Supra*, §§ 706, 708.

⁸ R. v. Herman, 14 Cox C. C. 279, 1879; 40 L. T. (N. S.), 263; L. R. 4 Q. B. D. 284. See U. S. v. Lissner, 12 Fed. Rep. 840, 1882, cited *supra*, § 749.

³ State v. Beeler, 1 Brev. 482, 1805.

⁴ R. v. —, 1 Cox C. C. 250, 1845.

**POINTS REQUESTED FOR THE DEFENCE IMPROPERLY
REFUSED, AND ERRONEOUS CHARGES.**

Reasonable Doubt. Refusal to Charge.

Defendant requested the court to charge: "That the jury should carefully examine the whole of the testimony, and that if upon the whole evidence the minds of the jury are left in a state of doubt and uncertainty, so that they cannot reasonably say that the defendant is guilty, they should acquit him." Refused. Held error. *Elmore v. State*, 92 Ala. 51, 1890.

An Intention to Defraud Some One Must be Present.

Defendant requested the court to instruct the jury that before they could find him guilty they must find that he intended to defraud some one. Refused. Held error. *State v. Warren*, 109 Mo. 430, 1891.

Where Paper Uttered Could Not Deceive One of Reasonable Intelligence.

Defendant also requested the following instruction: "The court instructs the jury that, although you may believe from the evidence that the defendant made, forged, and counterfeited the check introduced and read in evidence, and that the defendant when he made, forged, and counterfeited said check read in evidence, intended to make, forge, and counterfeit a check to resemble and be like a genuine check of the said Thomas T. Shamke, and that he attempted to pass said check as a true and genuine check of the said T. T. Shamke and with the intent to injure and defraud, yet if the jury further believe from the evidence that said check so made and read in evidence upon its face had no resemblance to a true and genuine check of Thomas T. Shamke, and that said check would not deceive or mislead a person of ordinary understanding, then there is no forgery in this case, and the jury will find the defendant not guilty." Refused. Held error. *State v. Warren*, 109 Mo. 430, 1891.

Where Defendant Thought He Had Authority.

It was held error for the court not to have instructed the jury in accordance with art. 441, Texas Penal Code, to the effect that if the defendant in making the order claimed to be forged, if he did make it, acted under an authority which he had good reason to believe and actually did believe to be sufficient, he was not guilty of forgery, though the authority was in fact insufficient and void. *Sweet v. State*, 28 Tex. App. 222, 1889. *Williams v. State*, 24 Tex. App. 342, 1887. *Supra*, § 695.

In the State of Texas defendant requested the court to charge: "That if previous to signing K.'s name to the note defendant sent H. to ask K. for authority to use his name, and that on returning H. told him he had seen K. and 'it was all right,' but to give K. notice 'when they did so,' and that, acting on such message, defendant, either alone or with H., executed the note, believing that he had authority to do so, they could not find defendant guilty." Refused. Held to be error. *McCay v. State*, 32 Tex. Cr. 233, 1893.

Where an attorney was indicted for forging a check by indorsing the name of the payee, and defended by claiming authority to indorse from the husband of the payee, it was held error for the court to refuse to charge: "That if the jury believed that M. S. directed or told Mr. Loew (the defendant) to sign that check in the name of his wife, and Loew in good faith believed that S. had the authority, they should find the defendant not guilty." *People v. Loew*, 19 N. Y. Sup. 360, 1892. *Supra*, § 669.

Swindling is Not Forgery.

It was held error for the court to refuse to charge as requested: "If you believe from the testimony that the note in evidence was actually signed by Lazarus Smith (the prosecutor) by his making his mark thereto, and that Wells had authority from Smith to so sign his name, and also had authority from the witness to the note (Griffin) to sign his name, and that the note in evidence was the note to sign, then I charge you that you cannot convict the defendant. If you believe that the note in evidence was signed by Lazarus Smith, by making his mark thereto when he believed it was for only twenty-five dollars, when, in fact, it was for fifty dollars, then you cannot convict the defendant of forgery under this indictment." *Wells v. State*, 89 Ga. 788, 1892.

Alteration Before Signature.

Under the New York Penal Code, § 521, which declares a person to be guilty of forgery "who, knowing the same to be forged or altered, with intent to defraud, utters, offers, disposes of or puts off as true" an instrument or writing, the defendant requested the court to instruct the jury that, if the instrument was altered before it was signed or executed, no conviction could be had under the indictment for uttering a forged paper. The court refused the charge, declaring that it was wholly immaterial whether the defendant made the change before or after it was signed. On appeal, held error. *People v. Underhill*, 142 N. Y. 38, 1894.

Alteration as a Matter of Fact Necessary for Conviction.

Where on a trial for altering an order from \$3.90 to \$13.90 it was proved that the defendant knew that only \$3.90 was due him, but it appeared probable that the order was originally drawn for \$13.90 by mistake, it was error not to charge that if defendant did not alter the order he must be acquitted, even though he knowingly received ten dollars more than was due him. *Bell v. State*, 21 Tex. App. 270, 1886.

CHAPTER X.

BURGLARY.

I. BREAKING.

Definition, § 758.

Breaking must be actual or constructive, § 759.

Breaking an outside disconnected gate is not burglary, § 760.

And so of detached outer covering to window, § 761.

Breaking into an inside room is burglary, § 762.

And so though defendant is guest at inn, § 763.

Breaking chest or trunk is not burglary, § 764.

Entrance by trick may be a breaking, § 765.

And so of entrance by conspiracy with servant, § 766.

Locks or nails not a necessary protection, § 767.

Entrance by chimney is breaking, § 768.

But not entering through aperture in wall, or open door, § 769.

Nor entering by assent, § 770.

Breaking out of house is not burglary at common law, § 771.

Owner's opening produced by fright is no defence, § 772.

II. ENTRY.

Need not be simultaneous with breaking, § 773.

But without entry breaking is not enough, § 774.

Entrance of hand sufficient, § 775.

And so of discharging gun, § 776.

And so of entrance by chimney, § 777.

But not so of boring holes, § 778.

Nor of taking money without entry, § 779.

Some entrance must be effected, § 780.

III. DWELLING-HOUSE.

Dwelling-house is a house in which occupiers usually reside, § 781.

Church edifice, § 782.

It is burglary to break into an out-building which is appurtenant to dwelling-house, § 783.

House not yet occupied not the subject of burglary, § 784.

Nor building casually used, § 785.

Otherwise as to building occupied by executors, § 786.

"Chambers" and "lodging-rooms" may constitute a dwelling, § 787.

And so of apartments in tenement houses, § 788.

And so of permanent tents and log cabins, § 789.

Occupation by servant may be occupation of master, § 790.

Not necessary that some one should be at the time in the house, § 791.

IV. DEFINITION OF STATUTORY TERMS.

"Shop" is a place for the sale of goods, § 792.

"Warehouse" is a place for business storage, § 793.

"Storehouse" is a place for family as well as business storage, § 794.

"Store" is a place for keeping and sale of goods, § 795.

"Counting-house" is a building where accounts are kept, § 796.

"Out-houses" are buildings in proximate relation to building in chief, § 797.

"Barn" covers building used for storage of grain, § 797 *a*.

V. OWNERSHIP.

Occupier is to be generally regarded as owner, § 798.

And so of servant who occupies at a yearly rent, § 799.

House occupied by married woman to be laid as husband's or wife's, § 800.

Public building may be described as property of occupant, § 801.

Transient guests' chambers are to be laid as the landlord's dwelling; otherwise with permanent guests, § 802.

Permanent apartments are dwellings of occupants, § 803.

Possession is sufficient if as against burglars, § 804.

Owner may be indicted for burglary in his lodger's apartments, § 805.

VI. TIME.

Breaking must be in night-time, § 806.

Night is from twilight to twilight, § 807.

Time is to be inferred from facts, § 808.

Time as defined by statute, § 809.

VII. INTENTION.

Felonious intention must be averred and proved, § 810.

Is to be inferred from facts, § 811.

But need not have been executed, § 812.

Possession of stolen goods sustains inference of burglary, § 813.

VIII. INDICTMENT.

Proper technical terms should be used, § 814.

House must be averred to be dwelling-house, § 815.

Ownership must be correctly stated, § 816.

Offence must be averred to have been in the night, § 817.

Intent to commit felony must be averred, § 818.

Defendant may be convicted of burglary and acquitted of larceny, or converse, § 819.

Goods intended to be stolen need not be specified, § 820.

Counts varying facts may be introduced, § 821.

IX. ATTEMPTS.

Attempts at burglary are indictable at common law, § 822.

POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)

§ 758. BURGLARY, at common law, is the breaking and entering the dwelling-house of another in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not.¹

Burglary is breaking into another's house by night with felonious intent.

¹ Hale's Sum. 49; 1 Russ. on Cr. State *v.* Wilson, Coxe, 439, 1793; Cole (6th Am. ed.) 786; 4 Bl. Com. 227; *v.* People, 37 Mich. 544, 1878; State Com. *v.* Newell, 7 Mass. 247, 1810; *v.* Branham, 13 S. C. 389, 1880; Ray

I. BREAKING.

§ 759. There must be an actual or constructive breaking into the house.¹ Every entrance into the house by a trespasser is not a breaking. Should a door or other aperture be partially or wholly open, and the thief enter, this is not a breaking.² When the window of the house is open, and a thief, with a hook or other instrument, draws out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief break the glass of a window, or make an aperture in wall or floor, and, with a hook or other instrument, draw out some of the goods of the owner, this is burglary, for there was an actual breaking of the house.³ But where a window was a little open, and not sufficiently so to admit a person, and the defendant pushed it wide open and got in, this was held to be no sufficient breaking.⁴

Breaking
must be
actual or
constructive.

v. State, 66 Ala. 281, 1880; *Hamilton v. State*, 11 Tex. App. 116, 1880; *Guynes v. State*, (Tex.) 8 S. W. Rep. 667, 1888. By §§ 496–500 of the New York Penal Code of 1882, burglary is divided into three degrees, the second of which includes breaking into an inhabited house in the daytime. *State v. Owens*, 79 Mo. 619, 1883, accomplice; *People v. Meegan*, (N. Y.) 11 N. E. Rep. 48, 1887; *Nichols v. State*, (Wis.) 32 N. W. Rep. 543, 1887; *State v. Jordan*, (Iowa) 54 N. W. Rep. 63; *State v. Mack*, (Oreg.) 25 Pac. Rep. 639, 1891. Section 854 of Revised Statutes of Louisiana divides burglary into two degrees, the second of which, breaking or entering in the daytime, does not require an averment that the breaking or entering was in the daytime, an averment of a breaking or entry being sufficient. See *State v. Anselm*, (La.) 8 So. Rep. 583, 1891; *State v. Frahn*, (Iowa) 35 N. W. Rep. 451, 1887; see, also, *Green v. State*, 21 Tex. App. 64, 1886; *State v. Dan*, 3 W. Coast Rep. 275, 1884. See burglary under statutes of Nevada; also, *People v. Stapleton*, (Idaho) 2 W.

Coast Rep. 176, 1884; *Ashton v. State*, 68 Ga. 25, 1881.

¹ 1 Russ. on Cr. (6th Am. ed.) 786; *Rolland v. Com.*, 82 Pa. 306, 1876; *Clarke v. Com.*, 25 Gratt. 908, 1875. See *Peters v. State*, 26 S. W. Rep. 61, 1884.

² *R. v. Johnson*, 2 East P. C. 488, 1786; *R. v. Lewis*, 2 C. & P. 628, 1827; *State v. Wilson*, Coxe, 439, 1793; *Stone v. State*, 63 Ala. 115, 1879. But see *Alexander v. State*, (Tex.) 20 S. W. Rep. 756, 1892, under Penal Code of Texas; *Milton v. State*, (Tex.) 6 S. W. Rep. 303, 1887; *Miller v. State*, 77 Ala. 41, 1885.

³ 3 Inst. 64; 1 Hale, 551. *Infra*, § 769; *State v. Moore*, (Mo.) 22 S. W. Rep. 1086, 1893. In *Walker v. State*, 63 Ala. 49, 1879, the doctrine of the text was applied to the statutory offence of breaking into a corn-crib.

⁴ *R. v. Smith*, Car. Cr. L. 293; 1 Mood. C. C. 178, 1834; *R. v. Hyams*, 7 C. & P. 441, 1836; *R. v. Lewis*, 2 Ibid. 628, 1827; *R. v. Spriggs*, 1 M. & R. 357, 1835; *Com. v. Strupney*, 105 Mass. 588, 1870. *Infra*, §§ 767, 769.

Opening a latch is breaking;¹ and if a door be closed, it is not necessary, to constitute burglary, that the door should be latched.² That the door entered was closed at the time of the attempt may be inferentially shown.³ And making an opening by fire,⁴ taking glass out of a door,⁵ bursting a glass already cracked,⁶ and breaking more fully one already partially broken,⁷ have each been considered to constitute breaking.⁸

§ 760. Where the prisoner opened the area gate with a skeleton key, and from the area passed into the kitchen through a door which it appeared was open at the time, it was ruled that opening the area gate was not a breaking of the dwelling-house, as there was a free passage at the time from the area into the house.⁹

Breaking an outside disconnected gate is not burglary.

Removing a loose plank (not fixed to the freehold) in a partition wall of a building is not a breaking.¹⁰

The breaking of the outside fence of the curtilage of a dwelling-house, which opened not into any building, but into a yard only, has been held not to be the breaking of the dwelling-house.¹¹

§ 761. Cutting and tearing down a netting of twine, which is nailed to the top, bottom, and sides of a glass window, so as to cover it, and entering the house through such window, though it be not shut, constitute a sufficient breach and entry,¹² and so where a glass window was broken but

And so of detached outer covering to window.

¹ 1 Hale, 552; *State v. O'Brien*, 432, 1836; *R. v. Wheeldon*, 8 C. & P. (Iowa) 46 N. W. Rep. 861, 1890; *State* 747, 1839.

v. Hecox, 83 Mo. 531, 1884.

⁹ *R. v. Davis*, R. & R. 322, 1817.

² *State v. Boon*, 13 Ired. 244, 1853;

State v. Reid, 20 Iowa, 413, 1866; see, also, *Kent v. State*, (Ga.) 11 S. E. Rep. 355, 1890. *Infra*, § 767.

¹⁰ *Com. v. Trimmer*, 1 Mass. 476, 1806. See *R. v. Paine*, 7 C. & P. 135, 1835; and remarks of Mr. Greaves, 1 Russ. on Cr. 790.

³ *People v. Bush*, 3 Parker C. R. 552, 1855.

⁴ *White v. State*, 49 Ala. 344, 1873.

⁵ *R. v. Smith*, R. & R. 417, 1820.

⁶ *R. v. Bird*, 9 C. & P. 44, 1839.

⁷ *R. v. Robinson*, 1 Mood. C. C. 327, 1834; *R. v. Bird*, 9 C. & P. 44, 1839.

⁸ See *Pugh v. Griffith*, 7 Ad. & El. 827, 1838; *R. v. Jordan*, 7 C. & P.

¹¹ In this case the premises consisted of a dwelling-house, warehouse, and stable, surrounding a yard; there was an immediate entrance to the dwelling-house from the street, and a gate and gateway, under one of the warehouses, leading into the yard; the prisoner entered the premises by breaking this gate; the judges held that this was not burglary; that breaking this gate,

¹² *Com. v. Stephenson*, 8 Pick. 354, 1823. See *People v. Nolan*, 22 Mich. 229, 1870. As to window screen, see *Sims v. State*, (Ind.) 36 N. E. Rep. 278, 1894.

the inside shutters were not moved.¹ But where a shutter-box partly projected from a house, and adjoined the side of a shop window, which side was protected by wooden panelling, lined with iron, it was held that the breaking and entering the shutter-box did not constitute burglary.² And where the only covering to an open space in a dwelling-house was a cloak hung upon two nails at the top and loose at the bottom, and it was removed from one of the nails, Field, J., held that this was not a sufficient breaking.³

§ 762. A burglary may be committed by a breaking on the inside ; for though a thief enter the dwelling-house in the night-time, through the outer door left open, or by an open window, yet if, when within the house he turn the key, or unlatch a chamber door, with intent to commit felony, this is burglary.⁴ Hence where a servant, who sleeps in an adjacent room, unlatches his master's door and enters his apartment,

which was part of the outward fence of the curtilage, and not opening into any of the buildings, was not a breaking of any part of the dwelling-house. *R. v. Bennett*, R. & R. 289, 1815. In *Bearden v. State*, (Ga.) 20 S. E. Rep. 212, 1894, breaking into a corn-crib not within the curtilage was held to be larceny only.

¹ *R. v. Davis*, R. & R. 499, 1823 ; *R. v. Perkes*, 1 C. & P. 300, 1824 ; though see 2 East P. C. 487.

² *R. v. Paine*, 7 C. & P. 135, 1835. In *Timmons v. State*, 34 Ohio St. 426, 1873, it was held that the force necessary to push open a closed, but unfastened, transom, that swings horizontally on hinges over an outer door of a dwelling-house, is sufficient to constitute a breaking in burglary under a statute which requires a forcible breaking. S. P., *Dennis v. People*, and other cases cited *infra*, § 767.

³ *Hunter v. Com.*, 7 Gratt. 641, 645, 1851 ; compare with *State v. Fleming*, (N. C.) 12 S. E. Rep. 131, 1890.

⁴ *R. v. Johnson*, 2 East P. C. 488, 1786 ; *Denton's Case*, Fost. 108 ; *State v. Scripture*, 42 N. H. 485, 1861 ; *State v. Wilson*, Coxe, 439, 1793 ; *Rolland*

v. Com., 85 Pa. 66, 1877. In this case, while the law in the text was conceded, it was contended that in the case of the opening of an inner door it must be accompanied with an intent to commit a felony in the very room so entered.

To this, however, the court (Paxson, J.) replied : " We do not assent to this qualification of the common law rule. If a burglar, entering by an outer door or window incautiously left open, with the intent to commit a felony in a particular room in the house, as if he intends to rob a safe, with the location of which he is familiar, and in furtherance of his design, and to enable him to accomplish it successfully, opens the door of the adjoining room in the same house to gag and bind the owner sleeping therein, it is a breaking within the meaning of the law defining the offence of burglary. Yet in such case there would be an

entire absence of an intent to commit a felony in the bed-room. The binding of the owner, standing alone, would be a mere assault and battery, punishable as a misdemeanor. Taken in connection with the main object, it assumes a different character, and

with intent to kill him,¹ or to commit a rape on his mistress,² it is burglary. And so where a person left in charge of a house enters, and steals from, a closed room which, from his employment, he has no right to enter.³

§ 763. Whether a guest at an inn is guilty of a burglary by rising in the night, opening his own door, and stealing goods from other rooms, was once doubted;⁴ but the true rule is, that if the entrance into such other rooms be by opening doors which are shut, this is a burglarious entrance.⁵ But mere opening with felonious intent without entering, though an attempt, is not burglary.⁶ And it has been said not to be burglary, but larceny, for such guest to steal from a bar-room where he had a right to enter.⁷

And so when defendant is guest at an inn.

§ 764. Breaking open a chest or trunk is not in itself burglarious;⁸ and according to the views of Mr. Justice Foster, the same rule holds good in relation to all other fixtures, which, though attached to the freehold, are intended only the better to supply the place of movable depositories.⁹ Thus, when the doors are open and the thief thereby enters, though he afterward break open a chest or cupboard, it is not such a breaking as to constitute burglary.¹⁰

Breaking chest or trunk not burglary.

§ 765. In cases where the offender, with intent to commit a felony, for the purpose of effecting it gains admission by some trick, the offence is burglary, for this is a constructive breaking.¹¹ Thus, where thieves, having intent to rob, raised the hue and cry, and brought the constable,

Entrance by trick may be a breaking.

becomes a necessary incident of the felony, as much so as the lifting of a latch or the breaking of the door of the safe." See *Rolland v. Com.*, 82 Pa. 306, 1876. See, however, *People v. Fralick*, Hill & D. 63, 1843, where it was held, under the N. Y. statute, not burglary where the thief, after entering an open door, got into an upper room by opening a trap-door. See *Hill v. Com.*, (Ky) 15 S. W. Rep. 870, 1891, as to burglary under the General Statutes of Kentucky, in regard to the felonious taking away of anything of value.

¹ 1 Hale, 544; 2 East P. C. 488; U. S. v. Bowen, 4 Cranch C. C. 604, 1855.

² Gray's Case, 1 Stra. 481, 1822; 2 East P. C. 488.

³ *Hild v. State*, 67 Ala. 39, 1880.

⁴ 1 Hale, 554. See *R. v. Wheeldon*, 8 C. & P. 747, 1839; *State v. Clark*, 42 Vt. 629, 1870; *People v. Bush*, 3 Parker C. R. 552, 1855; *Mason v. People*, 26 N. Y. 200, 1862. See *infra*, § 771.

⁵ *State v. Clark*, 42 Vt. 629, 1870.

⁶ 1 Hale, 554. See, *contra*, 2 East P. C. 503.

⁷ *State v. Moore*, 12 N. H. 42, 1841.

⁸ Fost. 108, 109; 2 East P. C. 488.

⁹ Fost. 109. See, on this point, 1 Ben. & H. Lead. Cas. 531-2.

¹⁰ *State v. Wilson*, Coxe, 439, 1793.

¹¹ 2 East P. C. 486; *Rolland v. Com.*, 82 Pa. 306, 1876; *Johnston v. Com.*, 85 Ibid. 54, 1877; *Dutcher v. State*, 18 Ohio St. 308, 1868; *State v. John-*

to whom the owner opened the door ; and when they came in they robbed the owner and bound the constable ; this was held a burglary. So if admission be gained under pretence of business ; or if one take lodgings with a like felonious intent, and afterward rob the landlord ; or get possession of a dwelling-house by false affidavits, without any color of title, and then rifle the house ; such entrance, being gained by fraud, will be burglarious.¹ The entry in such case, however, must be immediate.²

§ 766. If a servant conspire with a robber, and let him into the house by night, this is burglary in both ;³ for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open.⁴

§ 767. While there must be a breaking, removing, or putting aside something material, which constitutes a part of the dwelling-house, and is relied on as a security against intrusion, yet if the door or window opened were at the time of the attempt shut, being kept in its place only by its own weight,⁵ it is no matter, as we have seen, that there was no fastening by locks or bolts ; a latch to the door, or the weight of the window or door, is sufficient,⁶ and, as has been noticed, if a door

son, Phillips, 186, 1867 ; State v. Mordecai, 68 N. C. 207, 1872 ; Morrow v. State, (Tex.) 25 S. W. Rep. 284, 1894 ; Van Walker v. State, (Tex.) 26 S. W. Rep. 507, 1894.

“ When a person rings a door-bell of a house the owner has a right to presume that his visitor calls for the purpose of friendship or business. If, in obedience to the summons, he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner, and constitutes a constructive breaking.” Paxson, J., Johnston v. Com., *ut supra*.

¹ 2 East P. C. 485. *Supra*, §§ 140 *et seq.*, 150.

² State v. Henry, 9 Ired. 463, 1849.

³ 1 Hale, 553 ; 1 Hawk. c. 38, s. 14 ;

R. v. Cornwall, 2 Stra. 881, 1731 ; State v. Rowe, (N. C.) 4 S. E. Rep. 506, 1887 ; Neiderluck v. State, (Tex.) 3 S. W. Rep. 573, 1887 ; Com. v. Lowrey, (Mass.) 32 N. E. Rep. 940, 1893.

⁴ R. v. Johnson, C. & M. 218, 1841. See Allen v. State, 40 Ala. 334, 1866 ; R. v. Egginton, 2 Leach, 913, 1801. See State v. Stickney, (Kans.) 36 Pac. Rep. 714, 1894, as to entry with consent of owner. *Supra*, §§ 141, 231 *a* ; *infra*, §§ 770, 915.

⁵ R. v. Haines, R. & R. 450, 1821 ; R. v. Hyams, 7 C. & P. 441, 1836 ; State v. Carpenter, 1 Houst. C. C. 367, 1862 ; Frank v. State, 39 Miss. 705, 1865. *Supra*, § 759.

⁶ 1 Russ. on Cr. by Greaves, 787 ; R. v. Hall. R. & R. 355, 1818 ; R. v. Russell, 1 Mood. C. C. 377, 1834 ;

be firmly closed, it is not necessary that it should be bolted or latched.¹

§ 768. Entrance by a thief through the chimney is a breaking; for that is as much closed as the nature of things will permit. And this rule holds though the burglar were detected before a chamber was entered.²

Entrance
by chim-
ney is
breaking.

§ 769. If the window of a house be left open,³ in whole or in part, so as to admit the person,⁴ or if there be an aperture in the wall, roof, or cellar, to admit light or air, through which the entry is made, this is no breaking.⁵ As has been observed, the opening of a folding or trap-

But not
entering
through
aperture in
wall, or
open door.

People v. Bush, 3 Parker C. R. 552, 1855; State v. Reid, 20 Iowa, 413, 1866; Dennis v. People, 27 Mich. 151, 1873; State v. Boon, 13 Ired. 244, 1853; Hild v. State, 67 Ala. 39, 1881; Carter v. State, 68 Ibid. 96, 1881; Frank v. State, 39 Miss. 705, 1865.

C. 377, 1834; Timmons v. State, 34 Ohio St. 426, 1877.

Removing a covering constitutes the offence, though it is otherwise if there be a partial opening. R. v. Smith, 1 Mood. C. C. 178, 1834; R. v. Hyams, 3 Russ. on Cr. (9th ed.) 3; 7 C. & P. 441, 1836; Com. v. Strupney, 105 Mass. 588, 1870. *Supra*, § 759.

At one time the English judges were divided on the question whether when the heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, was opened, it was burglary; the door having bolts by which it might have been fastened on the inside, but it did not appear that it was so fastened at the time. R. v. Callan, R. & R. 157, 1809. Formerly the case was held within the definition of the offence. Brown's Case, 2 East P. C. 487, 1799. Perhaps, however, there was a difference between these two cases in this: that in the latter case there were no interior fastenings, but in the former there were, though not used. At a nisi prius case, in 1830, before Bolland, J., it was held that the lifting up, from inside, of a trap-door covering a cellar which was merely held in its place by its own weight, and which had no fastenings, is not a sufficient breaking to constitute a burglary. R. v. Lawrence, 4 C. & P. 231, 1829. But it is now held otherwise. R. v. Russell, 1 Mood. C.

¹ State v. Reid, 20 Iowa, 413, 1866; State v. Carter, 1 Houst. C. C. 402, 1862; State v. Boon, 13 Ired. 244, 1853.

Removal of an iron grating may be burglary as much as opening a window. People v. Nolan, 22 Mich. 229, 1870.

² 1 Hawk. c. 33, s. 4; 4 Bl. Com. 226; R. v. Brice, R. & R. 450, 1821; State v. Willis, 7 Jones, (N.C.) 190, 1859; Donohoo v. State, 36 Ala. 281, 1864; Walker v. State, 52 Ibid. 376, 1874; Olds v. State, (Ala.) 12 So. Rep. 409, 1893.

And see distinctions taken *infra*, § 777.

³ R. v. Smith, 1 Mood. C. C. 178, 1834; Green v. State, 68 Ala. 539, 1881.

⁴ Com. v. Strupney, 105 Mass. 588, 1870; White v. State, 51 Ga. 285, 1874; Williams v. State, 52 Ibid. 580, 1874; Pines v. State, 50 Ala. 153, 1873; Costello v. State, (Tex.) 21 S. W. Rep. 360, 1893; Williams v. State, (Tex.) 13 S. W. Rep. 609, 1890.

⁵ R. v. Lewis, 2 C. & P. 628, 1827; R. v. Spriggs, 1 M. & R. 357, 1835; State v. Boon, 13 Ired. 244, 1853. *Supra*, § 759; *infra*, § 777.

door, covering such aperture by its own weight, though itself unlatched, is burglary.¹

§ 770. If a servant, with his master's assent, pretend to agree with a robber, and open the door and let the latter in, this, as has been already seen, is no burglary.² Where the owner voluntarily assents to the entrance, this is a defence; but the owner giving a key to an outdoor servant to enter for special purposes, is no defence when the latter is charged with a burglarious entry.³ A wife's consent to her paramour to break into her husband's house in order to commit adultery with her, is not, where adultery is a felony, a defence.⁴

§ 771. Doubts having been entertained whether, when a thief got into a house without breaking, it was burglary to break out, the stat. 12 Anne, c. 1, s. 7, makes such a breaking out burglary.⁵ Under this statute it has been held burglary to break open a door, window, or skylight in the attempt to escape, though the defendant only get his head through;⁶ and even for a lodger, who enters lawfully, to break out after committing a felony.⁷ But it was subsequently held that it is not burglary, under the statute of Anne, as expanded by those of 7 & 8 Geo. IV. and 24 and 25 Victoria, simply to open an outside door from inside, without passing through such door, when the original entrance into the house was effected without breaking.⁸ At common law, it is held that such posterior breaking out cannot be tacked to the prior entrance so as to make the offence burglary. Hence, a breaking out of a house has been held not to be burglary at common law.⁹

¹ *Supra*, § 767. But see *People v. Barry*, (Cal.) 29 Pac. Rep. 1026, 1892, for burglary under Penal Code of California § 459.

² *Supra*, §§ 141, 231 a, 766; *R. v. Johnson*, C. & M. 218, 1841; *Roscoe's Crim. Ev.* 345. See *R. v. Egginton*, 2 Leach, 913, 1801; *Allen v. State*, 40 Ala. 334, 1867; *infra*, § 915. See *People v. Collins*, 53 Cal. 185, 1878. As to Texas statute, see *Brown v. State*, 7 Tex. App. 501, 1880; *Mace v. State*, 9 Ibid. 110, 1880.

³ *Lowder v. State*, 63 Ala. 143, 1879; *Turner v. State*, (Tex.) 5 S. W. Rep. 511, 1887.

⁴ *Forsythe v. State*, 6 Ohio, 19, 1834; *supra*, § 121; *State v. Corliss*, (Iowa) 51 N. W. Rep. 1154, 1892.

⁵ See similar statute in Georgia. *White v. State*, 51 Ga. 285, 1874.

⁶ *R. v. McKearney*, *Jebb's C. C.* 99; *R. v. Lawrence*, 4 C. & P. 231, 1829; *R. v. Compton*, 7 Ibid. 139, 1835.

⁷ *R. v. Wheeldon*, 8 C. & P. 747, 1839. See *supra*, §§ 762, 765.

⁸ *R. v. Davis*, 6 Cox C. C. 369, 1853. See *State v. McPherson*, 70 N. C. 239, 1874.

⁹ *Clarke's Case*, 2 East P. C. 490, 1707; 1 Hale, 554; *Rolland v. Com.*, 82 Pa. 306, 1876; *Adkinson v. State*,

§ 772. Where the owner, either from apprehension or force, or with the view more effectually to repel it, opens the door through which the robber enters, this is burglary.¹ It is otherwise, however, if money be thus obtained outside of the house, the defendant not entering.²

Owner's opening produced by fright no defence.

II. ENTRY.

§ 773. The entry is essential to the constitution of the offence.³ But when both entry and breaking take place in the night, it is not necessary that both should be at the same time.⁴ Hence, if thieves break a hole in the house one night with intent to enter another night and commit felony, which they execute accordingly, it is burglary.⁵

Need not be simultaneous with breaking.

§ 774. When the thief breaks the house, and his body or any part thereof, as his foot or his arm, is within any part of the house, it is deemed an entry; or when he puts a gun into a window which he has broken (though the hand be not in), or into a hole of the house which he has made, with intent to murder or kill, this is an entry and breaking of the house; but if he barely break the house, without any such entry at all, this is no burglary.⁶

But without entry breaking not enough

§ 775. Where the defendant introduced his hand through a pane of glass, which he had broken, between an outer window and an inner shutter, for the purpose of undoing the window-latch, it was considered a sufficient entry.⁷ The

Entrance of hand sufficient.

5 Baxt. 569, 1871; Ray v. State, 86 N. C. 662, 1882. See State v. McPherson, 70 Ibid. 239, 1874; 1 Ben. & H. Lead. Cas. 540; Brown v. State, 55 Ala. 123, 1876. See *contra*, under statute of Anne, State v. Ward, 43 Conn. 489, 1875.

² 2 East P. C. 486. *Infra*, § 779.

³ *Infra*, § 771.

⁴ 2 East. P. C. 508; R. v. Smith, R. & R. 417, 1820.

⁵ 1 Hale, 551. See R. v. Bird, 9 C. & P. 44, 1839. *Infra*, § 806.

⁶ 3 Inst. 54; 2 East P. C. 490; Pines

¹ 2 East P. C. 486; Hawk. c. 38, s. 4; R. v. Swallow, 1 Russ. on Cr. 792. *Supra*, § 150. In People v. Collins, 53 Cal. 185, 1878, A. informed the sheriff that he (A.) had been asked by

v. State, 50 Ala. 153, 1873; State v. Whitby, 15 Kans. 402, 1873. See Ray v. State, 66 Ala. 281, 1880; Hammons v. State, (Tex.) 16 S. W. Rep. 99, 1891.

B. to enter a house in order to steal certain money in it. By the sheriff's advice A. entered alone and took the money, which he gave to B. outside. This was held not to be burglary in

⁷ R. v. Bailey, R. & R. 341, 1818; R. v. Wheeldon, 8 Ibid. 747, 1839; R. v. Bird, 9 Ibid. 44, 1839; R. v. O'Brien, 4 Cox C. C. 398, 1851; Fisher v. State, 43 Ala. 717, 1870.

B. *Supra*, §§ 211 a, 231 a.

same is true of the mere introduction of the offender's finger.¹ Where thieves came by night to rob a house, and the owner went out and struck one of them; whereupon another made a pass with a sword at persons he saw in the entry, and in so doing his hand was over the threshold, this was deemed burglary.²

§ 776. It has been said that discharging a loaded gun into a house is a sufficient entry.³ And when the intent is to effect a personal burglarious entrance, for the purpose of homicide, this is sound law.⁴ Otherwise the offence may be a felonious assault.

§ 777. An entry down a chimney, as has been seen, is a sufficient entry, for the chimney is a part of the house.⁵ An entry, however, through a hole in the roof left for the purpose of admitting light is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and needs protection; whereas if a man choose to leave a hole in the wall or roof of his house instead of a fastened window, he must take the consequences.⁶

§ 778. If the sole entrance into the house is effected by a instrument by which a hole is made; such instrument not being suitable to draw out or injure anything inside, and without felonious intent, though this is an attempt, it is not a sufficient entry to constitute burglary.⁷

§ 779. In a case where the house was broken and not entered, and the owner for fear threw out his money, which the assailant took, it was held to be no burglary; though clearly robbery, if taken in the presence of the owner.⁸

§ 780. Where the prisoner raised a window which was

¹ R. v. Davis, R. & R. 499, 1823; 1863; Franco v. State, 42 Tex. 276, and see 1 Hale, 533; Franco v. State, 1875. *Supra*, § 768.
42 Tex. 276, 1875; Fost. 107; 2 East P. C. 490.

² 2 East P. C. 490.

³ 1 Hawk. c. 38, s. 11; 1 Hale, 555; 1834; Car. C. L. 293; s. c. by the Pickering v. Rudd, 1 Stark. 48, 1818; name of R. v. Roberts, 2 East P. C. Garner v. State, (Tex.) 19 S. W. Rep. 487. See R. v. Hughes, Ibid. 491, 333, 1892.

⁴ 1 Russ. on Cr. 796. See, however, 2 East P. C. 490.

⁵ R. v. Brice, R. & R. 450, 1821; State v. Willis, 7 Jones, (N. C.) 190, 1859; Donohoo v. State, 36 Ala. 281,

⁶ R. v. Spriggs, 1 M. & R. 357, 1835. *Supra*, § 768.

⁷ R. v. Rust, 1 Mood. C. C. 184, (N. C.) No. 1, 248, 1864. See *supra*, § 187. *Infra*, § 780.

⁸ 2 East P. C. 486, 490. See *infra*,

not bolted, and thrust a crow-bar under the bottom of the shutter (which was about half a foot within the window), so as to make an indent on the bottom of the shutter, but from the length of the bar his hand was not inside the house, there was held not to be a sufficient entry to constitute burglary.¹ And so *a fortiori* where he merely broke open the outer shutter, but did not get his hand through the glass pane.²

Some entrance must be effected.

The entrance by guests at inns has been previously discussed.³

III. DWELLING-HOUSE.

§ 781. The breaking and entering, to constitute a burglary, must be ordinarily into the dwelling-house of another; that is to say, a house in which the occupier and his family usually *reside*, or, in other words, dwell and lie in.⁴

Dwelling-house is a house in which occupiers usually reside.

§ 782. It has been said that a church edifice may be the subject of burglary at common law;⁵ but this has been doubted.⁶ In most States it is so by statute.

Church edifice.

§ 783. As an introduction to the cases hereafter to be given in detail, it may be now stated generally that no matter to what use an out-building may be put, it is burglary to break and enter it, if it is appurtenant or ancillary to the dwelling-house, and is within such convenient distance from the same as to make passing and repassing an ordinary household occurrence. What this convenient distance is varies with the state of the neighborhood. In a city, a store on the opposite side of a street could not be considered

Burglary to break into an out-building which is appurtenant to dwelling-house.

¹ *R. v. Rust*, 1 Mood. C. C. 184, Under New York statute, see *Quinn* 1834; s. c., by the name of *R. v. People*, 71 N. Y. 561, 1878. *Infra*, *Roberts*, 2 East P. C. 487. *Supra*, § 791.

§ 778.

⁵ 3 Inst. 64; 1 Hale, 556; *R. v.*

² *State v. McCall*, 4 Ala. 643, 1842. *Baker*, 3 Cox C. C. 581, 1849, *Alderson*, B. See 2 Ben. & H. Lead. Cas.

³ *Supra*, § 762.

⁴ See 2 Russ. on Cr. (6th Am. ed.) 54; 1 Russ. on Cr. by Greaves, 826. 797. See *Ashton v. State*, 68 Ga. 25, 1881; *Scott v. State*, 62 Miss. 781, 1885. 478, 1876. As to theatres, see *Lee v. State*, 56 Ga. 1881; *Scott v. State*, 62 Miss. 781, 1885. As to school-houses, *State v. Bailey*, 10 Conn. 144, 1832.

As to breaking into "sample room," see *Thomas v. State*. (Ala.) 12 So. Rep. 409, 1893; *State v. Clark*, 8 Crim. Law Mag. 537; *Hollister v. Com.*, 60 Pa. 108, 1869. See, for larger definition, under New York Penal Code, § *People v. Stickman*, 34 Cal. 242, 1868. 498.

⁶ 1 Hawk. c. 38, s. 17. See *People v. Richards*, (N. Y.) 15 N. E. Rep. 371,

an appurtenant to a dwelling-house from which it might be only forty feet distant. In a well-settled country, a barn which no common inclosure embraced in the same cluster as the dwelling-house, and which was a hundred feet distant from it, would not, for the same reason, be regarded as appurtenant.¹ On the other hand, on an open prairie, neither a common inclosure, nor close proximity, would be necessary to constitute the offence. The question is, Is it probable that the building is under the immediate personal care of its owner? If so, in view of the peril to life consequent upon a nocturnal attack on it, the offence is one against family peace and safety as well as against property, and consequently rises to burglary.²

Hence, burglary may be committed in a building standing near enough to the dwelling-house to be used with it as appurtenant to it; or when standing close to it in the same yard, whether the yard be inclosed or open.³ And a building used with a dwelling-house, and opening into an inclosed yard belonging thereto, was deemed parcel of the dwelling-house, though it also opened into an adjoining street, and though it had no internal communication with the dwelling-house.⁴ In another case the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined, all of which were used with the house, and

¹ *State v. Langford*, 1 Dev. 253, *Infra*, § 792. As limiting the text, 1828; *State v. Ginns*, 1 N. & McC. 583, 1819. See *State v. Hecox*, 83 Mo. 531, 1884, for burglary of a granary under the Rev. Stat. Mo.; *People v. Aplin*, (Mich.) 49 N. W. Rep. 148, 1891. See *infra*, § 784.

² *R. v. Westwood*, R. & R. 495, 1823; *R. v. Burrows*, 1 Mood. C. C. 274, 1834; *Pitcher v. People*, 16 Mich. 142, 1865; *Hollister v. Com.*, 60 Pa. 103, 1869; *State v. Twitty*, 1 Hayw. 102, 1814; *State v. Wilson*, *Ibid.* 242, 1814; *Armour v. State*, 3 Humph. 379, 1842. "Shops," "store-house," "store," "counting-house," "warehouse," and "out-house," as statutory terms, are the subjects of future distinct definition; *State v. Hutchinson*, (Mo.) 20 S. W. Rep. 34, 1892, as to question for jury. See *People v. Shaughnessy*, (Mich.) 50 N. W. Rep. 645, 1891.

³ See 1 Hale, 558; *Brown's Case*, 2 East P. C. 493, 1787; *Garland's Case*, *Ibid.* 1776; *People v. Snyder*, 2 Parker C. R. 23, 1855; *Quinn v. People*, 2 Hun, 336, 1874; s. c. 71 N. Y. 561, 1877; *State v. Langford*, 1 Dev. 253, 1828; *State v. Wilson*, 1 Hayw. 242, 1814; *State v. Twitty*, *Ibid.* 102, 1814. That this includes the "smoke-house," which may be proved under averment of "mansion-house," see *Fletcher v. State*, 10 Lea, 338, 1882; *Wait v. State*, (Ala.) 13 So. Rep. 584, 1893. As to question for jury, see *People v. Smith*, (Mich.) 52 N. W. Rep. 67, 1892; *People v. Griffin*, (Mich.) 43 N. W. Rep. 1061, 1889.

⁴ *R. v. Lithgo*, R. & R. 357, 1818; *People v. Calderwood*, (Mich.) 33 N. W. Rep. 23, 1887.

had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, etc., making altogether an inclosed yard. The workshop had no internal communication with the house, and it had a door opening into the street; its roof was higher than that of the dwelling-house. The street door of the workshop was broken open in the night. It was held that this workshop was parcel of the dwelling, and that the conviction was right.¹ And so as to a barn, part of the same group of buildings as the dwelling-house, and not separated from it by a public road.²

¹ *R. v. Chalkling*, R. & R. 334, 1817.

The provision of the New York Revised Statutes (2 R. S. 668, § 16), declaring that no building shall be deemed a dwelling-house within the meaning of the provision relating to burglary, unless the same be found to be joined to, immediately connected with, and part of a dwelling-house, is intended to mean no structure, itself a building separate from, and independent of, the dwelling-house of the owner, *i. e.*, uninhabited out-houses, isolated from the dwelling, and does not apply to the lower story of a dwelling used as a store, although having no internal communication with the upper stories. *Quinn v. People*, 71 N. Y. 561, 1877.

² *Pitcher v. People*, 16 Mich. 142, 1865.

Adjoining the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house; and adjoining the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roofs of the dwelling-house, kiln, and dairy were of different heights. It was held, that the dairy was not a part of the dwelling-house, and that a burglary could not be committed by breaking into it. *R. v. Higgs*, 2 C. & K. 321, 1846. See *Fisher v. State*, 43 Ala. 717, 1870.

Again, a storehouse, two hundred and fifty yards distant from the dwelling (in which last the owner usually slept), which was on the opposite side of the road, in which there was no chimney and no bed or bedstead, though the owner sometimes slept in it, was held not to be the subject of burglary. *State v. Jenkins*, 5 Jones, (N. C.) 430, 1857. And so as to mill-house similarly situated. *State v. Sampson*, 12 S. C. 567, 1880.

A smoke-house opening into the yard of a dwelling-house, and used for its common and ordinary purposes, is, in law, a part of the dwelling-house, and in the breaking and entering it a burglary may be committed. *State v. White*, 4 Jones, (N. C.) 349, 1856. But it is otherwise if the smoke-house be detached and in a distinct lot. *State v. Jake*, 1 Winston, (N. C.) No. 2, 80, 1864.

The prisoner broke into a goose-house opening into the prosecutor's yard, into which his house also opened, and the yard was surrounded partly by other buildings of the homestead and partly by a wall; some of the buildings had doors opening backward, and there was a gate in one part of the wall opening upon a road. The goose-house was held to be a part of the dwelling-house. *R. v. Clayburn*, R. & R. 360, 1818.

A barn fifteen rods from a dwelling-house, and separated from it by a

§ 784. A building constructed for use as a dwelling-house, under repair, in which no one at the time lives, though the owner's property is deposited there, is not a place in which burglary can be committed until he has taken possession, and begun to inhabit it.¹ If one of the workmen engaged in the repairs sleep there in order to protect it, it will not make any difference;² nor though the house is ready for the reception of the owner, and he has sent his property into it preparatory to his own removal, does it become for this reason his mansion.³ And where the landlord of a house purchased the furniture of his

highway, is not within the same curtilage. *Curkendall v. People*, 36 Mich. 309, 1878.

The breaking into a store in the night-time, when there was no fence inclosing the dwelling-house and the store, so as to bring them under one inclosure, and when the store was not appurtenant or ancillary to the dwelling-house, and the two were twenty feet apart, has been held to be no burglary. *People v. Parker*, 4 Johns. 424, 1809. See *Hollister v. Com.*, 60 Pa. 103, 1869; *State v. Ginns*, 1 N. & McC. 583, 1819.

An area gate, opening into the area only, is said, as we have seen, not to be part of the dwelling-house, so as to make the breaking thereof burglary, if there is any door or fastening to prevent persons in the area from entering the house, although such door or fastening might not be secured at the time. *R. v. Davis*, R. & R. 322, 1817.

In an English case, where a centre building was allotted to a variety of trades, and there were two wings annexed to it, both of which were used as dwelling-houses, and were occupied by different persons, but had no internal communication with the building, though the roofs of all were connected, and the entrances of all were out of the same common inclosure, the centre building was held not to be the subject of burglary, being

viewed as a distinct tenement, the adjoining houses being the respective abodes of individuals. *Egginton's Case*, 2 East P. C. 494, 1801; 2 B. & P. 508; s. c. 2 Leach, 913. But this case rests on the supposition that the buildings were absolutely separate.

A two-storied house, of which the front room on the first floor was used as a storehouse, and the back room (which also contained a few boxes of goods, and communicated with the front by a door in the partition) as a sleeping-room by the owner, while the clerks, who were unmarried men, and took their meals at a hotel, slept in the rooms on the second floor, is a dwelling-house, both within the common law definition of burglary and under §§ 3308-9 of the Alabama Code. *Ex parte Vincent*, 26 Ala. 145, 1855. See, also, *State v. Williams*, 90 N. C. 724, 1884; *State v. Frank*, (La.) 7 So. Rep. 131, 1889.

¹ 1 Leach, 185; *Fuller's Case*, 2 East P. C. 498, 1782; 1 Leach, 196; *Elsmore v. St. Braivells*, 2 Man. & R. 514; s. c. 8 B. & C. 461, 1828. But see *infra*, § 791.

² 1 Leach, 186. But see *Clark v. State*, (Wis.) 436, for burglary under Rev. Stat. Wis.

³ *R. v. Hallard*, 2 East P. C. 498, 1776; *R. v. Thompson*, *Ibid.* 1796; 2 Leach, 771. *Infra*, § 815.

out-going tenant, and procured a servant to sleep there in order to guard it, but without any intention of making it his own residence, a breaking into the house was not considered to be a burglary.¹ It is otherwise when the house is occupied by servants as part of the owner's family.²

§ 785. The mere casual use of a tenement will not suffice.³ Where neither the owner nor any of his family have slept in the house, it is not his dwelling-house, though he had used it for his meals and all the purposes of his business, and so a breaking into it is not a burglary.⁴

Not building casually used.

§ 786. If a man died in his leasehold house, and his executors put servants in it, and keep them there at board wages, burglary may be committed in breaking into it, and it may be laid to be the executor's property.⁵

Otherwise as to building occupied by executors.

§ 787. A dwelling-house is deemed any permanent building in which a party may dwell and lie, and as such, burglary may be committed in it. A set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose.⁶ So even a loft over a stable, used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken.⁷

"Chambers" and "lodging rooms" may constitute a dwelling.

Burglary may be also committed by breaking into a lodging-room, even by a person who lawfully entered the house of which such lodging-room is part;⁸ or into a garret used for a workshop, and rented together with an apartment for sleeping; and if the landlord does not sleep under the same roof, the place may be laid as the mansion of the lodger.⁹

When a landlord breaks and enters a guest's chamber, if the chamber was the guest's dwelling-house as a settled abode, the landlord may be indicted for burglary; but not otherwise.¹⁰

¹ R. v. Davis, 2 Leach, 876, 1800; R. v. Smith, 2 East P. C. 497, 1720; R. v. Fuller, Ibid. 498, 1782; 1 Leach, 196.

² *Infra*, § 790.

³ 1 Hale, 557. Though see *State v. Wilson*, 1 Hayw. 242, 1814; *Armour v. State*, 3 Humph. 379, 1842.

⁴ R. v. Martin, R. & R. 108, 1806; *Fuller v. State*, 48 Ala. 273, 1872.

⁵ 2 East P. C. 499

⁶ 1 Hale, 556; 1 Hawk. c. 38, s. 11.

⁷ R. v. Turner, 1 Leach, 305, 1781.

⁸ *Supra*, §§ 762, 763; 1 Leach, 89; *State v. Clark*, 42 Vt. 629, 1869; *Com. v. Bowden*, 14 Gray, 103, 1860; *People v. Bush*, 3 Parker C. R. 552, 1855; *Mason v. People*, 26 N. Y. 200, 1862; *Colbert v. State*, (Ga.) 17 S. E. Rep. 840, 1893; *State v. Bee*, (S. C.) 6 S. E. Rep. 911, 1888.

⁹ 1 Leach, 237. *Infra*, § 802.

¹⁰ Ibid.; Dalt. C. 151. See R. v.

§ 788. What has been said with regard to “chambers” and “lodgings” applies more strongly to apartments in hotels or tenement houses in which families reside separately as in a permanent home, though with a common street door and hall. Each “apartment” or section of this common building is so distinct and independent that burglary may be committed by breaking into it. There is, however, a distinction between such “apartments” and ordinary chambers in inns which are transiently occupied. The latter, at least according to the old authorities, must be laid as the landlord’s dwelling, though it is now safer to insert counts charging the ownership both ways. But when the residence of the lodger is permanent, it is now clear that the apartment must be laid to be his dwelling-house.¹ Nor does it make any difference in principle that the owner occupies an apartment in the same building. The apartments of the lessees must be laid as their dwelling-houses, and, as a consequence, he is indictable for burglary in breaking into and entering the same.²

And so of
apart-
ments in
tenement
houses.

§ 789. The offence cannot be committed in a tent or booth in a market or fair, even though the owner lodge in it;³ because it is not a permanent but a temporary edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling-house.⁴ And so of a log-cabin occupied by an agent.⁵

And so of
permanent
tents and
log-cabins.

Occupation
of servant
may be
occupation
of master.

§ 790. The occupation of a servant as such, and not as a tenant, is the occupation of the master, and will be a sufficient residence to render it the dwelling-house of the master.⁶

§ 791. It is not necessary that any person should be actually

Picket, 2 East P. C. 501, 1765; R. v. 1870; People v. Calvert, 22 N. Y. Sup. Ball, 1 Mood. C. C. 30, 1834; Ashton 220, 1893.

v. State, 68 Ga. 25, 1881; and cases ² See *infra*, §§ 801-3.

cited *infra*, § 802. And see *infra*, ³ 1 Hawk. c 38, s. 35; 1 Hale, § 936, as to analogous case of general 557.

owner stealing from special.

⁴ R. v. Smith, 1 M. & Rob. 256,

¹ R. v. Carrell, 1 Leach, 237, 1782; 1833.

R. v. Bailey, 1 Mood. C. C. 23, 1834;

⁵ State v. Jake, 1 Winston, (N. C.)

R. v. Wheeldon, 8 C. & P. 747, 1839; No. 2, 80, 1864.

People v. Bush, 3 Parker C. R. 552,

⁶ R. v. Stock, R. & R. 185, 1810; R.

1855; People v. Smith, 1 Ibid. 329,

v. Wilson, Ibid. 115, 1806; State v.

1854; Mason v. People, 26 N. Y. 200,

Wilson, 1 Hayw. 242, 1814; Armour

1862; Houston v. State, 38 Ga. 165,

v. State, 3 Humph. 379, 1842. *Supra*,

1868; People v. St. Clair, 38 Cal. 137, § 786.

within the house at the time the offence is committed. For if the owner leave it *animo revertendi*, though no person reside in it in his absence, it will still be his mansion.¹ It has been even ruled, though with doubtful accuracy, that burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, to which, on going into the country, he had removed his furniture from his former residence in town, though neither the prosecutor nor his family had ever lodged in such house, but merely visited it occasionally.² And though a man leave his house and never mean to live in it again, yet if he use part of it as a shop, while his servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family will be habitation by him, and the shop may still be considered as part of his dwelling-house.³ It is otherwise where the house is finally abandoned by the owner, who leaves persons in it, not as domestic servants but as care-takers.⁴

Not necessary that some one should be at the time in the house.

IV. DEFINITIONS OF STATUTORY TERMS.

§ 792. (a) *Shop*.—Under the English statutes this must be a place for the sale of goods. A mere working apartment is not such “a shop.”⁵ But this has been qualified even in England, so as to make a blacksmith’s workshop to be a shop;⁶ and in the United States the term includes, popularly, any place where goods are sold, or work done, for which money is on the spot received.⁷ This, however, excludes a counting-room, where goods are not exhibited, nor the work done for which the money is paid.⁸

“Shop” is a place for the sale of goods.

¹ 1 Hawk. c. 37, s. 11.

⁵ R. v. Sanders, 9 C. & P. 79, 1839.

² Com. v. Brown, 3 Rawle, 207, 1832. See State v. Sufferin, (Wash.) 32 Pac. Rep. 1021, 1893.
In this case, Gibson, C. J., concedes that the conclusion conflicts with modern English rulings. *Supra*, § 784; Foster, 77; 2 East P. C. 496; R. v. Murray, Ibid. 1698; and R. v. Martin, R. & R. 108, 1806; R. v. Harris, 2 Leach, 701, 1795; 2 East P. C. 498; *Ex parte* Vincent, 26 Ala. 145, 1855. See *supra*, § 781.

⁶ R. v. Carter, 1 C. & K. 173, 1840.

⁷ State v. Carrier, 5 Day, 131, 1811.

See State v. Canney, 19 N. H. 135, 1847; State v. Brooks, 4 Conn. 446, 1821; People v. Humphrey, 1 Root, 63, 1774. See People v. Hagan, 14 N. Y. Sup. 233, 1891, for breaking into a fruit stand, under Penal Code of New York.

³ R. v. Gibbons, R. & R. 442, 1821.

⁴ R. v. Flanagan, R. & R. 187, 1810.

⁸ People v. Marks, 4 Parker C. R.

§ 793. (b) *Warehouse*.—This term includes a cellar for the storage of goods intended for removal and sale;¹ and any place of temporary storage for commercial use meets the description.² But the term does not cover a slight structure in a garden used for garden seeds.³

“Ware-house” is a place for business storage.

§ 794. (c) *Storehouse*.—This is a still wider term, and includes a storage for family as well as for business purposes, and for retailing, as well as for commission or wholesale business.⁴ A building for storage, however, which is slept in continually, is a dwelling-house.⁵

“Store-house” is a place for family as well as business storage.

§ 795. (d) *Store* has been defined to be a place where goods are exhibited for sale;⁶ but this is too narrow a definition, as, when used as a *nomen generalissimum*, the term includes “storehouse.”⁷

“Store” is place for keeping and sale of goods.

§ 796. (e) *Counting-house*.—This, in England, has been held to include a building connected with a chemical factory; in which building is a weighing machine, where the goods are weighed, and a book kept in which the weights are entered; and in the same building the time of the workmen is entered, and they are accustomed to be paid, though the books for this purpose, except when so used, are kept in the “office,” with the general books of the concern.⁸

153, 1845; and, as to “school-house,” see *State v. Bailey*, 10 Conn. 144, 1832. As to “place of business,” see *Bethune v. State*, 48 Ga. 505, 1873.

¹ *R. v. Hill*, 2 M. & R. 458, 1835.

² *Wilson v. State*, 24 Conn. 57, 1855; *Allen v. State*, 10 Ohio St. 287, 1832. See *Com. v. Pennock*, 3 S. & R. 199, 1817; *State v. Garrison*, (Kans.) 34 Pac. Rep. 751, 1893. See, as to the buildings of railroad depot, *State v. Bishop*, 55 Vt. 287, 1881. See *Longford v. People*, (Ill.) 25 N. E. Rep. 1009, 1890; *infra*, § 813, as to breaking into a car on a side-track; and *State v. Edwards*, (Mo.) 19 S. W. Rep. 91, 1892, as to “railroad depot;” and *State v. Turner*, (Mo.) 17 S. W. Rep. 304, 1891, for burglary of a “calaboose.” As to smoke-house, see *Mullins v. Com.*, (Ky.) 20 S. W. Rep. 1035, 1893.

³ *State v. Wilson*, 47 N. H. 101, 1867.

⁴ See *State v. Sandy*, 3 Ired. 570, 1842; *Green v. State*, (Ark.) 19 S. W. Rep. 1055, 1892; *Butler v. Com.*, 10 Va. L. J. 55, 1885; see *State v. Evans*, 18 S. C. 137, 1882.

⁵ *State v. Potts*, 75 N. C. 129, 1876.

⁶ *State v. Canney*, 19 N. H. 135, 1848. See *Moore v. People*, 47 Mich. 639, 1882. That under a statute specifying “storehouse,” there can be no conviction for breaking into a “store-room,” see *Hagar v. State*, 35 Ohio St. 268, 1879.

⁷ See *Com. v. Whalen*, 131 Mass. 419, 1881; *Moore v. People*, 47 Mich. 639, 1882.

⁸ *R. v. Potter*, 2 Den. C. C. 235, 1851; 3 C. & K. 179; 5 Cox C. C. 187, 1851.

§ 797. (f) *Out-houses*.—These are defined as at common law in another section.¹ Under the statutes the term has a wider meaning, including all buildings in business dependence on the building in chief; supposing there be relative proximity, such as contiguity, or juxtaposition within the same inclosure, or, if in the open country, within the same field or lot.² But the out-house must be a house, *e. g.*, something, though a mere cow-house, or pig-sty, complete in itself.³

“Out-houses” are buildings in proximate relation to building in chief.

§ 797 a. (g) *Barn*.—The word “barn,” in a statute, covers all buildings used for the storage of grain;⁴ and it does not cease to be a barn because it is sometimes used to store tobacco.⁵

“Barn” includes buildings for storage of grain.

V. OWNERSHIP.⁶

§ 798. “If the rule,” remarks Mr. East,⁷ “by which to ascertain the ownership may be compressed with sufficient discrimination into a small compass, I should say generally that where the legal title to the whole mansion remains in the same person, there, if he inhabit it either by himself, his family, or servants, or even by his guest, the indictment must lay the offence to be committed against his mansion. And so it is if he let out apartments to inmates who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicile there, without any interference on the part of the proper owner, or if they be only in possession of parts of the house as inmates to the

Occupier is to be generally regarded as owner.

¹ *Supra*, § 783.

² See § 783, and *State v. Brooks*, 4 Conn. 446, 1821; *Swallow v. State*, 20 Ala. 30, 1851; *Price v. Com.*, (Ky.) 25 S. W. Rep. 1062; 15 Ky. L. R. 837, 1894. That under “other buildings” in a statute a stable is included, see *Orrell v. People*, 94 Ill. 456, 1880; see *White v. Com.*, (Ky.) 9 S. W. Rep. 303, 1888, that tobacco barn is not an out-house under General Statutes of Kentucky; *Shotwell v. State*, 43 Ark. 345, 1884.

³ See *R. v. James*, 1 C. & K. 303, 1844. See *Kincaid v. People*, (Ill.) 28

N. E. Rep. 1060, 1891, where, under Criminal Code of Illinois, § 36, “engine-room” is not within the meaning of “other buildings.”

⁴ *Barnett v. State*, 38 Ohio St. 7, 1882.

⁵ *Ratekin v. State*, 26 Ohio St. 420, 1875.

⁶ As to the manner of averring the names of owners, etc., see Whart. Cr. Pl. & Pr. §§ 109 *et seq.*; Whart. Crim. Ev. § 94.

⁷ 2 East P. C. 499, 500. See *supra*, § 787.

owner, and have a distinct and separate entrance, then the offence of breaking, etc., their separate apartments must be laid to be done against the mansion-house of such occupiers, respectively." And, as a general rule, the ownership, so far as burglary is concerned, is in a lessee or other tenant having title, and not in the owner of the fee.¹

§ 799. Where it appeared that a servant lived in the house of his master at a yearly rent, it was ruled that the house could not be described as the master's house, though it was on the premises where the master's business was carried on, and although the servant had it because of his service.² It is otherwise where the servant pays no rent, or is a *locum tenens* for the master.³ But whenever the servant occupies the house for his own benefit, and not for that of his master, then the servant is to be regarded as owner.⁴

And so of servant who occupies his master's house at a yearly rent.

§ 800. If a house be tenanted by a married woman, it is at common law the house of her husband and not of herself, although she live separate from her husband.⁵ Even if a married woman live apart from her husband, upon an income arising from property vested in trustees for her separate use, a house that she has hired to live in is, at com-

House occupied by married woman to be laid as husband's.

¹ *Infra*, §§ 799, 803, 816; *Ashton v. State*, 68 Ga. 25, 1881. See, as to ownership of a railway car, *State v. Parker*, 10 Nev. 79, 1875.

² *R. v. Jarvis*, 1 Mood. C. C. 7, 1854; *Smith v. People*, (Ill.) 3 N. E. Rep. 733, 1885. *Supra*, §§ 789, 790; *infra*, § 803.

³ *R. v. Rawlins*, 7 C. & P. 150, 1835; *R. v. Gibbons*, R. & R. 442, 1821; *R. v. Wilson*, *Ibid.* 115; *R. v. Smyth*, 5 C. & P. 201, 1832. As to bailee, see *Wimbish v. State*, (Ga.) 15 S. E. Rep. 325, 1892.

⁴ *R. v. Jobling*, R. & R. 525; and see *R. v. Smyth*, 5 C. & P. 202; *R. v. Jarvis*, 1 Mood. C. C. 7, 1854; *R. v. Camfield*, *Ibid.* 42, 1854; *R. v. Witt*, *Ibid.* 248, 1854; *R. v. Turner*, 1 Leach, 305, 1784; *R. v. Flanagan*, R. & R. 187, 1810. *Infra*, § 816.

Where the servant of three partners in trade had weekly wages, and par-

ticular rooms assigned to him, as lodging for himself and family, over the bank and brewery office of his employers, with which his lodging communicated by a trap-door and a ladder, it was ruled by the twelve judges that a burglary committed in the banking-room was well laid as in the dwelling-house of the three partners. *R. v. Stock*, 2 Taunt. 349; 2 Leach, 1015; s. c. R. & R. 185, 1810.

A gardener lived in a house of his master, quite separate from the dwelling-house of his master, and had the entire control of the house he lived in, and kept the key; it was held that, on an indictment for burglary, the house might be laid either as his or his master's. *R. v. Rees*, 7 C. & P. 568, 1856. As to proof of ownership, see *Jackson v. State*, 55 Wis. 589, 1882; *People v. Edwards*, 59 Cal. 359, 1881.

⁵ *Farre's Case*, Kel. 43; 2 East R. C.

mon law, properly described as the dwelling-house of her husband, though he has never been in it, and she paid the rent out of her separate property.¹ And if a wife be living apart from her husband, in a house built by him, though she be living in adultery with another man, who paid the house-keeping expenses, it may be laid as the dwelling-house of the husband; even if the husband expected the criminal intercourse when he placed her in the house.² But under recent statutes the ownership may be laid in the wife.³

§ 801. A public hall may be described as the residence of the clerk of the company to whom it belongs, and who resides in it;⁴ the apartments occupied by a banking corporation as the property of the bank;⁵ and when the house of a charitable institution is entered, ownership is implied in the statement that the house is the house of the institution.⁶

Public building may be described as property of occupant.

§ 802. According to the strict common law rule, where the chamber of a guest at an inn is forced open and his goods stolen, the burglary must be laid in the dwelling-house of the landlord,⁷ and in all cases where the occupier has the transient use merely and no interest in the apartments he occupies, it is the same.⁸ But if the lodgers lease their apartments for definite periods, the old rule ceases to be applicable, and the apartment may be laid as the tenant's dwelling.⁹

Transient guests' chambers are to be laid as the landlord's dwelling, otherwise with permanent guests.

§ 803. It was once held that where lodgers have rooms of which they keep the keys, and inhabit them severally with their families, yet if they enter at one outer door with the owner, these rooms cannot be said to be the dwelling-house of the inmates, but the indictment ought to be

Permanent apartments are dwellings of occupants.

504, 1786; and see *Bogett v. Frier*, 1 East, 301; *R. v. Smyth*, 5 C. & P. 201, 1832; but see *contra*, *Dutcher v. State*, 18 Ohio, 308, 1849. And under the Married Woman's Acts, where the statute vests such property in the wife, it may be so described. But see *Snyder v. People*, 26 Mich. 106, 1872.

¹ *R. v. French*, R. & R. 491, 1822.

² *R. v. Wilford*, R. & R. 517, 1828.

³ *State v. Trapp*, 17 S. C. 469, 1881. *Infra*, § 815.

⁴ 2 Leach, 931; 2 East P. C. 501.

⁵ *State v. Rand*, 33 N. H. 216, 1857.

⁶ *Davis v. State*, 38 Ohio St. 505, 1882.

⁷ 1 Hale, 557; *R. v. Prosser*, 2 East P. C. 502, 1768; *R. v. Witt*, 1 Mood. C. C. 248, 1834; *R. v. Wilson*, R. & R. 115, 1806; *Rodgers v. People*, 86 N. Y. 360, 1881; but see *Mason v. People*, 26 Ibid. 200, 1862; *People v. St. Clair*, 38 Cal. 137, 1870. *Supra*, § 707.

⁸ 1 Hawk. c. 38, s. 26.

⁹ *R. v. Bailey*, 1 Mood. C. C. 23, 1854; *State v. Johnson*, (Wash.) 30 Pac. Rep. 672, 1892. *Supra*, §§ 787-8.

for breaking the house of the owner. On the other hand, it was said that if the owner inhabit no part of the house, or even if he occupy a shop or cellar in it, but do not sleep therein, the apartments of such inmates were to be considered as their respective dwelling-houses.¹ This restriction, however, as to the owner not sleeping in the house, cannot now be maintained; and if there be separate apartments leased on long terms to lodgers, the ownership may be laid in the lodger.² And it has even been held that a tenant at will may be such an occupant.³

A fortiori, if all internal communication be cut off by an actual severance, the apartments become distinct houses, so that if one house be divided to accommodate the families of two partners, though the rent and taxes of the whole be paid out of the common fund, each part will be regarded as a mansion.⁴ But a house, the joint property of partners in trade, in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of the partners resides in it,⁵ and although the lower part of the house is occupied as a store, which is the part entered, and the upper part, which is occupied as a home by one of the partners, is approached only from outside through a yard.⁶

Possession is sufficient as against burglars. § 804. It is enough if the owners averred in the indictment have lawful possession *as against burglars*. It is not necessary to consider what title they have against

¹ Carrell's Case, 1 Leach, 237, 1782; a back door into a passage in the Trapshaw's Case, Ibid. 427, 1786; and house, let the shop to his son, who see 1 Hawk. c. 38, s. 26; R. v. Ball, 1 used it as a place of business only, Mood. C. C. 30, 1834. and did not reside there, a burglary

² People v. Bush, 3 Parker C. R. 552, 1855; Mason v. People, 26 N. Y. 200, 1862; State v. Fish, 3 Dutch. 323, 1855. *Supra*, §§ 787-8. having been committed in the shop, the judges held that it was properly described in the indictment as the dwelling-house of the father. R. v.

³ Ashton v. State, 68 Ga. 25, 1881. Sefton, R. & R. 202, 1811.

⁴ R. v. Jones, 1 Leach, 537; 2 East P. C. 504, 1790; Tracy v. Talbot, Salk. 532. Where a lodger occupied a sleeping-room on the first floor and a workshop in the attic, and the rest of the

⁵ R. v. Athea, 1 Mood. C. C. 329, 1834. house was occupied by other lodgers, a burglary in the workshop was held

⁶ Quinn v. People, 71 N. Y. 561, 1877. by the judges to be well laid to have been committed in the dwelling-house

In a case where the prosecutor, of the lodger who rented it. R. v. having a dwelling-house with a shop Carrell, 1 Leach, 237. See, also, adjoining, with separate entrances People v. Smith, 1 Parker C. R. 329. from the street, but the shop having 1782. *Supra*, §§ 787, 801.

the landlord or other legal claimants.¹ But ownership of some kind must be stated.²

§ 805. A man cannot be indicted for burglary in his own house. Hence it was once held that, if the owner of a house break and enter into the room of his lodger and steal his goods, he can only be convicted of larceny.³ But now, where the lodger has separate and permanent apartments, the law is otherwise.⁴

Owner
may be
indicted
for burg-
lary in his
lodger's
apart-
ments.

VI. TIME.

§ 806. The breaking and entering must be in the night, though they need not be both in the same night,⁵ for if the defendants break a hole in the house one night, with the intent to enter another night and commit felony, and they accordingly do so through the hole they so made the night before, this has been held burglary.⁶ Nor is it any defence that the entrance was not consummated until daytime, if the breaking and the beginning of the entry were by night.⁷

Breaking
must be in
night-time

§ 807. The night-time, according to the old English common law, extends from the termination of daylight, beginning at the time when the countenance ceases to be reasonably discerned, and extending to the earliest dawn of the next morning.⁸ But there are some moonlight nights, in which the countenance can be discerned more accurately than on some foggy days; and besides this, what such light is depends upon the vision of the witness. The jury must determine the question independently of this capricious test.⁹ When twilight has

Night is
from twi-
light to
twilight.

¹ *Houston v. State*, 38 Ga. 165, 1868; *State v. Golden*, 49 Iowa, 48, 1878; *Buchanan v. State*, (Tex.) 5 S. W. Rep. 847, 1887. ⁶ *R. v. Smith*, R. & R. 417, 1820; *R. v. Jordan*, 7 C. & P. 432, 1836. *Supra*, § 773.

² *Davis v. State*, 38 Ohio St. 56, 1882. ⁷ *Com. v. Glover*, 111 Mass. 395, 1872; *People v. Gibson*, 25 N. W. Rep. 316, 1885.

³ Kel. 84; 2 East P. C. 502, 506.

⁴ *State v. Fish*, 3 Dutch. 323, 1855. See *supra*, § 788. ⁸ *State v. Bancroft*, 10 N. H. 105, 1839. See *Lewis v. State*, 16 Conn. 32, 1843; *Com. v. Chevalier*, 7 Dane's Ab. 134; *People v. Griffin*, 19 Cal. 578, 1878. Compare *Thomas v. State*, 5 How. (Miss.) 20, 1840.

⁵ *Supra*, § 773. This is the rule under Georgia statute. *Jones v. State*, 63 Ga. 141, 1879; *Lassiter v. State*, 67 Ibid. 739, 1881; but see *State v. Hutchinson*, (Mo.) 20 S. W. Rep. 34, 1892, for statutory burglary; see *State v. Ruby*, 61 Iowa, 86, 1883; *Territory v. Duncan*, (Mont.) 6 W. Coast Rep. 65, 1885. ⁹ *Infra*, § 808; *State v. Morris*, 47 Conn. 179, 1879; *Thomas v. State*, 5 How. (Miss.) 20, 1840.

ceased, allowing for this an hour after the setting of the sun, night may be considered to have begun.

The method of averring time, in indictments for burglary, is elsewhere stated.¹

§ 808. Whether the offence was committed in the night is to be inferred from facts,² and no presumption of law will suffice for this purpose.³ The question of time is for the jury.⁴

§ 809. Statutes have frequently been passed defining night-time.⁵ When a statute so directs, it is sufficient to aver the offence to have been committed in the night-time generally, which is also good at common law.⁶ In some jurisdictions it is burglary to break into a dwelling with felonious intent in the daytime.⁷

VII. INTENTION.

§ 810. The indictment, where no consequent felony is laid, must not only aver the breaking to be with an intent to commit a felony, common law or statutory, but such intent as laid, must be proved beyond reasonable doubt.⁸

¹ Whart. Cr. Pl. & Pr. § 130. *Infra*, Mass. Sess. 1847, c. 13. See *People v. Casey*, (Cal.) 3 W. Coast Rep. 26, § 817.

² *State v. Bancroft*, 10 N. H. 105, 1884; *State v. Nichols*, (Wis.) 32 N. 1839; *Howser v. State*, 58 Ga. 78, 1877. W. Rep. 543, 1887.

³ *State v. White*, 4 Jones, (N. C.) 349, 1856; *Waters v. State*, 53 Ga. 582, 1849; *Butler v. People*, 4 Denio, 567, 1874. See *People v. Schryver*, 68, 1847; *People v. Burgess*, 35 Cal. 42 N.Y. 1, 1869; Whart. Crim. Ev. § 106. 115, 1868; *People v. Taggart*, 43 Cal. 81, 1872. *Infra*, § 817.

⁴ *State v. Leaden*, 35 Conn. 515, 1868. See *Adams v. State*, 31 Ohio St. 462, 1877; *People v. Burgess*, 35 Cal. 115, 1868.

⁵ In Massachusetts, "Whenever, in any criminal prosecution, an offence is alleged to have been committed in the night-time, the time called night-time shall be deemed and considered to be the time which existed between one hour after the sun-setting on one day and one hour before sun-rising on the next day; and in all cases the time of sun-setting and sun-rising shall be ascertained according to the mean time, in the place where the offence was committed." Gen. Laws

⁶ *Infra*, § 818; 1 Hawk. c. 38, s. 18; 3 Inst. 65; 1 Hale, 561; *R. v. Brice*, R. & R. 450, 1821; *R. v. Furnival*, Ibid. 445, 1821; *R. v. Cobden*, 3 F. & F. 833, 1862; *Jones v. State*, 11 N. H. 269, 1840; *State v. Ayer*, 3 Fost. 301, 318, 1851; *State v. Cooper*, 16 Vt. 551, 1844; *Com. v. Newell*, 7 Mass. 247, 1810; *Osborne v. People*, 2 Parker C. R. 583, 1855; *McCourt v. People*, 64 N. Y. 583, 1875; *State v. Eaton*, 3

It is a defence that the object of the defendant was to expose as a detective the parties really guilty.¹

If the breaking and entering be at different times, both must appear to have been done with the same felonious intent.²

The violent breaking into the dwelling-house of another, *with intent to disturb the peace*, may be indictable at common law as malicious mischief, but is not burglary;³ nor is it burglary to enter a house for adulterous purposes, where adultery is not a felony.⁴

Harring, 554, 1843; State v. Carpenter, 1 Houst. C. C. 367, 1862; State v. Carter, Ibid. 402, 1862; State v. Cody, Winston, (N. C.) 197, 1864; State v. Cowell, 12 Nev. 337, 1877; Reeves v. State, 7 Tex. App. 276, 1880; Hawick v. State, (Ark.) 6 S. W. Rep. 19, 1887. See Reed v. State, 14 Tex. App. 662, 1883. See Sanchez v. State, (Tex.) 21 S. W. Rep. 45, 1893, as to failure of court to instruct jury in regard to intent. State v. Colvin, 90 N. C. 717; State v. Meche, (La.) 7 So. Rep. 573, 1890; Gale v. State, 13 Lea, 489, 1884; Price v. People, 109 Ill. 109, 1884. See State v. Owens, 79 Mo. 619, 1883.

In Robinson v. State, 53 Md. 151, 1879, where the defence was that the intent was to have sexual connection with an inmate of the house, the court said: "If it be true as offered to be shown, that the prisoner had knowledge, at the time of his entry into the house, of the lewd and lascivious habits and character of the witness, or that he had had improper intimacy or intercourse with her, these were circumstances proper to be left to the jury for their consideration in passing upon the question of intent, with which the act was done."

A breaking and entering with intent to cut off an ear of a person in the house is not felony by the common law, nor by the Massachusetts statute of 1804, c. 123. Com. v. Newell, 7 Mass. 247, 1810. See *supra*, § 810. So breaking into a house with intent to

embezzle, but not *steal* (where embezzlement is not a felony), is not burglary. R. v. Dingley, 1 Show. 53; 2 Leach, 841, 1687. *Infra*, § 820.

In People v. Collins, 53 Cal. 185, 1878, it was held that if the defendant act through an agent, who is a decoy, and who enters the building without intending to steal, the offence is not made out. *Supra*, § 231.

As to inference from other attempts, see Whart. Crim. Ev. §§ 31-2. State v. Caddle, (W. Va.) 12 S. E. Rep. 1098, 1891; see People v. Laird, (Mich.) 60 N. W. Rep. 457, 1894, as to evidence to convict when defence is an alibi; State v. Shores, (W. Va.) 7 S. E. Rep. 413, 1888.

¹ Price v. People, 109 Ill. 109, 1820. *Supra*, §§ 149, 231 *a*.

² R. v. Smith, R. & R. 417.

³ *Supra*, 173; Hackett v. Com., 15 Pa. 95, 1850; Com. v. Taylor, 5 Binney, 277, 1812.

Under the Ohio statute, which prescribes the punishment for breaking and entering in the night a mansion-house in which any person shall reside or dwell, and committing or attempting to commit any personal violence or abuse, the intent with which the party enters forms no part of the offence. Forsythe v. State, 6 Ohio, 22, 1834.

It is not burglary where the object is to take goods under claim of title. R. v. Knight, 2 East P. C. 510, 1782; *infra*, § 884.

⁴ State v. Cooper, *ut supra*.

§ 811. Intent in burglary, as in other criminal offences, is to be inferred from facts.¹ If the defendant actually committed a felony when in the house, or took unequivocal steps toward such a commission, this gives a strong inference that his entrance was with intent to commit the felony.² But a variance as to the intent stated may be fatal;³ and it has been held that an allegation of an intent to steal will not be sustained by proof of an intent to have sexual intercourse.⁴

§ 812. Whether the felonious intent be executed or not is immaterial, supposing that it can be inferred. It is in this point that burglary differs from robbery, which requires that something be taken, though it be not material of what value.⁵

¹ See Whart. Crim. Ev. §§ 734-799; *People v. Winters*, (Cal.) 28 Pac. Rep. R. v. Brice, R. & R. 450, 1821; R. v. 946, 1892; *State v. Fox*, (Iowa) 45 N. Cobden, 3 F. & F. 833, 1851; *Com. v. W. Rep.* 874, 1890; *People v. Robin-* Williams, 2 Cush. 582, 1849; *People son*, (Mich.) 49 N. W. Rep. 260, 1891; *v. Larned*, 3 Seld. 445, 1852; *Osborne v. People v. Griffin*, (Mich.) 43 N. W. People, 2 Parker C. R. 583, 1855; Rep. 1061, 1889; *State v. Gadbois*, Hackett v. Com., 15 Pa. 95, 1850; (Iowa) 56 N. W. Rep. 272, 1893. As to State v. Manluff, 1 Houst. C. C. 208, facts showing breaking in daytime, 1878; *Johnson v. Com.*, 29 Gratt. 796, *People v. Dupree*, (Mich.) 56 N. W. 1862; *Brown v. State*, 59 Ga. 456, 1877; Rep. 1046, 1893; *People v. Curley*, State v. Woods, 31 La. An. 267, 1875; (Mich.) 58 N. W. Rep. 68, 1894; *State Franco v. State*, 42 Tex. 276, 1875; *v. Kepper*, (Iowa) 23 N. W. Rep. 304, *People v. Beaver*, 49 Cal. 57, 1875; 1885; *State v. Weldon*, (S. C.) 17 S. Spahn v. People, (Ill.) 27 N. E. Rep. E. Rep. 688, 1893; *State v. Dawkins*, 688, 1891; *Gregory v. State*, (Ga.) 7 S. (S. C.) 10 S. E. Rep. 772, 1890; *State E. Rep.* 222, 1888; *State v. Ellwood*, *v. Meche*, (La.) 7 So. Rep. 573, 1890. (R. I.) 24 Atl. Rep. 782, 1892; *People* ² *State v. Squires*, 11 N. H. 37, *v. McCord*, (Mich.) 42 N. W. Rep. 1840; *Com. v. Tuck*, 20 Pick. 356, 1106, 1889; *Painter v. State*, (Tex.) 9 1838; *People v. Marks*, 4 Parker C. S. W. Rep. 774, 1888; *Hackett v. State*, R. 153, 1856; *Stoops v. Com.*, 7 S. & (Ga.) 15 S. E. Rep. 532, 1892; *State v. R.* 491, 1822; *State v. Turner*, (Mo.) Franks, (Iowa) 19 N. W. Rep. 832, 19 S. W. Rep. 645, 1892; *State v. Cash*, 1884; *People v. Morton*, (Utah) 11 Pac. (Kans.) 16 Pac. Rep. 144; *People v. Rep.* 512, 1886; *People v. Stevens*, 8 Burns, (Mich.) 35 N. W. Rep. 154, 1887. W. Coast Rep. 321, 1885; *Miller v.* ³ *Neubrandt v. State*, 53 Wis. 89, State, (Ga.) 16 S. E. Rep. 985, 1893; 1882. Williams v. State, (Tex.) 13 S. E. Rep. ⁴ *Robinson v. State*, 53 Md. 151, 609, 1890; *State v. Anderson*, (Wash.) 1879; *supra*, § 810. But see *People v. Soto*, 53 Cal. 415, 1879. Whart. Crim. 31 Pac. Rep. 969, 1892; *State v. Mun-* son, (Wash.) 34 Pac. Rep. 932, 1893; Ev. § 149. See *Dismukes v. State*,

⁵ 2 East P. C. 513; *Olive v. Com.*, 5 Bush. 376, 1869; *People v. Noonan*, 14 N. Y. Sup. 519, 1891.

Where a man burglariously entered a room in which a young woman was sleeping, and grasped her ankle without any attempt at explanation, when she screamed and he fled, this is evidence of an attempt to commit a rape, and must be submitted by the court to the jury.¹ But a mere touching the foot of a woman is not ground from which such an intent can be inferred.²

It is no defence that the intent was impossible of execution;³ as where the thing sought was not in the house,⁴ or that it was frustrated by extrinsic agencies.⁵

§ 813. Mere possession of stolen goods, without other evidence of guilt, is not to be regarded as *prima facie* evidence of the burglary.⁶ But where goods have been feloniously taken by means of a burglary, and they are immediately or soon after found in the actual and exclusive possession of a person, who gives a false account, or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct may sustain the inference not only that he stole the goods, but that he made use of the means by which access to them was obtained.⁷ There should

Possession of stolen goods sustains inference of burglary.

(Ala.) 3 So. Rep. 671, 1888. Under the Alabama Code, an indictment for burglary may allege, in a single count, that the act was committed with the intent to steal, or to commit a rape. *State v. Tytus*, (N. C.) 4 S. E. Rep. 29, 1887.

¹ *State v. Boon*, 18 Ired. 244, 1853; *Harvey v. State*, 53 Ark. 425, 1890; *McComb v. Com.*, (Ky.) 12 S. W. Rep. 382, 1889; *State v. Ryan*, 15 Oreg. 572, 1888.

² *Hamilton v. State*, 11 Tex. App. 116, 1881; *Mitchell v. State*, 32 Tex. Cr. 479, 1893; *Fields v. State*, (Tex.) 24 S. W. Rep. 907, 1894, as to touching face. See *Robinson v. State*, cited *supra*, § 810; *Turner v. State*, 24 Tex. App. 12, 1887. See, also, *Kelly v. State*, (Tex.) 22 S. W. Rep. 588, 1893.

³ *Supra*, § 186; *State v. Beal*, 37 Ohio St. 108, 1881; though see *R. v. Lyons*, 2 East P. C. 497, 1778; *R. v. McPherson*, Dears. & B. 197, 1857; discussed *supra*, § 186; and see, more fully, *infra*, § 820.

⁴ *State v. Beal*, 37 Ohio St. 108, 1881.

⁵ *Supra*, § 187; *State v. McDaniel*, Winston, (N. C.) No. 1, 249, 1864.

⁶ *People v. Gordon*, 40 Mich. 716, 1879; *State v. Hayden*, 45 Iowa, 11, 1877; *People v. Beaver*, 49 Cal. 57, 1875; *State v. Owsley*, 111 Mo. 450, 1892; *State v. Scott*, 109 Mo. 226, 1892; *Freed v. State*, 24 Tex. App. 422, 1887; *People v. Flynn*, 73 Cal. 511, 1887; *Ayres v. State*, (Tex.) 21 Tex. App. 399, 1886; *State v. Shaffer*, 59 Iowa, 290, 1882; *Eley v. State*, (Tex.) 13 S. W. Rep. 998, 1890; *State v. North*, 95 Mo. 615, 1888; *Shuler v. State*, (Tex.) 23 Tex. App. 182, 1887; *State v. Jones*, (Nev.) 11 Pac. Rep. 317, 1886; *People v. Hart*, (Utah) 37 Pac. Rep. 330, 1894; *Fahey v. State*, (Ga.) 11 S. E. Rep. 607, 1890; *White v. State*, 72 Ala. 195, 1882. But see *Henderson v. State*, 70 Ala. 23, 1881; *State v. Tilton*, 63 Iowa 117, 1884.

⁷ *Com. v. McGorty*, 114 Mass. 299, 1873; *Davis v. People*, 1 Parker C. R. 447, 1854; *Walker v. Com.*, 28 Gratt.

be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of the larceny.¹ But extrinsic mechanical indications may constitute such additional evidence.²

969, 1877; *Stuart v. People*, 42 Mich. 255, 1879; *Gaines v. State*, 89 Ga. 366, 1892; see *Martin v. State*, 21 Tex. App. 1, 1886; where possession of goods was not shown; *Magee v. People*, 139 Ill. 138, 1891; *Mangham v. State*, 87 Ga. 549, 1891; *Beach v. State*, (Tex.) 12 S. W. Rep. 868, 1889; *Lowe v. State*, 14 Lea, (Tenn.) 204, 1884; *Christian v. State*, (Tex.) 21 S. W. Rep. 252, 1893; *State v. Moore*, (Mo.) 22 S. W. Rep. 1086, 1893; *Medicus v. State*, (Tex.) 22 S. W. Rep. 878, 1893; *People v. Arthur*, 93 Cal. 536, 1892; *State v. Mooney*, (Wash.) 28 Pac. Rep. 363, 1891; *State v. Jennings*, (Iowa) 79 Ia. 513, 1890; *State v. Yohe*, (Iowa) 53 N. W. Rep. 1088, 1893; *Ryan v. State*, 83 Wis. 486, 1892; *Boswell v. State*, (Ga.) 17 S. E. Rep. 805, 1893; *Woodruff v. State*, 20 S. W. Rep. 573, 1892; *State v. Owens*, 79 Mo. 619, 1883; *Gravelly v. Com.*, 86 Va. 396, 1889; *Stokes v. State*, 84 Ga. 258, 1890; *Ross v. State*, 82 Ala. 65, 1887; *Hicks v. State*, (Ala.) 13 So. Rep. 375, 1893; *State v. Warford*, (Mo.) 16 S. W. Rep. 886, 1891; *Brown v. State*, 61 Ga. 311, 1878; *Bryan v. State*, 62 Ibid. 179, 1879; *Smith v. State*, 62 Ibid. 663, 1879; *Neubrandt v. State*, 53 Wis. 89, 1881. See, as to the presumption generally arising from the possession of stolen goods, *Whart. Crim. Ev.* § 758; *Cooper v. State*, 87 Ala. 135, 1889; *State v. Edwards*, 109 Mo. 315, 1892; *State v. Turner*, 106 Mo. 272, 1891; *Payne v. State*, 21 Tex. App. 184, 1886; *Garrity v. People*, 107 Ill. 162, 1883; *Thomas v. State*, (Tex.) 22 S. W. Rep. 144, 1893. But see *Taliaferro v. Com.*, 77 Va. 411, 1883.

¹ *Ibid.*; *R. v. Coots*, 2 Cox C. C. 188, 1847; *Longford v. People*, (Ill.) 25 N. E. Rep. 1009, 1890; *Matthews v. State*, 86 Ga. 782, 1891; *Johnson v. Com.*, (Ky.) 15 S. W. Rep. 671, 1891; *People v. Hannon*, 85 Cal. 374, 1890; *England v. State*, 89 Ala. 76, 1890; *Clifton v. State*, 26 Fla. 523, 1890; as to facts insufficient to establish burglary, see *Henderson v. Com.*, (Ky.) 27 S. W. Rep. 808, 1894; *Cavender v. State*, 126 Ind. 47, 1890; *Coleman v. State*, 26 Tex. App. 673, 1888; *People v. McNutt*, 64 Cal. 116, 1883. *Randolph v. State*, (Ala.) 14 So. Rep. 792, 1894; *Walker v. State*, 97 Ala. 85, 1893; *People v. Carroll*, (Mich.) 20 N. W. Rep. 66, 1884; *State v. Stevens*, (Iowa) 25 N. W. Rep. 777, 1885; *Jackson v. State*, 28 Tex. App. 143, 1889; *Jackson v. State*, 28 Tex. App. 370, 1890; *Hamilton v. State*, (Tex.) 34 S. W. Rep. 32, 1893; *Harris v. State*, 84 Ga. 279, 1890.

² *Com. v. Williams*, 2 Cush. 582, 1849; *People v. Larned*, 3 Seld. 445, 1852; *Knickerbacker v. People*, 43 N. Y. 177, 1869; *State v. Harrold*, 38 Mo. 496, 1867; *Frank v. State*, 39 Miss. 705, 1864; *People v. Winters*, 29 Cal. 658, 1865; see *State v. Owens*, 79 Mo. 619, 1883; *Whart. Crim. Ev.* §§ 764 *et seq.*; *People v. Hope*, 62 Cal. 291, 1882; *Murks v. State*, 92 Ga. 449, 1893; *People v. Lowrey*, 70 Cal. 193, 1886; *People v. Calvert*, 22 N. Y. Sup. 220, 1893; *Boyer v. Com.*, (Ky.) 19 S. W. Rep. 845, 1892; *Goldsmith v. State*, (Tex.) 22 S. W. Rep. 405, 1893; *Clark v. State*, (Tex.) 26 S. W. Rep. 68, 1894; *People v. M'Gilver*, (Cal.) 6 W. Coast Rep. 490, 1885.

It is not necessary, in order to put proof of goods stolen in evidence, that they should be specified in the indictment.¹

VIII. INDICTMENT.²

§ 814. The offence must not only be laid to be done feloniously, but also *burglariously*; which is a term of art, and cannot be expressed by any other word or circumlocution.³ It must be stated, also, that the offender broke and entered the house; a breaking without an entry, or *vice versa*, is insufficient.⁴ The want of owner's consent need not be alleged.⁵

§ 815. It must be laid to be done in a mansion or dwelling-house; and, therefore, if it be only said to be in the house of

¹ *Infra*, § 820; *Com. v. McGorty*, 114 Mass. 299, 1873. See *Foster v. People*, 49 How. Pr. 69, 1874; *State v. Dawson*, 90 Mo. 149, 1886.

² For forms of indictment, see Whart. Prec. tit. BURGLARY.

³ 1 Hale, 550; 4 Co. 39 *b*; 5 Ibid. 121 *b*; *State v. McDonald*, 9 W. Va. 456, 1876; *State v. Hughes*, 22 Ibid. 766, 1884; *Portwood v. State*, 29 Tex. 47, 1867; Whart. Cr. Pl. & Pr. § 265. As to Illinois, see *Lyons v. People*, 68 Ill. 271, 1873. As to immateriality of surplusage, see *Harris v. People*, 44 Mich. 305, 1880. That non-consent need not be averred, see *Buntain v. State*, 15 Tex. App. 485, 1883; *Miller v. Com.*, (Ky.) 20 S. W. Rep. 198, 1892; *Gundy v. State*, 72 Wis. 1, 1888. See *People v. Haight*, 7 N. Y. Sup. 89, 1889, for insufficiency of indictment under Penal Code of New York. *People v. Rogers*, 81 Cal. 209, 1889. The indictment omitted "feloniously," but charged offence in language of the statute. Held, indictment was sufficient. See *Hamilton v. State*, 26 Tex. App. 208, 1888. As to the omission of "did" in the indictment, see *Jester v. State*, 26 Tex. App. 369, 1888; *Jones v. State*, 25 Tex. App. 226, 1888; *People v. Bosworth*, 19 N. Y. Sup.

114, 1892; but see *Reed v. State*, 14 Tex. App. 662, 1883; *State v. Jordan*, (La.) 1 So. Rep. 655, 1887; *Cunningham v. Com.*, (Ky.) 13 S. W. Rep. 104, 1890; *Slaughter v. Com.*, (Ky.) 24 S. W. Rep. 622, 1894; *Smith v. State*, 93 Ind. 67, 1883; *Walker v. State*, (Ala.) 12 So. Rep. 83, 1892; *People v. Murray*, (Cal.) 6 W. Coast Rep. 643. 1885.

⁴ 1 Hale, 550. In Massachusetts, under the Revised Statutes, the term is no longer necessary. *Tully v. Com.*, 4 Metc. 357, 1842. See Tr. & H. Prec. 67. That the entrance need not be averred to be burglariously, see *Reed v. State*, 14 Tex. App. 662, 1883. See *Webb v. Com.*, 87 Ky. 129, 1888; *Winston v. Com.*, (Ky.) 7 S. W. Rep. 900, 1888, as to General Statutes of Kentucky; *State v. Johns*, 15 Oreg. 27, 1887; *State v. Huntley*, (Oreg.) 35 Pac. Rep. 1065, 1894. See *Sullivan v. State*, 13 Tex. App. 462, .

⁵ *Sullivan v. State*, 13 Tex. App. 462, 1883; *Reed v. State*, 14 Ibid. 662, 1883; overruling *Brown v. State*, 7 Ibid. 619, 1880. See, also, *Com. v. Wicker*, (Ky.) 5 S. W. Rep. 428, 1887; *Smith v. State*, (Tex.) 3 S. W. Rep. 238, 1886; *Taylor v. State*, (Tex.) 5 S. W. Rep. 141, 1887; *Sullivan v. State*, 13 Tex. App. 462, 1883.

such a one, it is not sufficient.¹ The words mansion-house sufficiently describe a dwelling-house.²

House
must be
averred to
be dwell-
ing-house.

In Ohio, under the statute, the indictment must allege or imply that some person resided or dwelt in the house.³ Where the burglary is in any out-house which by law is considered part of the dwelling-house, it must still be laid to be done in the dwelling-house.⁴

§ 816. It is material to state to whom the mansion belongs with accuracy in the indictment.⁵ The ownership, as has already been seen,⁶ is to be stated to be in the occupant, if a lessee or other tenant

¹ 1 Hale, 550, 566; 1 Hawk. c. 38, v. Dan, 3 W. Coast Rep. 275, 1884. s. 10; 4 Bl. Com. 224, 225. *Supra*, As to ownership of railroad car, see § 784. As to meaning of dwelling-house, see Quinn v. People, 71 N. Y. 488, 1894. As to corporation owner, see Crawford v. State, 68 Ga. 822, 1882; State v. McIntire, 59 Iowa, 264, 1882; Carter v. Com., (Ky.) 5 S. W. Rep. 48, 1887. See as to averment of ownership of railway car, Johnson v. State, (Ala.) 13 So. Rep. 503, 1893; State v. Dan, (Nev.) 4 Pac. Rep. 336, 1884; State v. Wright, (Oreg.) 24 Pac. Rep. 229, 1890. See Robinson v. State, (Ala.) 4 So. Rep. 774, 1888, as to ownership of wife. But see Jackson v. State, (Ala.) 15 So. Rep. 344, 1894; State v. Brown, (S. C.) 11 S. E. Rep. 641, 1890; State v. Hupp, (W. Va.) 6 S. E. Rep. 919, 1888. See White v. State, 72 Ala. 195, 1893, as to partners; Johnson v. State, 73 Ala. 483, 1883; Pells v. State, 20 Fla. 774, 1884; People v. McGilver, (Cal.) 6 W. Coast Rep. 490, 1885.

² Com. v. Pennock, 3 S. & R. 199, 1817; Bigham v. State, 31 Tex. Cr. 244, 1892.

³ Forsyth v. State, 6 Ohio, 22, 1833.

⁴ 2 East P. C. 512; McElrath v. State, 55 Ga. 562, 1875.

⁵ *Supra*, §§ 783 *et seq.*; Wilson v. State, 34 Ohio St. 199, 1877; State v. Shores, 31 W. Va. 491, 1888; State v. Fockler, 22 Kans. 542, 1879; but see State v. Nelson, 101 Mo. 477, 1890, where the indictment described the dwelling entered and the goods stolen as the property of the wife, and the proof showed that the dwelling was owned by her husband and the goods by her daughter, and it was held that under Revised Statutes of Missouri 1879, § 1820, the variance did not work an acquittal. People v. Rogers, 81 Cal. 209, 1889. Under Penal Code of California, see Painter v. State, 26 Tex. App. 454, 1888, where a corn-crib was owned by A. and the corn by B.; see People v. Parker, 91 Cal. 91, 1891, as to allegation of ownership of a barn; State v. Franks, 64 Iowa, 39, 1884. See State

⁶ See *supra*, §§ 787, 798, 804-7; White's Case, Leach, 252, 1783; Cole's Case, Moor, 466; 1 Hale, 558. See Doan v. State, 26 Ind. 495, 1866; State v. Morrissey, 22 Iowa, 158, 1867; *Cf.* People v. Van Blarcom, 2 Johns. 105, 1806; Quinn v. People, 71 N. Y. 561, 1878; Houston v. State, 38 Ga. 165, 1868. As to occupation by tenant, see *supra*, §§ 780, 789, 799.

entitled to possession,¹ though it is said that ownership may be laid in either landlord or tenant.² Under the Married Woman's Act the ownership may be laid in a married woman, when it is taken and occupied by her.³ When the ownership is unknown, it may be so stated.⁴

Ownership must be correctly stated.

§ 817. The indictment must not only state the offence to have been committed in the night, but it was once thought that it should state the particular hour of the night; though it was not held necessary that the evidence should strictly correspond with the latter allegation.⁵ The better opinion now seems to be, that it is enough to aver the offence to have been in the night.⁶ It is also enough to say "about the hour of twelve in the night of the same day."⁷ It is certainly

Offence must be averred to have been in the night.

An unoccupied house of A. may be averred to be the dwelling-house of A., on an indictment for breaking and entering. *Com. v. Reynolds*, 122 Mass. 454, 1877; *People v. Bitancourt*, (Cal.) 15 Pac. Rep. 744, ; *Aldridge v. State*, (Ala.) 7 So. Rep. 48, .

Laughlin, 11 Cush. 598, 1853; *Com. v. Marks*, 4 Leigh, 658, 1834; *Hall v. People*, 43 Mich. 417, 1876; *State v. Tazwell*, 30 La. An. Pt. II. 884, 1879; see *State v. Ruby*, 61 Iowa, 86, 1883; *Coates v. State*, (Tex.) 20 S. W. Rep. 585, 1892. But see *Finlan v. State*, (Tex.) 13 S. W. Rep. 866, 1890, and *Rodriguez v. State*, (Tex.) 26 S. W. Rep. 406, 1894; *State v. Miller*, (Wash.) 28 Pac. Rep. 375, 1891; *Lassiter v. State*, 67 Ga. 739, 1881; *Sampson v. State*, (Tex.) 20 S. W. Rep. 708, 1892.

That proof of the *de facto* existence of a corporation may sustain the allegation of ownership, see *Whart. Crim. Ev.* (9th ed.) §§ 164 a, 527. *Infra*, § 941; *supra*, § 716.

¹ See *supra*, § 798. *State v. Short*, 54 Iowa, 392, 1880; *McCrellis v. State*, 69 Ind. 159, 1879; *State v. Ashton*, 68 Ga. 25, 1881; see *Stokes v. State*, (Ga.) 10 S. E. Rep. 740, 1890.

⁶ *Whart. Cr. Pl. & Pr.* § 130. This is clearly the case under statutes which specify simply "the night" as the predicate. See *Com. v. Williams*, 2 Cush. 582, 1849; *People v. Burgess*, 35 Cal. 115, 1868. But at common law, as has been already shown, the reason of the case is to the same effect. *Supra*, § 810. See *Martin v. State*, (Wis.) 48 N. W. Rep. 119, 1891, where the information contains two counts charging separate burglaries on the same night and in the same vicinity, it was not an abuse of discretion to refuse to require the prosecutor to elect between them.

Under Alabama statute, see *Anderson v. State*, 48 Ala. 665, 1872; *Murray v. State*, *Ibid.* 675, 1872. As to joint ownership, see *Webb v. State*, 52 *Ibid.* 422, 1874.

² *Kennedy v. State*, 81 Ind. 379, 1881. As to joint owners, see *Coates v. State*, (Tex.) 20 S. W. Rep. 585, 1892; *Smith v. People*, (Ill.) 21 N. W. Rep. 141, 1883.

³ *State v. Trapp*, 17 S. C. 467, 1881; *aliter* at common law, *supra*, § 800.

⁴ *State v. McIntire*, 59 Iowa, 264, 1882.

⁵ 2 East P. C. 515. See *Lewis v. State*, 16 Conn. 82, 1844; *Com. v. Mc-*

⁷ *State v. Seymour*, 36 Me. 225, 1853; *Methard v. State*, 19 Ohio St. 363, 1869.

insufficient to aver the offence to have been committed between the hours of twelve at night and nine the next morning.¹ But the date, in other respects, is immaterial, unless affected by the statute of limitations.²

§ 818. It must be alleged and proved, either that a felony, which must be specified, was committed in the dwelling-house, or that the party broke and entered with intent to commit some felony within the same;³ and the averment of intent will be enough, without an averment of stealing.⁴ Where the averment of larceny is made it is not necessary, it is said, to aver the intent to be felonious, the presumption being that it was so.⁵ But it is unsafe to leave out the felonious intent, since in such case if the consummated act be not proved, the defendant must be acquitted.⁶

The same burglary may be laid to have been committed, in several counts, each with a distinct intent.⁷

¹ *State v. Mather*, Chipman, 32. An indictment charging that the goods were feloniously and burglariously taken from a dwelling-house, without charging that this was done in the night-time, is not a good indictment for burglary, but is only an indictment for larceny. *Thompson v. Com.*, 4 Leigh, 652, 1834. The *noctanter* must be expressly alleged. *Lewis v. State*, 16 Conn. 32, 1843; *Mark's Case*, 4 Leigh, 658, 1834. But see *Buchanan v. State*, (Tex.) 5 S. W. Rep. 847, 1887; *Whart. Cr. Pl. & Pr.* § 130.

² *State v. Branham*, 13 S. C. 385, 1880.

³ *Supra*, § 810; *Webster v. State*, 9 Tex. App. 75, 1851; *Jones v. State*, 18 Fla. 889, 1882. Under Code of Washington Territory, § 828, it is unnecessary for the prosecution to show the intent of the entry; see *Linbeck v. State*, (Wash.) 25 Pac. Rep. 452, 1890; *Alderman v. State*, (Nebr.) 38 N. W. Rep. 36, 1888; *Allen v. State*, 12 Lea, (Tenn.) 424, 1883.

⁴ *Supra*, § 810; 2 Hale, 513; *State v. Moore*, 12 N. H. 42, 1841; *State v. Brady*, 14 Vt. 353, 1842; *Com. v. Tuck*,

20 Pick. 356, 1838; *Murray v. State*, 48 Ala. 675, 1871; *Snow v. State*, 54 Ala. 188, 1875, and cases next cited. See *Pardue v. State*, 4 Baxt. 10, 1870; *Stevenson v. State*, 5 Ibid. 681, 1871. See *People v. Urquidas*, (Cal.) 31 Pac. Rep. 52, 1892; *Ashford v. State*, (Nebr.) 53 N. W. Rep. 1036, 1893.

That under Iowa statute, "burglarious" is not necessary to qualify intent, see *State v. Short*, 54 Iowa, 392, 1880.

⁵ *Jones v. State*, 11 N. H. 269, 1840; *State v. Squires*, Ibid. 37, 1840; *State v. Moore*, 12 Ibid. 42, 1841; *Com. v. Brown*, 3 Rawle, 207, 1832; *People v. Shaber*, 32 Cal. 36, 1867. See *Edwards v. State*, 62 Ind. 34, 1878. *Supra*, § 810; *People v. Marks*, (Mich.) 51 N. W. Rep. 638, 1892.

⁶ *R. v. Furnival*, R. & R. 445, 1821; *Jones v. State*, 11 N. H. 269, 1841; *State v. Ayer*, 3 Fost. 301, 1857; *State v. Brady*, 14 Vt. 353, 1842; *Com. v. Tuck*, 20 Pick. 356, 1838. See *supra*, §§ 811-12; *State v. Curtis*, 30 La. An. Pt. II. 814, 1878; *Reed v. State*, 14 Tex. App. 662, 1883.

⁷ 1 East P. C. 515; *State v. Eaton*,

If, however, no committed felony being averred, the indictment neglect to specify the felony which the defendant intended to commit, the defect is fatal.¹ But when this is well laid, surplusage in describing things stolen may be rejected.²

Entrance, as well as breaking, must be averred.³

§ 819. That burglary and larceny may be joined is elsewhere seen.⁴ When larceny is joined to burglary, the defendant may be acquitted of one, and found guilty of the other, if the offence on which there is a conviction is properly pleaded.⁵ Thus, if the prisoner be charged that he feloniously and burglariously broke and entered

Defendant may be acquitted of burglary and convicted of larceny.

3 Harring. 554, 1845; *State v. Bean*, 1881; *Becker v. Com.*, (Pa.) 9 Atl. (Me.) 1 East Rep. 526; Whart. Cr. Rep. 510, 1887.

Pl. & Pr. §§ 386-90. As to intent to ravish, see *People v. Burns*, 63 Cal. 614, 1882. *Infra*, § 821.

¹ *State v. Lockhart*, 24 Ga. 420, 1857; *Portwood v. State*, 29 Tex. 47, 1867; *People v. Nelson*, 58 Cal. 104, 1880. If the larceny be defectively averred, it may be rejected as surplusage, supposing the intent to be well laid. See *People v. Smith*, (Cal.) 24 Pac. Rep. 988, 1890, where it was held indictment need not aver the degree of larceny in order to establish burglary under the Penal Code of California. *Williams v. State*, (Tex.) 5 S. W. Rep. 838, 1887; *Levine v. State*, (Tex.) 3 S. W. Rep. 660, 1887. See *Miller v. State*, (Tex.) 13 S. W. Rep. 646, 1890; *Bigham v. State*, (Tex.) 20 S. W. Rep. 577, 1892; *Larned v. Com.*, 12 Metc. 240, 1847; *State v. Dooley*, 64 Mo. 146, 1865; and see *infra*, § 820. But a general verdict in such case is bad. *State v. Dooley*, *supra*.

² *Infra*, § 820; *Burke v. State*, 5 Tex. App. 74, 1878.

³ *Supra*, §§ 773, 818; *Pines v. State*, 50 Ala. 153, 1874; *State v. Whitby*, 15 Kans. 402, 1875; Whart. Cr. Pl. & Pr. §§ 243, 465.

⁴ Whart. Cr. Pl. & Pr. § 244; *supra*, § 818; *Harris v. State*, 61 Miss. 304,

⁵ *Supra*, § 27; *R. v. Vandercom*, 2 East P. C. 519, 1796; *State v. Squires*, 11 N. H. 37, 1841; *Com. v. Hope*, 22 Pick. 1, 1839; *Crowley v. Com.*, 11 Metc. 575, 1846; *Com. v. Brown*, 3 Rawle, 207, 1832; *Com. v. Solby*, 15 W. N. C. 392, 1885; *State v. Hayden*, 45 Iowa, 11, 1877; *Clark v. Com.*, 25 Gratt. 908, 1875; *Berry v. State*, 10 Ga. 511, 1852; *Bush v. State*, 65 Ibid. 658, 1880; *Bell v. State*, 48 Ala. 684, 1872; *State v. Alexander*, 56 Mo. 131, 1873; *State v. Turner*, 63 Ibid. 436, 1876; *State v. Owens*, 79 Ibid. 619, 1879; *Harris v. State*, 61 Miss. 304, 1880; *Dunham v. State*, 9 Tex. App. 330, 1880. See *State v. Butterfield*, 75 Mo. 297, 1881; *Yarborough v. State*, (Ga.) 12 S. E. Rep. 650, 1890; *State v. Hutchinson*, (Mo.) 20 S. W. Rep. 34, 1892; *State v. M'Clung*, (W. Va.) 13 S. E. Rep. 654, 1891; *State v. Crenshaw*, (La.) 12 So. Rep. 628, 1893; *State v. Hecox*, 83 Mo. 531, 1884; *State v. Owens*, 79 Mo. 619, 1883; *State v. Nicholls*, (La.) 22 Rep. 85, 1885. That the conviction of larceny and acquittal of burglary is a bar to another trial for the burglary, see Whart. Cr. Pl. & Pr. §§ 455, 465, 896.

In Mississippi it has been ruled that on an indictment for burglary and

the dwelling-house of J. S., and then and there certain goods of J. S. feloniously and burglariously did steal, etc.; the indictment comprises two offences, namely, burglary and larceny; and therefore he may be acquitted of the burglary if in accordance with the evidence, and found guilty only of the larceny.¹ But in such case, if the prisoner be acquitted of the larceny, he cannot, as has been seen, be found guilty of the burglary, unless there be an intent to steal charged; because, unless intent be charged, the larceny constitutes part of the burglary.² And if larceny be not charged, there can be no conviction of larceny,³ nor can there be any conviction of larceny except of the articles specified in the indictment.⁴ Whether the sentence, in case of a conviction of the double offence, can be for burglary *plus* larceny, depends upon local practice and sometimes statutory prescription.⁵

Petit larceny, when a felony can be joined with burglary.⁶

larceny a general verdict of guilty is a verdict of guilty of burglary alone. *Roberts v. State*, 55 Miss. 421, 1878.

¹ See, also, *State v. Brady*, 14 Vt. 353, 1842; *Shaffer v. State*, 59 Iowa, 290, 1882; *State v. Cocker*, 3 Harring. 554, 1843; *State v. Hayes*, (Mo.) 16 S. W. Rep. 514, 1891; *State v. Hupp*, (W. Va.) 6 S. E. Rep. 919, 1888; *State v. Johnson*, 34 La. An. 49, 1882; *Shepherd v. State*, 42 Tex. 501, 1875; *People v. Barry*, (Cal.) 29 Pac. Rep. 1026, 1892; *State v. Wilson*, 59 N. H. 139, 1879.

² See Whart. Cr. Pl. & Pr. §§ 465-8; *R. v. Furnival*, R. & R. 445, 1821; *Jones v. State*, 11 N. H. 269, 1841; *State v. Dawkins*, (S. C.) 10 S. E. Rep. 772, 1890.

³ *State v. Warner*, 14 Ind. 572; 1860; *Fisher v. State*, 46 Ala. 717, 1871; *Roberts v. State*, 14 Ga. 8, 1853.

⁴ *State v. M'Graw*, 74 Mo. 573, 1881.

⁵ See *Kite v. Com.*, 11 Metc. 581, 1846; *State v. Henley*, 30 Mo. 509, 1860, sustaining double sentence. See *People v. Brooks*, 3 W. Coast Rep. 57, for previous conviction. *State v.*

Moore, (Mo.) 22 S W. Rep. 1086, 1893; *Robinson v. State* (Ala.) 4 So. Rep. 774, 1888; and *Breese v. State*, 12 Ohio St. 146, 1861, declaring for burglary alone; and see *Lyons v. People*, 68 Ill. 271, 1873. When the conviction is for larceny, the grade is determined by value, as in other cases of larceny. *State v. Barker*, 64 Mo. 282, 1876. See, also, *People v. Hall*, (Cal.) 30 Pac. Rep. 7, 1892; *Gordon v. State*, 71 Ala. 315, 1881; *Smith v. State*, (Tex.) 3 S. W. Rep. 238, 1886.

On a conviction for breaking and entering a store, and stealing therefrom, the prosecuting officer may enter a *nolle prosequi* as to the breaking and entering, and thereby leave the defendant punishable for the simple larceny alone. *Anon.*, 31 Me. 592, 1850.

⁶ But see *Short v. State*, 63 Ind. 376, 1878; *State v. Ford*, 30 La. An. Pt. I. 311, 1878; *Adams v. State*, 55 Ala. 143, 1875; *People v. Murray*, 8 Cal. 519, 1857.

As to conviction of petit larceny, see *Borum v. State*, 66 Ala. 468, 1880. *Infra*, § 862 *a*. See, also, *People v. Murray*, 8 Cal. 519, 1857; *infra*, § 802 *a*.

A general verdict of guilty, on an indictment for burglary and larceny, will be regarded as exclusively applying to the charge of burglary.¹

§ 820. If the indictment charge generally an intent to steal the goods "in the said dwelling-house then and there being," this is good,² and may be sustained by proof of stealing the goods of C. D., a stranger in said house,³ or by proof of intent to steal whatever was in the house;⁴ and this holds good even though the indictment should aver, besides the intent, an actual stealing of the goods of E. F., which goods belonged only to E. F. as joint owner with G. H., or to G. H. exclusively.⁵ For the averment of stealing may be rejected as surplusage,⁶ and the burglary left to stand supported solely by the intent, and it is enough to aver the intent to be generally to steal the goods which are in the house. There are English authorities, as we have seen, to the effect that if the intent be averred to be to steal the goods of A. B., it is a fatal defect if no goods of A. B. are in the house.⁷ This is no doubt true when there is no separate averment of intent, and when the ownership in the averment of larceny is wrongly stated.⁸ But the weight of authority, as has been noticed, is that it is no defence that the burglar was mistaken as to the ownership of the goods.⁹ And it may be regarded as a

Goods intended to be stolen need not be specified.

¹ *Roberts v. State*, 55 Miss. 421, Clarke, 1 C. & K. 421, 1844; Larned 1878. See *State v. Christian*, 30 La. v. Com., 12 Metc. 240, 1847; *State v. An. Pt. I.* 367, 1878; *Robertson v. Brady*, 14 Vt. 353, 1842; *State v. Rivers*, (Iowa) 27 N. W. Rep. 781, 1886.

² *Com. v. McGorty*, 114 Mass. 299, 1878; *Jones v. State*, 18 Fla. 889, 1882. See, generally, *Bluett v. State*, 12 Tex. App. 39, 1854.

³ *R. v. Lawes*, 1 C. & K. 62, 1843; *Hall v. State*, 48 Wis. 688, 1880; *State v. Clifton*, 30 La. An. Pt. II. 951, 1878; but see *Wilburn v. State*, 41 Tex. 237, 1874.

⁴ *Osborne v. People*, 2 Parker C. R. 583, 1855; *State v. McDaniel*, Winston, (N. C.) 249, 1864; *Olive v. State*, 5 Bush, 376, 1869; and see *supra*, §§ 101 *et seq.*

⁵ See *supra*, §§ 120, 186; *R. v.*

⁶ *Supra*, § 818.

⁷ *R. v. Jenks*, 2 Leach, 774, 1796; 2 East P. C. 514; *R. v. Lyons*, Ibid. 497, 1778; *R. v. McPherson*, Dears. & B. 197, 1857. See, as parallel case, *R. v. Parfit*, 8 C. & P. 288, 1838; *State v. Shaffer*, 59 Iowa, 290, 1882. *Supra*, §§ 186, 644.

⁸ *State v. Manluff*, 1 Houst. C. C. 208, 1866; *State v. Lee*, Ibid. 335, 1870.

⁹ *Supra*, §§ 186, 812; *R. v. Clarke*, 1 C. & K. 421, 1844; *State v. Brady*, 14 Vt. 523, 1842; *State v. Beale*, 37 Ohio St. 108, 1875.

rule that when the intent is distinctly averred it is not necessary to specify the goods stolen,¹ or their value.²

§ 821. It has been already seen that if the intent be proved to be to commit a misdemeanor (*e. g.*, assaulting instead of killing, or embezzlement instead of larceny), an acquittal must be had, not merely on account of variance, but because no felonious intent is proved.³ To avoid such variances, it is important to have several counts in cases of doubt, so as to adapt, as has been already observed, the intent to any contingency of the trial.⁴ Different phases of statutory burglary may be also joined.⁵

Counts
varying
intent may
be intro-
duced.

IX. ATTEMPTS.

Attempts
indictable
at common
law.

§ 822. An attempt at burglary is indictable at common law,⁶ and breaking a gate of the yard of a dwelling-house with intent to commit burglary is such an attempt.⁷

¹ *Spencer v. State*, 13 Ohio, 401, 1844; *Hillsman v. State*, 68 Ga. 836, 1881; *State v. Beckworth*, 68 Mo. 82, 1878. See *State v. Bartlett*, 55 Me. 200, 1867; *Com. v. Williams*, 2 Cush. 582, 1849; *Hunter v. State*, 29 Ind. 80, 1868; *Boose v. State*, 10 Ohio St. 575, 1860; *Burke v. State*, 5 Tex. App. 74, 1878; *Johnson v. Com.*, (Ky.) 7 S. W. Rep. 927, 1888; *Hillsman v. State*, 68 Ga. 836, 1882.

² *Spears v. State*, 2 Ohio St. 585, 1853; *State v. Beckworth*, 68 Mo. 82, 1878; *Kelly v. State*, 72 Ala. 244, 1882; *Henderson v. State*, 70 Ibid. 23, 1881; *Farley v. State*, (Ind.) 26 N. E. Rep. 898, 1891; *State v. Scott*, (Mo.) 19 S. W. Rep. 89, 1892; *State v. Yates*, (Ohio) 10 Crim. Law Mag. 439.

A dog is a "thing of value," and burglary may be committed where larceny of dog is intended. *Green v. State*, 21 Tex. App. 64, 1886; *State v. Kane*, 68 Wis. 260, 1885; *Duncan v. Com.*, (Ky.) 4 S. W. Rep. 321, 1887; *Hamilton v. State*, (Tex.) 24 S. W. Rep. 32, 1893; *State v. Jennings*, (Iowa) 44 N. W. Rep. 799, 1890; *State v. Kane*, (Wis.) 23 N. W. Rep. 488, 1885; *Kelly v. State*, 72 Ala. 244, 1882; *Henderson*

v. State, 70 Ala. 23, 1881; *contra*, *People v. Murray*, 8 Cal. 519, 1857; the reason given being that *petit* larceny is a misdemeanor only. But if the intent be to steal the goods of A. B., this intent is irrespective of value, and hence this distinction is not good. In any view it does not hold where *petit* larceny is a felony. *Short v. State*, 63 Ind. 376, 1878.

³ *Supra*, § 810; *R. v. Dingley*, 2 Leach, 841, 1687; *R. v. Knight*, 2 East P. C. 510, 1782; *R. v. Dobbs*, Ibid. 513, 1770.

⁴ 2 East P. C. 515; 2 Leach C. C. 1105, *note*. See *Bell v. State*, 48 Ala. 684, 1872.

⁵ *Whart. Cr. Pl. & Pr.* § 290; *Gonzales v. State*, 12 Tex. App. 657, 1882.

⁶ *Supra*, § 185. *R. v. Spanner*, 12 Cox C. C. 155, 1872; *R. v. Bain*, L. & C. 129, 1862; 9 Cox C. C. 98, 1862; *State v. Halford*, (N. C.) 10 S. E. Rep. 524, 1889.

⁷ *Com. v. Smith*, 6 Phila. 305, 1867. See *People v. Morgan*, 13 N. Y. Sup. 448, 1891, as to possession of burglar's tools, under Penal Code of New York, § 508; *Davis v. State*, (Ala.) 6 So. Rep. 266, 1889.

**POINTS REQUESTED FOR THE DEFENCE IMPROPERLY
REFUSED, AND ERRONEOUS CHARGES.**

Reasonable Doubt. Correspondence of Proof with Indictment.

The court was requested by the defendant to charge that as the charge in the indictment was "by force in the night-time," the entry must be found as alleged beyond a reasonable doubt. Refused. Held error. *Melton v. State*, 24 Tex. App. 287, 1887.

The court instructed the jury in a case where the evidence showed that part of the stolen goods had been found by defendant some time after the burglary, that if they believed that the goods were carried away as stated in the indictment, "and that recently thereafter the same property, or any part thereof, was found in defendant's possession, then the law presumes that the defendant is guilty of both the burglary and the larceny, and if he has failed to account for his possession of said property in a manner consistent with his innocence this presumption becomes conclusive against him." Held error. *State v. Scott*, 109 Mo. 226, 1891.

Burglary with Intent to Commit Rape.

On the trial of an indictment for burglary with intent to commit a rape it was error for the court to refuse defendant's request to define to the jury the character of force necessary to constitute rape. *Mitchell v. State*, 32 Tex. Cr. 479, 1893.

Force as Well as Fraud in the Entering Necessary.

Where the indictment charged an entry by force, threats, and fraud, and the evidence showed that the defendant was admitted into the house by a domestic servant, who was an accomplice, it was held error for the trial judge to so frame his charge as to hinge the guilt of the defendant upon an entry effected by fraud, ignoring force altogether. *Neiderluck v. State*, 23 Tex. App. 38, 1887.

The court charged the jury in effect that an entry into a house in the night-time through an open door, without the consent of the owner and with intent to steal, was a forcible entry and was burglary. Held error. *Costello v. State*, (Tex.) 21 S. W. Rep. 360, 1893.

Stealing in a Store in the Daytime.

Where the evidence showed that defendant entered a store in the daytime through an open door, defendant requested the court to charge: "The fact that a person attempts to steal while in a building is not sufficient without other circumstances proved to cast on him the burden of proving himself not guilty of burglary." Refused. Held error. *People v. Barry*, 94 Cal. 481, 1892.

CHAPTER XI.

ARSON.

Arson is the malicious burning of another's house, § 825.

I. BURNING.

Any appreciable burning is sufficient, § 826.

Must be causal connection between ignition and combustion, § 827.

Means of ignition are immaterial, § 828.

II. INTENT.

Burning must be malicious, § 829.

Maliciously burning one's own house and thereby burning another's is arson, § 830.

Intent to be inferred from facts, § 831.

III. PROPERTY BURNED.

Arson to burn house and contiguous warehouses, § 833.

And so of barn, § 834.

But not a deserted or unfinished dwelling, § 835.

By statute offence extended, § 835 *a*.

IV. OWNERSHIP.

Ownership at common law must be established, § 836.

Possession is the test, § 837.

Husband and wife not guilty of arson in burning their common house, § 838.

V. INDICTMENT.

Indictment must contain technical terms, § 839.

At common law building may be laid as house, § 840.

Ownership must be laid and proved as laid, § 841.

Intent to defraud should be correctly stated, § 842.

VI. BURNING WITH INTENT TO DEFRAUD INSURERS.

Such burning is statutory arson § 843.

VII. ATTEMPTS.

Indictable at common law, § 844.

POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)

ARSON AT COMMON LAW.¹

Arson is the malicious burning of another's house.

§ 825. ARSON is the malicious and wilful burning of another's house;² the gist of the offence being the danger to the life of persons who may be dwelling in the house fired.³ When the firing of an out-house,⁴ from the nature

¹ See Wharton's Prec. 389-409.

² 4 Bl. Com. 220. See *People v. Fisher*, 51 Cal. 319, 1876; *Young v. Com.*, 12 Bush, 243, 1876.

³ See cases cited *infra*, § 837. See *People v. Fanshawe*, 137 N. Y. 68, 1893, for arson under Penal Code of

New York; *People v. Lee Hung*, (Cal.) 1 W. Coast Rep. 45, 1883.

⁴ The common law in this respect is now absorbed in statutes making such offences specifically indictable. See *State v. Roper*, 88 N. C. 656, 1883. *Infra*, §§ 1065 *et seq.*

of things, is likely to communicate the flames to the house, this is a firing of the house.¹ It is also said to be arson, at common law, maliciously and wilfully to burn another person's barn stored with hay or grain.² And the reasons for this position are: (1) that not only cattle are sheltered in barns, but that they are often occupied by persons who have charge of them; and (2) that their contiguity to dwelling-houses, and their inflammable character, render the fire which consumes them likely to spread to the dwelling-house. When such is the case, and when the fire thus maliciously started burns the dwelling-house, the offence is arson at common law.³

I. BURNING.

§ 826. The offence is consummated by the least burning of the house. The charring of floor or wall is sufficient,⁴ and it makes no matter how soon the fire be extinguished.⁵ Any appreciable burning is sufficient.
 "The burning necessary to constitute arson of a house

¹ *R. v. Cooper*, 5 C. & P. 535, 1833; Rep. 542, 1890. Under General Statutes of Kentucky, it is arson to burn a barn containing wheat, etc. *Cook v. State*, 83 Ala. 62, 1887. "Corn-pen" includes "corn-crib" under Sess. Acts Alabama, 1885, and burning thereof is arson in the second degree. See, also, *Leonard v. State*, 96 Ala. 108, 1892, as to arson in third degree. *State v. Roberts*, 15 Oreg. 187, 1887.

² *R. v. Cooper*, *ut supra*. See *Overstreet v. State*, 46 Ala. 30, 1871.

³ *R. v. Russell*, C. & M. 541, 1842; *Com. v. Tucker*, 110 Mass. 403, 1872; *State v. Sandy*, 3 Ired. 570, 1843; *State v. Mitchell*, 5 Ibid. 350, 1845; *People v. Haggerty*, 46 Cal. 354, 1873; *People v. Simpson*, 50 Ibid. 304, 1875. But not if house was simply scorched and smoked. *Woolsey v. State*, 30 Tex. App. 346, 1891; see *Blanchette v. State*, (Tex.) 24 S. W. Rep. 507, 1893; *Smith v. State*, 23 Tex. App. 357, 1887.

⁴ 1 Hawk. c. 39, s. 17; 3 Inst. 66; 1 Hale, 569; Dalt. 606; 2 Russ. on Cr. 558; *State v. Babcock*, 51 Vt. 570, 1878; *Hester v. State*, 17 Ga. 130, 1857.

⁵ 1 Hale P. C. 567; *Sampson v. Com.*, 5 W. & S. 385, 1843. *Infra*, § 834. But see *contra*, as to stack of hay, *Creed v. People*, 81 Ill. 565, 1876. Compare *Com. v. Macomber*, 3 Mass. 254, 1807; *Gibson v. State*, 54 Md. 447, 1880; *State v. Pope*, 9 S. C. 273, 1877. As to burning of corn-crib after having been torn down, see *Mulligan v. State*, 25 Tex. App. 199, 1888. See *DeShazer v. Com.*, (Ky.) 14 S. W. 1857.

¹ 1 Hale P. C. 567; *Sampson v. Com.*, 5 W. & S. 385, 1843. *Infra*, § 834. But see *contra*, as to stack of hay, *Creed v. People*, 81 Ill. 565, 1876. Compare *Com. v. Macomber*, 3 Mass. 254, 1807; *Gibson v. State*, 54 Md. 447, 1880; *State v. Pope*, 9 S. C. 273, 1877. As to burning of corn-crib after having been torn down, see *Mulligan v. State*, 25 Tex. App. 199, 1888. See *DeShazer v. Com.*, (Ky.) 14 S. W. 1857.

at common law," says Sir William Russell,¹ "must be an *actual burning* of the whole or some part of the house;² . . . but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offence will be complete though the fire should be put out, or go out of itself."³ "Setting fire to" is, in this sense, equivalent to "burning."⁴

To burning it is not necessary that there should a flame.⁵

Whether a board, produced in court, is burned, is a question for the jury.⁶

Burning of personal property in a house is not, however, arson unless the building itself be in some way charred or burned.⁷

§ 827. As has been already shown,⁸ there must be a causal connection between the ignition and combustion. The defendant is not responsible if the combustion take place from the agency of extraordinary and incalculable natural causes, or from the interposition of the independent, self-determined action of another person.⁹ The defendant's participation must be proved beyond reasonable doubt.¹⁰

The jury in some jurisdictions may be taken to view the house.¹¹ Experiments are admissible to show the character of the burning.¹²

How far a watchman, appointed to watch for fires, is responsible, if by negligence on his part he omits to give notice that a fire has begun, has been already discussed.¹³

§ 828. The instrument of burning is immaterial. To set on fire

¹ 2 Russ. on Cr. 548. As to attempt, show that he was the incendiary. see *supra*, § 181. Whart. Crim. Ev. §§ 439 *et seq.* See

² See *R. v. Judd*, 2 T. R. 255.

See *Sam v. State*, 33 Miss. 347, 1862.

³ 3 Inst. 66; Dalt. 506; 1 Hale, 568, 569; 1 Hawk. P. C. c. 39, s. 16, 17; 2 East P. C. c. 21, s. 4; *Com. v. Van Shaack*, 16 Mass. 105, 1819.

⁷ *Supra*, § 826.

⁸ *Supra*, § 153.

⁹ *McDade v. People*, 29 Mich. 50, 1873.

⁴ *State v. Dennin*, 32 Vt. 158, 1860.

¹⁰ *People v. Fairchild*, 48 Mich. 31, 1882; *Brown v. Com.*, 87 Va. 215, 1890.

⁵ *R. v. Stallion*, 1 Mood. C. C. 398, 1833.

⁶ *Com. v. Betton*, 5 Cush. 427, 1850.

¹¹ *Fleming v. State*, 11 Ind. 234, 1858; Whart Cr. Pl. & Pr. § 707.

The *corpus delicti* includes both the burning of the house and the defendant's guilty agency, which should be established before confessions of an accused party should be received to

¹² *R. v. Haseltine*, 12 Cox C. C. 404, 1873.

¹³ *Supra*, § 130.

by hot shot would, no doubt, be arson ; and so of kindling a fire in a stack, or other adjacent structure, likely to communicate to the dwelling, and which does so communicate.¹ Burning a series of houses by one ignition, though the periods of the conflagration of each were successive, may be charged as one act.²

Means of ignition are immaterial.

II. INTENT.

§ 829. The burning must be malicious,³ otherwise it is not felony, but only a trespass, and therefore, as we have seen,⁴ no negligence or mischance amounts to it. Thus, in England, if a person not properly qualified, by shooting at game, happen to set fire to the thatch of a house, or if a man shooting at the poultry of another do the same, the offence is not arson.⁵ And it has been held that the setting fire by a prisoner to his cell is not arson, if the intent were merely to effect his own escape by making a hole, and not to burn down the building, though it is otherwise if the intention were to burn the house.⁶ It has also been argued that if a man, intending to commit a felony, by accident set fire to another's house, this is arson at common law, and also within the statute ;⁷ and so if, intending to set fire to the house of A., he accidentally set fire to that of B.⁸ But in the former case the better

Burning must be malicious.

¹ *R. v. Cooper*, 5 C. & P. 535, 1833 ; 1787 ; *Stevens v. Com.*, 4 Leigh, 683, *Grimes v. State*, 63 Ala. 166, 1879. 1834 ; *Luke v. State*, 49 Ala. 30, 1873 ; See *infra*, § 834 ; *supra*, § 152. *Lockett v. State*, 63 Ibid. 5, 1879 ;

² *Woodford v. People*, 62 N. Y. 22 Am. Rep. 255, and *note*. In *Delany v. State*, the distinction in the text is affirmed. *Washington v. State*, 87 Ga. 117, 1875. But see *Whart. Cr. Pl. & Pr.*, §§ 254, 296, 469.

³ 2 East P. C. 1033 ; *Jesse v. State*, 12, 1891 ; *State v. Collins*, 2 Idaho, 28 Miss. 100, 1856. See *R. v. Nattrass*, 1182, 1892. But see *Willis v. State*, 15 Cox C. C. 73, 1880 ; *R. v. Harris*, 32 Tex. Cr. 534, 1894 ; *Smith v. State*, 23 Tex. App. 357, 1887. Ibid. 75, 1880 ; *Davis v. State*, 15 Tex. App. 594, 1884. See *People v. Fanshawe*, 19 N. Y. Sup. 865, 1892 ;

⁴ *Supra*, § 827. ⁷ See *Foster*, 258, 259 ; 1 Hale, 567-9 ; *R. v. Regan*, 4 Cox C. C. 335, 1850, cited *supra*, § 120. But see *R. v. Heard v. State*, 23 Rep. 549, 1887 ; *Faulkner*, 11 Irish L. T. 13 ; 13 Cox C. C. 550, 1878, where it was rightly held not arson for a sailor to set fire to a ship by lighting spirits which he was trying to steal ; and see *Jesse v. State*, 28 Miss. 100, 1854.

⁵ *Supra*, § 827.

⁶ 1 Hale, 567, 569 ; 3 Inst. 67.

⁸ *People v. Cottrell*, 18 Johns. 115, 1820. See, also, *State v. Mitchell*, 5 Ired. 350, 1844 ; *Jenkins v. State*, 53 Ga. 33, 1874 ; *Delany v. State*, 41 Tex. 601, 1871 ; *Com. v. Posey*, 4 Call, 109, 1820. See *People v. Fan-*

course is to prosecute the defendant, not for arson, but for an attempt to commit arson, and also for a negligent burning; and in the latter for attempt at arson of A.'s house, and the negligent burning of B.'s house, unless the burning of B.'s house was a natural consequence of the firing of A.'s house.¹ It is hard to see how the averment of an intent to burn A.'s house can be sustained, when there was no such intent either specifically or generically. In any view, however, it is not necessary that there should be a specific design to burn the particular house. The indictment is sustained if there be proof of a design to injure either the house fired, or an attached house, or the public generally, as where a general conflagration is designed.²

§ 830. The prevalent view is that if a man, by wilfully setting fire to his own house, with a malicious intent, burn also the house of one of his neighbors, it will be arson.³ This is no doubt true, if the defendant's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighborhood, and if there were grounds from which an intent to produce a general conflagration, or burning of the neighbor's house, could be inferred.⁴

Malicious-
ly burning
one's own
house and
thereby
burning
another's
is arson.

¹ See *supra*, §§ 317-18, 322.

² *Ibid.*; *People v. Orcutt*, 1 Parker C. R. 252, 1851; *Lacy v. State*, 15 Wis. 13, 1863. *Supra*, §§ 106, *et seq.*

³ See *R. v. Probert*, 2 East P. C. 1031, 1799; *R. v. Isaac*, *Ibid.* 1031, 1799; *R. v. Scofield*, Cald. 397; *McDonald v. People*, 47 Ill. 533, 1868; *Gage v. Shelton*, 3 Rich. 242, 1832. And see cases cited *supra*, § 829; *infra*, §§ 842-3. See *Early v. Com.*, 86 Va. 921, 1890.

⁴ See *supra*, § 120.

In New York it is said to be a high misdemeanor, although not arson at common law, to set fire to one's own house in a populous city, where the danger of the communication of the fire is necessarily great (*Ball's Case*, 3 City Hall Rec. 85. See *State v. Elder*, 21 La. An. 157, 1869. In New Hampshire it has been held that one's own dwelling-house falls under "any

dwelling-house," in the statute; *State v. Hurd*, 51 N. H. 176, 1871), though no such communication actually takes place. 1 Hawk. c. 39, s. 1; Hale, 568, 569; *Holmes's Case*, Cro. Car. 376; 4 Bl. Com. 321. As to statute, see *infra*, § 843. In Massachusetts, it is true, in an action of slander, where the defendant was charged with having said of the plaintiff that he had set fire to his own house, it was held that such an offence was not *per se* indictable; *Bloss v. Tobey*, 2 Pick. 320, 1823; but it is clear that the court meant to go no further than to say that a charge of such burning, unless alleged to have been accompanied with wantonness or malice, was not sufficient to support a declaration in slander without a proper *innuendo* or *colloquium*. It may be conceded that, without a malicious intent, the offence is not felony at common law. *R. v. Spald-*

Subject to the above qualifications, it is not arson at common law for a man to burn a house owned and occupied by himself;¹ nor, as will presently be seen,² for a lessee to burn the premises in his possession under the lease,³ nor for a mortgagor in possession to burn his own house,⁴ nor for either husband or wife to burn the house of the other,⁵ though in these cases the offence would be indictable as a misdemeanor.

§ 831. The intent may be inferred, when the building fired is another's, from the conditions of the act;⁶ or from threats, or quarrels,⁷ or from other attempts bearing upon the arson

Intent to
be inferred
from facts.

ing, 1 Leach, 218, 1780; *R. v. Probert*, 2 East P. C. 1031; *Roberts v. State*, 7

Cald. 359, 1870. It is otherwise when the intent is malicious, as to burn a neighbor's house, or to produce a general conflagration; *R. v. Scofield*, Cald. 397; *Holmes's Case*, Cro. Car. 376; or, when supposing there are persons dwelling in the house, to maliciously imperil their lives. In the latter case the elements of a felonious assault are made out; and the firing of the house might, under some statutes, be arson. It would be monstrous to hold that a man could defend himself on the charge of burning an inhabited house by proving the house was his own. Hence, when the purpose is felonious, burning one's own house is held to be statutory arson in New York and Ohio. *Shepherd v. People*, 19 N. Y. 537, 1859; overruling *People v. Henderson*, 1 Parker C. R. 560, 1854. (As to New York statute, see *infra*, § 835). See *Com. v. Mokely*, 131 Mass. 421, 1881; *State v. Toole*, 29 Conn. 342, 1860; *Allen v. State*, 10 Ohio St. 289, 1869.

¹ *State v. Hurd*, 51 N. H. 176, 1871; *infra*, § 843; *State v. Hannett*, 54 Vt. 83, 1881.
² *Infra*, §§ 836-37.
³ 2 East P. C. 1028. *Infra*, §§ 837, 838. This applies even to a tenancy by sufferance. *State v. Hannett*, 54

Vt. 83, 1881; *People v. Van Blarcum*, 2 Johns. 105, 1806.

⁴ *Ibid.* See *infra*, § 1025; *Roberts v. State*, *supra*. *R. v. Spalding*, *ut supra*.

⁵ *Infra*, § 838.

⁶ *R. v. Farrington*, R. & R. 209, 1811; *State v. Watson*, 63 Me. 128, 1874; *Com. v. Harney*, 10 Metc. 422, 1845; *Com. v. McCarthy*, 119 Mass. 354, 1876; *Com. v. Bradford*, 126 Ibid. 42, 1879; *Brooks v. State*, 51 Ga. 612, 1874; *Johnson v. State*, 89 Ga. 107, 1892; *Brown v. State*, 52 Ala. 345, 1874; *Tullis v. State*, 41 Tex. 598, 1874; *People v. Shainwold*, 51 Cal. 468, 1876. *Sawyers v. Com.*, 88 Va. 356, 1891; *People v. Murphy*, 135 N. Y. 450, 1892; *State v. Vatter*, 71 Iowa, 557, 1887; *State v. Roberts*, 15 Ore. 187, 1887; *Allen v. State*, 91 Ga. 189, 1891; *Fletcher v. State*, 90 Ga. 389, 1892; *Wright v. People*, 1 N. Y. C. R. 462, 1883; *Pilger v. Com.*, (Pa.) 8 Crim. Law Mag. 543, 1886; *Winslow v. State*, 76 Ala. 42, 1884. As to insufficiency of evidence to prove arson, see *Brown v. Com.*, 89 Va. 379, 1892; *People v. Cassidy*, 133 N. Y. 612, 1892; *Com. v. Gauvin*, 143 Mass. 134, 1886.

As to mixture of intents, see *R. v. Regan*, 4 Cox C. C. 335. See *supra*, § 119.

⁷ *Hudson v. State*, 61 Ala. 333, 1878; *McAdory v. State*, 62 Ibid. 154, 1879; *State v. Rhodes*, 111 N. C. 647,

under trial,¹ or even from other crimes, part of the same system.² In the statutory offence of setting fire to one's own house, with intent to defraud the insurers, the intent must be proved as laid; and if the policy of insurance or the defendant's knowledge of it cannot be proved, the case falls.³

§ 832. It is no defence that the defendant's motive was the obtaining a reward for notifying the fire, when his intent was to burn the house.⁴

III. PROPERTY BURNED.

§ 833. At common law the offence was considered to reach not only to the dwelling-house, but to all out-houses⁵ which are parcel thereof, though not adjoining thereto, from which fire could be caught.⁶ How far a jail is, in this sense, a dwelling-house, has been already noticed.⁷

Arson to burn house and contiguous out-houses.

1892; *Bond v. Com.*, 83 Va. 581, 1887; had made claims on two other insurance companies in respect of fires *People v. Lattimore*, 86 Cal. 408, 1890; which had occurred previously and in *State v. Crawford*, 99 Mo. 74, 1889; succession, was admitted for the purpose of showing that the fire which *Anderson v. Com.*, 83 Va. 326, 1887; formed the subject of the trial was the result of design and not of accident. *State v. Thompson*, 97 N. C. 496, 1887; *Com. v. Quinn*, 150 Mass. 401, 1890; *State v. Day*, 79 Me. 120, 1887; But it is not admissible to prove the distinguishing features of such fires. *State v. McMahon*, 17 Nev. 365, 1883; *State v. Fenlason*, 78 Me. 495, 1886; *State v. Emery*, 59 Vt. 84, 1886.

¹ See Whart. Crim. Ev. § 36; *R. v. Dossett*, 2 C. & K. 306, 1846; 2 Cox C. C. 243; *R. v. Taylor*, 5 Ibid. 138, 1852; *Com. v. Bradford*, 126 Mass. 42, 1878; *Hall v. State*, 3 Lea, 552, 1879; *State v. Rohfrischt*, 12 La. An. 382, 1857; *State v. Travis*, 39 La. An. 356, 1887; *State v. Halleck*, (Wis.) 7 Crim. Law Mag. 643, 1886. See *McDonald v. People*, 47 Ill. 533, 1868, as to statutory offence of firing with intent to defraud insurers.

² Whart. Crim. Ev. § 32; *Jones v. State*, 63 Ga. 395, 1879.

³ *R. v. Gilson*, R. & R. 138, 1807; *Martin v. State*, 28 Ala. 71, 1856. *Infra*, § 843. Upon a trial for arson with intent to defraud an insurance company, evidence that the prisoner

R. v. Gray, 4 F. & F. 1102, 1864. See Whart. Crim. Ev. § 36. But see *State v. Raymond*, 53 N. J. L. 260, 1891. Upon a trial for setting fire to a building with intent to defraud the insurers, it was held that evidence showing that upward of five years previously several buildings in which the prisoner had some interest, and which were insured, were burned, was irrelevant.

⁴ *Supra*, §§ 119, 120; *State v. Regan*, 4 Cox C. C. 335, 1850; *State v. Green*, 92 N. C. 779, 1885.

⁵ That the term "out-house" has a technical meaning, and does not include detached structures, see *State v. Roper*, 88 N. C. 656, 1883.

⁶ 1 Hale, 567-70; 3 Inst. 67, 69; 1 Hawk. c. 39, ss. 1, 2; 4 Bl. Com. 221.

⁷ *Supra*, § 829.

§ 834. The burning of a barn, though no part of the mansion, if it have corn or hay in it, is held, as we have seen, arson at common law.¹ By statutes, in some States, burn-^{And so of barn.} ing cotton-houses is made arson.²

§ 835. Temporary absence of the occupants does not cause a building usually inhabited to cease to be a dwelling-house,³ though the building must be usually dwelt in.⁴ Where^{But not a deserted or unfinished building.} the indictment charges burning a "dwelling-house," when such is the statutory term, a building which was built for a dwelling-house and had been occupied as such, but not within some months previous to its being burned, nor was so occupied at that time, is not a dwelling-house under the statute;⁵ and a building designed for a dwelling-house, constructed in the usual manner, but not yet entirely finished, and not yet occupied, is not a "house" to be the subject of arson at common law,⁶ and this rule applies to all

The test is, liability to communicate fire. *R. v. Cooper*, 5 C. & P. 535, 1838; *State v. Shaw*, 31 Me. 523, 1850; *People v. Taylor*, 2 Mich. 250, 1856; *Gage v. Shelton*, 3 Rich. 242, 1832. So under Pennsylvania statute, *Hill v. Com.*, 98 Pa. 192, 1881; *Washington v. State*, (Ala.) 2 So. Rep. 356, 1887. See *State v. Downs*, 59 N. H. 320, 1879.

As to what is the correct distinction between the *domus* of arson and the *domus mansionalis* of burglary, see a curious article in 13 Boston Law Rep. 157. Cf. *People v. Fairchild*, 48 Mich. 31, 1882.

¹ *Supra*, § 825; *Com. v. Philips*, (Ky.) 14 S. W. Rep. 378, 1890; *Cook v. State*, 83 Ala. 62, 1887. Whether a barn burned was within curtilage is a question for the jury. *Evans v. Com.*, (Ky.) 12 S. W. Rep. 769, 1890.

² *Washington v. State*, 68 Ala. 85, 1881; *James v. State*, (Ala.) 16 So. Rep. 94, 1894.

³ *Johnson v. State*, 48 Ga. 116, 1873, under statute; and this is good at common law when the absence is casual, and return at any moment likely.

⁴ *Dick v. State*, 53 Miss. 384, 1876; 1850.

Paine v. State, 89 Ala. 26, 1889. Under Alabama Code 1886, § 3780, wilfully setting fire to any inhabited dwelling-house, whether there is, at the time, in such dwelling-house, any human being or not, is arson in the first degree; *State v. Nolan*, 48 Kans. 723, 1892.

⁵ *Com. v. Barney*, 10 Cush. 478, 1852; *Hooker v. Com.*, 13 Gratt. 763, 1855; *McLane v. State*, 4 Ga. 335, 1848; *State v. Sutcliff*, 4 Strob. 372, 1849. *Supra*, § 1082 a. See *Elsmore v. St. Briavals*, 8 B. & C. 461, 1828; *State v. Roper*, 88 N. C. 656, 1883.

In New York, in which State it is by statute required that the house should be inhabited, it is enough if a human being be within the house, irrespective of the liability of such person to danger. *Woodford v. People*, 62 N. Y. 117, 1875. But there must be somebody in the house. *People v. Butler*, 16 Johns. 203, 1819. See *Shepherd v. People*, cited *supra*, § 830; *People v. Cassidy*, 14 N. Y. Sup. 349, 1891; *People v. Handley*, 93 Mich. 46, 1892.

⁶ *State v. McGowen*, 20 Conn. 245,

houses which have not yet been occupied as residences,¹ or which, having been occupied, have been finally abandoned.² It is otherwise under statutes, however, making indictable the burning of "buildings."³

§ 835 *a.* In most jurisdictions statutes have been passed imposing severe penalties on burning various kinds of property not dwelling-houses, which statutes, so far as they do not fall under the head of arson, are hereafter considered.⁴

In some jurisdictions the offence of arson is itself enlarged by statute; in Alabama, as we have seen, to include cotton-houses;⁵ and in other jurisdictions to include buildings for public use, *e. g.*, churches,⁶ and school-houses;⁷ and "buildings" in general.⁸

IV. OWNERSHIP.

§ 836. At common law it was once thought essential to aver the possession to be that of the person at the time the legal owner,⁹ but

¹ *McGarie v. People*, 45 N. Y. 153, 1870; *State v. Wolfenberger*, 20 Ind. 242, 1868; *State v. Sutcliff*, 4 Strob. 372, 1849. See under Massachusetts statute, *Com. v. Squire*, 1 Metc. 258, 1841; *Com. v. Barney*, 10 Cush. 478, 1852. roof, and injured the sides and floors so as to render it untenable, and which was being repaired, is not a building, within § 7 of 32-33 Vict. c. 22, so as to be the subject of arson. *R. v. Labadie*, 32 Up. Can. Q. B. 429; 1 Green C. C. 257.

² *Hooker v. Com.*, 13 Gratt. 763, 1855.

³ *R. v. Edgell*, 11 Cox C. C. 132, 1869; *R. v. Manning*, L. R. 1 C. C. 338, 1871; 12 Cox C. C. 106; *Com. v. Smith*, 151 Mass. 491, 1890; *Lavelle v. State*, (Ind.) 36 N. E. Rep. 135, 1894; *Ledgerwood v. State*, 134 Ind. 81, 1892. A store slept in by a servant may be the dwelling-house of the servant. Setting fire to a barn when one who usually sleeps therein is sleeping, is arson in the first degree. *State v. Jones*, 106 Mo. 302, 1891; *State v. Williams*, 90 N. C. 724, 1884. See *State v. Outlaw*, 72 Ibid. 598, 1875; see, also, *State v. Biles*, 6 Wash. 187, 1893.

But what remains of a wooden dwelling-house, after a previous fire, which left only a few rafters of the

⁴ As to arson in second degree, see *State v. McMahon*, 17 Nev. 365, 1883; *State v. Wright*, 89 N. C. 507, 1883. *Infra*, §§ 1065 *et seq.*

⁵ *Washington v. State*, 68 Ala. 85, 1880; *James v. State*, (Ala.) 16 So. Rep. 94, 1894. An indictment alleging the burning of a cotton-house without stating its value is good as a charge of arson in the third degree.

⁶ *R. v. Hickman*, 1 Leach, 318, 1784; *R. v. Parker*, Ibid. 320, 1782; *Com. v. Harrigan*, 2 Allen, 159, 1861. See *McDonald v. Com.*, 86 Ky. 10, 1887.

⁷ See *State v. O'Brien*, 2 Root, 516, 1797.

⁸ See last clause of § 835.

⁹ See *Glandfield's Case*, 2 East P. C. 1034, 1791; *Com. v. Wade*, 17 Pick. 395, 1836.

In *Glandfield's Case* it appeared that

this is now modified, in some jurisdictions, by statute, in other jurisdictions by judicial revision. Thus, in New York, after an elaborate examination of the authorities, it was held that, under the Revised Statutes, the house or building set fire to or burned must be described as the barn or building of the *person in possession*; and it was accordingly decided, when the building burned was alleged in the indictment as the building of the owner, and the proof was that, at the time of the offence, it was in the possession of a tenant, that the defendant could not be convicted.¹ In England by statute 7 Wm. IV., and 1 Vict. c. 89, s. 3, it is immaterial whether the house be that of a third person or the defendant himself, for that statute applies, whether the house be in the possession of the offender, or in the possession of any other person. Under these statutes it has been held that a house, in part of which a man lives, but lets other parts to lodgers, may be described as his house, even though he be an insolvent debtor, and have assigned the house to his assignee, if the assignee have not taken possession: at all events the room in which he lives may be described as his house.² If the possession of a

Ownership at common law must be established.

the out-houses burned were the property of Blanche Silk, widow, but were only made use of by John Silk, her son, who lived with her after his father's death, in the dwelling-house adjoining the out-houses, and took upon him the sole management of the farm with which these out-houses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother; that he paid all the servants, and purchased all the stock; but that the legal property, both in the dwelling-house and farm, was in the mother, and she alone repaired the dwelling-house and the out-houses in question. Heath, J., held that, as to the stable, pound, and hog-sties, which the son alone used, the indictment must lay them to be in his occupation; and as to the brew-house (another of the out-houses burned), the mother and her son both occasionally paying for ingredients, the beer being used in the family, to the ex-

penses of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid in their joint occupation. The prisoner was afterward convicted on a second indictment (2 East P. C. 1034), drawn agreeably to this opinion, the first having improperly laid the whole premises as in the sole occupation of the mother; and he was executed. In *Morris v. State*, (Miss.) 8 So. Rep. 295, 1890, the indictment averred that the accused burned "two cotton-houses of the property of one C." The evidence showed that a third person had an interest in one of the said houses, and another person owned the others. It was held there can be no conviction. See *People v. McLean*, 84 Cal. 480, 1890.

¹ *People v. Gates*, 15 Wend. 159, 1836. See *contra*, *Harvey v. State*, 67 Ga. 639, 1881.

² *R. v. Ball*, 1 Mood. C. C. 30, 1824. See *infra*, § 841.

house be obtained wrongfully, it may be described as the house of the wrongful occupier.¹ Since at common law, as we have seen, a man cannot commit arson of his own house, it has been held that a tenant (occupancy being the test) cannot be guilty at common law of arson in burning the property he occupies on lease.² On the other hand, a landlord may be guilty of arson in burning his house in a tenant's possession.³ But a mere servant, whose possession is that of his master, is guilty of arson in burning the house which he is occupying for his master.⁴

§ 837. Although there is some confusion in the earlier cases, the authorities now concur in accepting the position, to adopt the language of Cooley, J., in a Michigan case decided in 1872,⁵ that "arson is an offence against the habitation, and regards the possession rather than the property."⁶ The house, therefore, must not be described as the house of the owner of the

¹ R. v. Wallis, 1 Mood. C. C. 344.

² 2 East P. C. 1029, 1824; R. v. Spalding, 1 Leach, 218, 1780; R. v. Pedley, Ibid. 242, 1782. See Sullivan v. State, 5 St. & P. 175, 1834. *Supra*, § 830; but see Mulligan v. State, 25 Tex. App. 199, 1888, as to tenant's possession under Penal Code of Texas, arts. 659, 660.

³ 2 East P. C. 1024; Fost. 114. See Com. v. Erskine, 8 Gratt. 635, 1852, where this point was held under a statute. Sullivan v. State, *ut supra*. See Woolsey v. State, 30 Tex. App. 346, 1891, where landlord and tenant were in joint possession.

Where a parish pauper set fire to a house in which he was put to reside by the overseers, and it was not known who the trustees were in whom the legal ownership was vested, it was holden that it might be described as the house of the overseers, or of persons unknown. R. v. Rickman, 2 East P. C. 1034, 1789.

Where a part of the house is occupied by a tenant habitually lodging therein at night, and the residue by the owner, the building is well de-

scribed in the indictment as the dwelling-house of such tenant. Shepherd v. People, 19 N. Y. 537, 1859. See *infra*, §§ 841-3; Com. v. Elliston, (Ky.) 20 S. W. Rep. 214, 1892.

⁴ R. v. Gowen, 2 East P. C. 1027, 1786.

⁵ Snyder v. People, 26 Mich. 106, 1872; 1 Green C. R. 547.

⁶ See State v. Toole, 29 Conn. 344, 1860; Shepherd v. People, 19 N. Y. 537, 1859; People v. Van Blarcum, 2 Johns. 105, 1806; State v. Burrows, 1 Houst. C. C. 74, 1862; People v. Fairchild, 48 Mich. 31, 1882; State v. Sandy, 3 Ired. 570, 1842; State v. Gailor, 71 N. C. 88, 1874; State v. Moore, 61 Mo. 276, 1875; Young v. Com., 12 Bush, 243, 1876; Davis v. State, 52 Ala. 357, 1874; Adams v. State, 62 Ibid. 177, 1879; Tuller v. State, 8 Tex. App. 501, 1880; People v. Wooley, 44 Cal. 494, 1872; Burger v. State, 34 Nebr. 397, 1892; but under statute of Nebraska, where the offence charged is the burning of "certain stacks of wheat of the value of \$300," the names of owners must be alleged and proved.

fee, if in fact at the time another has the actual occupancy, but it must be described as the dwelling-house of him whose dwelling it then is,¹ even, it seems, though the occupation be wrongful.² It follows that a lessee, even for a year, could not be guilty of arson in burning the premises occupied by him as such,³ while the landlord, during such occupation, might be."⁴ And it is not arson at common law for a man to burn a house of which he is rightfully in possession.⁵

§ 838. The law with regard to the statement of ownership by married women is generally the same as in burglary.⁶ It must be remembered, however, that arson touches distinctively the rights of possession rather than of property; and hence it has been held in Michigan,⁷ that a husband living with his wife, and having a rightful possession jointly with her of a dwelling-house which she owns and they both occupy, is not guilty of arson in burning such dwelling-house. It was further said that the Michigan statutes for the protection of the rights of married women have not changed the common law rule as to arson when the burning is by the husband of the house of the wife, occupied as a dwelling or residence by both. And it is also held that a wife cannot be convicted of arson in burning her husband's house, though at the time living separate from him.⁸

V. INDICTMENT.⁹

§ 839. The indictment for arson at common law must lay the offence to have been done wilfully (or voluntarily) and mali-

¹ 2 East P. C. 1034; 4 Bl. Com. 220; Holmes's Case, Cro. Car. 376; Spalding's Case, 1 Leach, 218, 1780; § 830.

Com. v. Wade, 17 Pick. 395, 1835; State v. Bradley, 1 Houst. C. C. 164.

² Rex v. Wallis, 1 Mood. C. C. 344, 1832; State v. Toole, 29 Conn. 344, 1860.

³ 2 East P. C. 1029; 2 Russ. on Cr. 550; McNeal v. Woods, 3 Blackf. 485, 1837; State v. Lyon, 12 Conn. 487, 1833; State v. Fish, 3 Dutch. 323, 1859; State v. Sandy, 3 Ired. 570, 1842. Otherwise under statute; Allen v. State, 10 Ohio St. 287, 1860; Sullivan v. State, 5 St. & P. 175, 1854; State v. Moore, 61 Mo. 286, 1875; People v. Simpson, 50 Cal. 304, 1875.

⁴ 2 East P. C. 1023-4; Sullivan v. State, 5 St. & P. 175, 1854. *Supra*, § 830.

⁵ State v. Hannett, 54 Vt. 83, 1881.

⁶ See *supra*, §§ 800, 816.

⁷ Snyder v. People, 26 Mich. 106, 1872; 1 Green C. R. 547.

⁸ R. v. March, 1 Mood. C. C. 182, 1828. But see Emig v. Daum, 1 Ind. App. 146, 1890, where under Revised Statutes of Indiana § 1927, wife may be guilty of arson for burning her husband's barn; Garrett v. State, 109 Ind. 527, 1886, where husband burned wife's barn.

⁹ For forms of indictment, see Whart. Prec., tit. ARSON. Hoyt v. People, 140 Ill. 588, 1892.

ciously,¹ as well as feloniously. The word wilfully may be implied from other fit epithets.² "Burn" at common law is essential.³ If it appears, expletory terms may be rejected as surplusage.⁴ In Maine, however, "set fire to" has been held to be equivalent to "burn."⁵

Indictment must contain technical terms.

§ 840. Laying the burning to be of a house is sufficient even at common law, without saying a dwelling-house.⁶ But where the statutory term is "dwelling-house," the latter term should appear in the indictment.⁷ In Glandfield's Case the indictment, which was framed on the stat. 9 Geo. I., stated the burning to be of out-houses generally, which was ruled by Heath, J., to be sufficient, without stating of what denomination of out-houses, such being the description in the statute 9 Geo. I.⁸ The special locality of the house need not be stated, when it is averred to be within the jurisdiction.⁹

¹ *Jesse v. State*, 28 Miss. 100, 1857; *Kellenbeck v. State*, 10 Md. 431, 1857. Though see *Chapman v. Com.*, 5 Whart. 427, 1840; and see, generally, *State v. Dodson*, 16 S. C. 453, 1881; *Maxwell v. State*, 68 Miss. 339, 1890. See *State v. Morgan*, 98 N. C. 641, 1887, as to the necessity of employing statutory terms in the indictment. See *State v. Sivils*, 105 Mo. 530, 1891; *Aikman v. Com.*, (Ky.) 18 S. W. Rep. 937, 1892. See *State v. Massey*, 97 N. C. 465, 1887, for indictment under statutes of North Carolina; *State v. Thompson*, 97 N. C. 496, 1887. As to use of "was" for "did," see *People v. Duford*, 66 Mich. 90, 1887. See *Com. v. Weiderhold*, (Pa.) 8 East. Rep. 66, 1886, under Penal Code of Pennsylvania; *State v. McMahon*, 17 Nev. 365, 1883; *State v. Roper*, 88 N. C. 656, 1883.

² 1 Hawk. c. 89, s. 5; 2 East P. C. 1033. See Whart. Cr. Pl. & Pr. § 269.

³ *Cochran v. State*, 6 Gill. 400, 1848; *Mary v. State*, 24 Ark. 44, 1869; *Howell v. Com.*, 5 Gratt. 664, 1849.

⁴ *Polsten v. State*, 14 Mo. 463, 1851. See *Hester v. State*, 17 Ga. 130, 1855; *Staeger v. Com.*, 103 Pa. 469, 1883; *State v. Ely*, (La.) 1 So. Rep. 341, 1883.

⁵ *State v. Taylor*, 45 Me. 322, 1858, *sed quere*. As to indictment generally, see *Woodford v. People*, 62 N. Y. 117, 1875; *Page v. Com.*, 26 Gratt. 943, 1876; *State v. Keel*, 54 Mo. 182, 1873; *State v. Moore*, 61 Mo. 276, 1875; *Wolf v. State*, 53 Ind. 30, 1875; *Davis v. State*, 52 Ala. 357, 1874; *Mott v. State*, 29 Ark. 147, 1874; *People v. Shainwold*, 51 Cal. 468, 1876; *Thomas v. State*, 41 Tex. 27, 1874.

⁶ See 1 Hale, 567; *Com. v. Posey*, 4 Call, 109, 1787.

⁷ *McLean v. State*, 4 Ga. 335, 1848; *State v. Sutcliff*, 4 Strob. 372, 1849. *Supra*, § 835. *McClaine v. Territory*, 1 Wash. 345, 1890. It is not necessary to allege that the "dwelling-house" was used and occupied as a place of abode by anybody. See, also, *State v. Johnson*, 93 Mo. 73, 1887, as to arson of a penitentiary. See *People v. Russel*, (Cal.) 23 Pac. Rep. 418, 1889; *People v. Giacamella*, 71 Cal. 48, 1886. See *Com. v. Hayden*, 150 Mass. 332, 1889. ⁸ 2 East P. C. 1034. *Supra*, § 836. See *Hester v. State*, 17 Ga. 130, 1855. But see, *Richards v. Com.*, 10 Va. L. J. 237, 1885.

⁹ *Smith v. State*, 64 Ga. 605, 1880.

§ 841. The house must at common law ordinarily be laid to be the house of another.¹ Ownership must be laid, and proved as laid.² "Belonging to" is a sufficient averment of ownership.³ But a special ownership is sufficient; it not being necessary that the ownership should be in fee.⁴ Ownership must be laid, and proved as laid.

A mere servant, however, should not be laid as owner,⁵ though generally, as we have seen, proof of possession will sustain averment of ownership.⁶ But at the same time, if there are several tenants of a building, separated in distinct apartments, the burning must be averred to be of the property of the particular tenant of the part

¹ 2 East P. C. 1034; *Martha v. the lessee. State v. Sandy*, 3 Ired. State, 26 Ala. 72, 1854. And see *supra*, 570, 1842. See *Shepherd v. People*, § 834; but see, as to Louisiana, *State v. Elder*, 21 La. An. 158, 1869; and compare *Young v. Com.*, 12 Bush, 243, 1876. "The jail of Talladega County" implies a sufficient averment of ownership. *Lockett v. State*, 63 Ala. 5, 1880; *Ford v. State*, 112 Ind. 373, 1887.

² Whart. Cr. Pl. & Pr. § 109. *Supra*, §§ 798, 836; *infra*, § 932; *State v. Fish*, 3 Dutch. 323, 1869; *Marten v. State*, 28 Ala. 71, 1856. In *State v. Grimes*, 49 Minn. 443, 1892; it was held no material variance where ownership and possession were alleged to be in A., while proof showed possession was in A.'s husband. See *Butler v. Com.*, 10 Va. L. J. 55, 1885; *Harvey v. State*, 67 Ga. 639, 1881. As to corporate owners, see *McGary v. People*, 45 N. Y. 153, 1870.

³ *Com. v. Hamilton*, 15 Gray, 480, 1860.

⁴ *State v. Lyon*, 12 Conn. 487, 1837.

⁵ *Gowen's Case*, 2 East P. C. 1027, 1786.

⁶ *Supra*, § 837.

A room in a large building, separately leased by the owner of the building to a merchant, who occupied it as a store, and having no direct communication with the other parts of the building, is properly laid in an indictment for arson as the property of

On an indictment for setting fire to a barn in the night-time, whereby a dwelling-house was burned, charging the barn to be the property of G. and N., it appeared that G. was the general owner of the barn, and that part of it was in the occupancy of N., and a part of it used for the purpose of a stage company, who had hired it from G., by parol agreement, for no specified time, G. himself being a member and agent of the company, and exercising no different control over this part of the premises than he exercised over the other way stations of the company. It was held that the company, and not G., was occupant of this part of the barn, and that the allegation of the indictment that the property was N.'s and not G.'s was not supported by the proof. *Com. v. Wade*, 17 Pick. 395, 1835.

In Vermont, on an indictment for burning a public meeting-house, under a statute, it is not necessary to aver who are the owners. *State v. Roe*, 12 Vt. 93, 1840. An indictment for arson which charges that defendant set fire to "a certain dwelling-house belonging to one J. W. B. and in possession of one J. A.," is sufficiently definite as to the house and the ownership thereof.

burned.¹ And the apartment of a tenant of a tenement-house may be averred to be his "dwelling-house" or "house."²

The pleading of the name of the party defrauded has been elsewhere fully considered.³

§ 842. The law in respect to fraud on insurance companies is noticed in other sections.⁴ A variance in this respect is fatal at common law, if the objection be taken during trial;⁵ though it is no ground for *arresting judgment* that the name of the company is inaccurately stated.⁶ If the owners are an unincorporated company of individuals, their names should be given.⁷ Where the statute makes wilful burning by itself indictable, or where the offence is arson at common law, the intent to defraud need not be alleged.⁸

Intent to defraud should be correctly stated.

VI. BURNING HOUSES WITH INTENT TO DEFRAUD INSURERS.

§ 843. As we have already seen, it is not an indictable offence at common law for a person to burn his own house with intent to defraud insurers.⁹ In most jurisdictions, however, statutes are in force making this an indictable offence.¹⁰ A possibility of fraud is sufficient under the

Such burning has been made arson by statute.

¹ *R. v. Ball*, 1 Mood. C. C. 30, 1824; *State v. Toole*, 29 Conn. 344, 1860; 1865.

State v. Tonnerly, 9 Iowa, 436, 1859; *People v. Schwartz*, 32 Cal. 160, 1867. *Shepherd v. People*, 19 N. Y. 537, 1859.

² *R. v. Heseltine*, 12 Cox C. C. 404,

³ *Levy v. People*, 80 N. Y. 327, 1874. 1880.

⁴ *Supra*, § 830.

⁵ Whart. Prec. 389. Whart. Cr. Pl. & Pr. §§ 109 *et seq.* *Supra*, § 816; *State v. Johnson*, 93 Mo. 73, 1887.

⁶ See *State v. Hurd*, 51 N. H. 176, 1872; *State v. Babcock*, 51 Vt. 570, 1878; *Shepherd v. People*, 19 N. Y. 537, 1859; *People v. Henderson*, 1

⁷ *Supra*, §§ 716, 739; *infra*, § 843.

⁸ In an indictment for setting fire to a building with intent to defraud the insurers, the guilty intent to defraud the insurers must be averred; *Com. v. Makely*, 131 Mass. 421, 1881; and the names of the parties to be defrauded accurately given. *Staaden v. People*, 82 Ill. 432, 1876; *aff. Wallace v. People*, 63 Ibid. 451, 1871. See *State v. Jessup*, 42 Kans. 422, 1889. Burning a barn of another to defraud insurers is a statutory offence.

Parker C. R. 560, 1854; *State v. Thorne*, 81 N. C. 555, 1879; *People v. Schwartz*, 32 Cal. 160, 1867; *Heard v. State*, 81 Ala. 55, 1887. *Aliter* when the statutory offence is burning with intent to defraud. *State v. Porter*, 90 N. C. 719, 1884; *State v. Phifer*, Ibid. 721, 1884; *Baker v. State*, 25 Tex. App. 1, 1888; *People v. Fanshawe*, 19 N. Y. Sup. 865, 1892.

Though there are several insurers, the offence of burning with intent to

statute.¹ It is enough if the building was only partially burned.² The intent is to be inferred from all the circumstances of the case.³ In such prosecutions it is not necessary to prove technically the charter of the insurance company when domestic. It is enough if it was doing business in the place of prosecution.⁴

VII. ATTEMPTS.

§ 844. *Attempts* to commit arson may be prosecuted when the burning is not consummated;⁵ and under the New York statute it is held that such prosecutions may be maintained when one solicits another ineffectually to commit the offence.⁶ That a bare solicitation is indictable when there is no overt act, may well be questioned;⁷ but there can be no doubt that such solicitation is indictable when coupled with any action to communicate the fire.⁸ And the better view is that there is no accessoryship before the fact in cases of solicitation unless aid be actually rendered and overt acts done toward consummation.⁹

defraud such insurers is but a single crime. *Com. v. Goldstein*, 114 Mass. 272, 1873. As to proving intent, see *supra*, § 831.

¹ *R. v. Doran*, 1 Esp. 127; *R. v. Kitson*, Dears C. C. 187; *State v. Watson*, 63 Me. 128, 1874; *Jhons v. People*, 25 Mich. 500, 1868. In Illinois it is said that if the intent to defraud was malicious, it is no defence that the policy is invalid; *McDonald v. People*, 47 Ill. 533, 1868; and this is correct at least when the defect is not so absolute as to preclude a possibility of fraud. *Stitz v. State*, 104 Ind. 359, 1885. *Supra*, § 695.

² *State v. Babcock*, 51 Vt. 570, 1878.

³ Whart. Crim. Ev. §§ 734 *et seq.*; *State v. Byrne*, 45 Conn. 273, 1877; *People v. Sevine*, (Cal.) 22 Pac. Rep. 969, 1889; *Blumann v. State*, (Tex.) 21 S. W. Rep. 1027, 1893; *Com. v. Smith*, 151 Mass. 491, 1890; *Carncross v. People*, (N. Y.) 17 Weekly Dig. 383, 1883; *People v. Hooghkirk*, 19 Weekly Dig. 322, 1884.

⁴ Whart. Crim. Ev. § 164 *a*; *Johnson v. State*, 65 Ind. 204, 1879.

⁵ *R. v. Taylor*, 1 F. & F. 511, 1859; *R. v. Clayton*, 1 C. & K. 128, 1843; *Com. v. Flynn*, 3 Cush. 525, 1849; *State v. Johnson*, 19 Iowa, 230, 1865. *Supra*, § 173. See *Kiningham v. State*, 120 Ind. 322, 1889. Under Revised Statutes of Indiana 1881, § 1927, no conviction can be had for attempt to commit arson, since no penalty is provided therefor; *State v. Hull*, 83 Iowa, 112, 1891; *State v. Hayes*, 78 Mo. 307, 1883.

⁶ *People v. Bush*, 4 Hill, (N. Y.) 133, 1843. But see *supra*, § 179.

⁷ *Supra*, § 179.

⁸ *Supra*, § 173.

The attempt, however, must have causal relation to the act; *supra*, § 178. and the means must be adapted to the ends; §§ 180 *et seq.* See § 187 as to abandonment of attempt.

⁹ *Supra*, § 173; *McDade v. People*, 29 Mich. 50, 1873.

**POINTS REQUESTED FOR THE DEFENCE IMPROPERLY
REFUSED, AND ERRONEOUS CHARGES.**

Where the vital issue was whether defendant attempted simply to burn a hole in the door of the guard-house solely for purpose of escape, or set fire to the house maliciously for the purpose of burning, the court charged: "A man has the same right to burn a hole in the house to get into it as to burn a hole in it to get out of it. He has exactly the same right to burn a hole in a dwelling-house for the purpose of getting inside of it that he would have to burn a hole in the guard-house to get out of it." Held error. *Washington v. State*, 87 Ga. 12, 1891.

The court charged: "If it appeared to you that the house was feloniously burned, if it further appeared to you that the house was burned in the early morning, and that on the following night, in the immediate vicinity of such a house, the prisoner was found in possession of goods that were shown to have been in the house on the night immediately preceding the burning of the house, and if he failed to explain in what manner he became possessed of those goods, then you would be authorized, if that evidence was satisfactory to your mind, to find the defendant guilty of arson, the sufficiency and satisfactoriness of the testimony being a question entirely for you." Held error. *Fletcher v. State*, 90 Ga. 389, 1892.

Defendant requested the court to charge the jury that "If you found that the house was simply scorched or smoked, then this would not be sufficient, and you should acquit the defendant." Refused. Held error where the Texas statute declared that the burning necessary to constitute the offence is complete when the fire has been actually communicated to the house. *Woolsey v. State*, 30 Tex. App. 346, 1891.

It was held error for a judge to instruct the jury that defendant's attempts to escape from custody and to procure false testimony are, if proved, circumstances to be considered in determining his guilt or innocence; under Revised Statutes of Missouri 1879, § 1920, which forbids judges to comment on the evidence in criminal cases. *State v. Sivils*, 105 Mo. 530, 1891.

CHAPTER XII.

ROBBERY.

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| <p>I. FROM THE PERSON OR IN THE PRESENCE. Robbery must be larceny of property from the person or in the presence of prosecutor, § 847.</p> <p>II. MUST BE ANIMO FURANDI. Goods must be taken <i>animo furandi</i>, § 848.</p> <p>III. TAKING AND CARRYING AWAY. Goods must be taken and carried away, § 849.</p> <p>IV. FORCE AND FEAR. Taking must be through force or fear, § 850.</p> <p>V. NATURE OF THREATS. Threat calculated to produce terror sufficient, § 851.</p> <p>VI. CHARGING UNNATURAL CRIME. Extortion by charging unnatural crime is robbery, § 852.</p> | <p>VII. DEFENDANT HAVING TITLE. Where goods are taken under claim of title offence is not made out, § 853.</p> <p>VIII. SNATCHING. Snatching without struggle is no robbery, § 854.</p> <p>IX. AGAINST THE WILL. Taking must be against the will, § 855.</p> <p>X. CONSENT. Consent no defence if obtained by fear, § 856.</p> <p>XI. INDICTMENT. Proper technical averments must be made, § 857. May be a conviction of larceny, § 858.</p> <p>POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)</p> |
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ROBBERY AT COMMON LAW.

§ 846. ROBBERY is the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or by putting him in fear.¹ The property taken must be the subject of larceny, whether common law or statutory.²

¹ *R. v. Cannon*, R. & R. 146, 1809; *sett*, 7 N. Y. Sup. 839, 1889, for *de R. v. Hemming*, 4 F. & F. 50, 1861; *grees of robbery under Penal Code of Clary v. State*, 33 Ark. 561, 1879. See *New York*; *State v. Brown*, 104 Mo. 365, 1891; *Territory v. McKern*, 2 1892; *Lampkin v. State*, 87 Ga. 516, 1891; *Com. v. White*, 133 Pa. 182, 1890; *People v. Riley*, 75 Cal. 98, 1888; *McIntire v. Com.*, (Ky.) 4 S. W. Rep. 1, 1887; *Green v. State*, 32 Tex. Cr. 298, 1893; *Crawford v. State*, 90 Ga. 701, 1892; *State v. Kegan*, 62 Iowa, 106, 1883. See *People v. Mas-*

Idaho, 759, 1891; *Houston v. Com.*, 87 Va. 257, 1890; *Burke v. People*, 148 Ill. 70, 1893. As to statutory theft from person, see *Woodard v. State*, 9 Tex. App. 412, 1880; *Williams v. State*, 10 Ibid. 8, 1881.

² *Ibid.*

I. FROM THE PERSON OR IN THE PRESENCE.

§ 847. It must appear that the taking was from the person or in the presence of the prosecutor.¹ Where it appeared that with the prosecutor was a third person, who had the prosecutor's bundle, and who, when the prosecutor was forcibly attacked by the defendant, dropped the bundle, and ran to assist the prosecutor, when the defendant took up the bundle and ran off, a learned judge is said to have doubted whether the offence was robbery.² But when a thief puts a man in fear, and then in his presence drives away his cattle, or takes his goods, the robbery is complete;³ and such is the case where a man flying from a robber drops his hat, which the robber steals,⁴ and where by intimidation the owner is induced to open his desk or safe.⁵

Robbery
must be
from the
person or
in the
presence of
the prose-
cutor.

II. MUST BE ANIMO FURANDI.

§ 848. The goods, also, must appear to have been taken *animo furandi*, as in cases of larceny;⁶ though this is to be inferred from circumstances.⁷ It has been doubted whether the offence is constituted where a man, by force or threats, compels another to give him goods he has to sell, and gives him in return money to the amount of the value of the goods,⁸

Goods
must be
taken
*animo
furandi*

¹ R. v. Francis, 2 East P. C. 708, 1735; R. v. Hamilton, 8 C. & P. 49, 1015, 1735; Turner v. State, 1 Ohio 1837; U. S. v. Jones, 3 Wash. C. C. 209, 1821; Com. v. Snelling, 4 Binn. 379, 1812; Turner v. State, 1 Ohio St. 422, 1853; Kit v. State, 11 Humph. 167, 1851; Crews v. State, 3 Cold. 350, 1866. See *In re Allison*, 13 Colo. 525, 1889, as to robberies of passengers in a coach; Clark v. State, 28 Tex. App. 189, 1889; State v. Miller, (Kans.) 36 Pac. Rep. 751, 1894; Stegar v. State, 39 Ga. 583, 1868; People v. Anderson, 80 Cal. 205, 1889; Clements v. State, 84 Ga. 660, 1890; State v. Miller, 83 Iowa, 291, 1891. See distinctions in §§ 228-230 of New York Penal Code of 1882. But see State v. Calhoun, 72 Iowa, 432, 1887, under Code of Iowa, § 3858. See People v. Glynn, 7 N. Y. Sup. 555, 1889.

² R. v. Fellows, 5 C. & P. 508, 1833.

³ 1 Hale, 533; R. v. Francis, 2 Stra. 1015, 1735; Turner v. State, 1 Ohio St. 422, 1853. *Infra*, § 851.

⁴ 1 Hale, 533.

⁵ U. S. v. Jones, 3 Wash. C. C. 209, 1821. As to proof in such cases, see State v. Lucas, 57 Iowa, 501, 1882.

⁶ Murphy v. People, 3 Hun, 114, 1875; Matthews v. State, 4 Ohio St. 539, 1854; State v. Holloway, 41 Iowa, 200, 1875; State v. Curtis, 71 N. C. 56, 1874; Long v. State, 12 Ga. 293, 1853; see Ward v. Com., 14 Bush, 233, 1877. Intent must be proved beyond reasonable doubt. Langford v. State, 32 Nebr. 782, 1891; Stevens v. State, 19 Nebr. 647, 1886; Morris v. State, 13 Tex. App. 65, 1882; State v. McAndrews, 15 R. I. 30, 1885.

⁷ Ibid.

⁸ 1 Hawk. P. C. c. 84, s. 14.

although it is said by Mr. Archbold that it would be if the goods were of greater value than the money given for them.¹ As we will presently see, if a party under a *bonâ fide* impression that the property is his own obtain it by menaces, this is a trespass, but no robbery.²

III. TAKING AND CARRYING AWAY.

§ 849. There must be an actual taking and carrying away.³ If a robber cut a man's girdle, in order to get his purse, and the purse thereby fall to the ground, and the robber runs off, or is apprehended before he can take it up, this is not robbery, because the purse is never in the possession of the robber.⁴ But it is immaterial whether the taking were by force or upon delivery, supposing the delivery be caused by fear; and if by delivery, it is also immaterial whether the robber compelled the prosecutor to it by a direct demand in the ordinary way, or by any colorable pretence. A carrying away must also be proved; and where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him; and the man accordingly laid down the bed, but the robber, before he could take it up to remove it from the place where it lay, was apprehended, the judges held that the robbery was not complete.⁵ But where the defendant snatched out a lady's ear-ring, and succeeded in separating it from the ear, and it was afterward found among the curls of her hair, the court held this a sufficient proof of asportation to support the indictment.⁶

¹ Arch. Crim. Plead. 245.

² *Infra*, § 853.

A creditor having violently assaulted his debtor, and so forced him to give him a cheque in part payment, and having then again assaulted him, in order to force him to give him money in payment of the debt, it was held, that as there was no felonious intent, he could not properly be convicted of robbery. *R. v. Hemmings*, 4 F. & F. 50, 1861. See *R. v. Coghlan*, Ibid. 316, cited *infra*, § 852. *Contra*, under Iowa statute, *State v. Hollyway*, *ut supra*. As to larceny, see *infra*, § 884.

In Virginia it is said that robbery need not be *lucri causa*. *Jordan v. Com.*, 25 Gratt. 943, 1874.

³ *Com. v. Clifford*, 8 Cush. 215, 1851; *State v. Curtis*, 71 N. C. 56, 1874; *Jordan v. Com.*, 25 Gratt. 943, 1874.

⁴ 1 Hale, 533. As to proof in such cases, see *Odle v. State*, 13 Tex. App. 612, 1883.

⁵ *R. v. Farrell*, 1 Leach, 322.

⁶ *R. v. Lapier*, 1 Leach, 320. Where the defendant seized the seals and chain of the prosecutor's watch, and pulled the watch out of his fob, but the watch being secured around the neck by a chain, he could not take it until by giving two or three jerks he broke the chain, and ran off with the watch, the robbery was held complete.

R. v. Mason, R. & R. 419; *R. v. Davies*, 2 East P. C. 709.

It is also held that a person travelling with the owner of goods, and charged by the owner with their custody, may be guilty of robbery in violently taking these goods from the owner's constructive possession.¹

IV. FORCE OR FEAR.

§ 850. While there must be a felonious taking of property from the person of another, either by actual or by constructive force, consisting of the application of threatening words or gestures; yet, if force be used, fear is not an essential ingredient.² This disjunctive way of stating the offence has been incorporated in the statutes of several of the States, where it is provided that if the goods be taken either by violence or by putting the owner in fear, it is sufficient to constitute robbery.³

To knock another down, and take from him his property while he is insensible or unconscious, is robbery.⁴

It is not necessary that the fear should be of robbery. Fear of bodily hurt is enough.⁵

¹ James v. State, 53 Ala. 380, 1875.

² State v. Gorham, 55 N. H. 152, 1875; Com. v. Humphries, 7 Mass. 242, 1810; Com. v. Snelling, 4 Binn. 379, 1812; State v. Cowan, 7 Ired. 239, 1847; State v. Burke, 73 N. C. 83, 1875; Jackson v. State, 69 Ala. 249, 1881; Seymour v. State, 15 Ind. 288, 1860; Bonsall v. State, 35 Ibid. 460, 1871; State v. Howerton, 58 Mo. 581, 1875. The prisoner, when walking on the public street by night with a stranger, seized the latter's watch with violence enough to break a silk guard, and exclaimed, "Damn you, I will have your watch," and fled with it. This was held to be highway robbery, though the prosecutor could not swear that he feared anything except the loss of his watch. State v. McCune, 5 R. I. 60, 1857. But see Bonsall v. State, 35 Ind. 460, 1871; and *infra*, § 854.

In R. v. Gascoigne, 2 East P. C. 709; 1 Leach, 481, it was held rob-

bery for an officer to take money from a prisoner whom he had handcuffed for this purpose.

³ McDaniel v. State, 8 S. & M. 401; State v. Howerton, 58 Mo. 581, 1875; State v. Broderick, 59 Mo. 318, 1875. See Glass v. Com., 6 Bush, 436, 1869. See State v. Stoffel, 48 Kans. 364, 1892, as to fear of immediate injury and fear of future injury. Young v. State, 50 Ark. 501, 1888; Klein v. People, 6 Crim. Law Mag. 801, 1885; State v. Stinson, (Mo.) 27 S. W. Rep. 1098, 1894; People v. Glynn, 7 N. Y. Sup. 555, 1889.

⁴ Foster, 128; R. v. Lapier, 1 Leach, 320; Mahoney v. People, 3 Hun, 202, 1874; 5 Th. & C. 329; Com. v. Snelling, 4 Binn. 379, 1812; Brennan v. State, 25 Ind. 403, 1865. *Infra*, § 855; State v. Bradburn, 104 N. C. 881, 1889.

⁵ Com. v. Snelling, 4 Binn. 379, 1812. As to dangerous weapon, see State v. Calhoun, 72 Iowa, 432, 1887.

When the indictment elects to aver fear, fear must be proved.¹ And this is sufficient without tactual force.² But taking by a trick is not robbery.³

V. NATURE OF THREATS.

§ 851. Any threat calculated to produce terror is sufficient.⁴ Thus, if a man take another's child, and threaten to destroy him unless the other give him money, this is robbery.⁵ And where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatened to destroy the house unless the money were given; and the prosecutor thereupon gave him 5s., but he insisted on more, and the prosecutor, being terrified, gave him 5s. more; upon which the defendant and mob then took bread, cheese, and cider from the prosecutor's house, without his permission, and departed; this was also held robbery.⁶ But a threat to imprison by a person falsely representing himself to be a town marshal is not a threat which will sustain an indictment.⁷

VI. CHARGING WITH AN UNNATURAL CRIME.

§ 852. To extort money under threat of charging the prosecutor with an unnatural crime has in many cases been holden to be

¹ *Glass v. Com.*, 6 Bush, 436, 1869; to give them something to get rid of
Dill v. State, 6 Tex. App. 113, 1879. them and prevent mischief, by which

² *Com. v. Brooks*, 1 Duvall, 150, means they obtained money from the
1864; *State v. Howerton*, 58 Mo. 581, prosecutor; Parke, J. (after consult-
1875. ing Vaughan, B., and Anderson, J.,)

³ *Shinn v. State*, 64 Ind. 13, 1878. admitted evidence of the acts of the
See *Com. v. White*, 133 Pa. 182, 1890, mob at other places, before and after,
as to taking in a joke; *Thomas v. State*, on the same day, to show that the ad-
91 Ala. 34, 1891. vice of the prisoners was not *bona fide*,

⁴ See *Long v. State*, 12 Ga. 293, but in reality a mere mode of robbing
1852; *R. v. Reane*, 2 East P. C. 734; of the prosecutor. *R. v. Winkworth*,
Ashworth v. State, 31 Tex. Cr. 419, 4 C. & P. 444. See *People v. Hughes*,
1893. 137 N. Y. 29, 1893; for extortion by

⁵ Per Eyre, C. J., in *R. v. Reane*, 2 threat of boycott, 19 N. Y. Sup. 550,
East P. C. 734; and see *R. v. Donnally*, 1892; *People v. Barondess*, 16 N. Y.
Ibid. 718, S. P. Sup. 436, 1891.

⁶ *R. v. Simons*, 2 East P. C. 731. ⁷ *William v. State*, 12 Tex. App.
See *R. v. Brown*, Ibid. 731; S. P., R. 240, 1882; see *Kimble v. State*, Ibid.
v. Astley, Ibid. 712. 420, 1882. But see, *McCormick v.*

Where a mob came to the house of State, 26 Tex. App. 678, 1886; *Sweat*
the prosecutor, and with the mob the *v. State*, 90 Ga. 315, 1892.
prisoners, who advised the prosecutor

robbery;¹ even where it appeared that the prosecutor parted with his money from fear merely of losing his character or situation by such an imputation.² Obtaining money by such and similar means is in many States by statute made a substantive offence.³ But to extort money, or other valuable things, by threatening a criminal prosecution for passing counterfeit money, or by any prosecution, except that for an un-

Extortion
by charg-
ing un-
natural
crime is
robbery.

¹ R. v. Jones, 1 Leach, 139; 2 East P. C. 718; R. v. Donnally, 1 Leach, 193; 2 East P. C. 718; R. v. Cannon, R. & R. 146; R. v. Stringer, 2 Mood. C. C. 261; People v. McDaniels, 1 Parker C. R. 199; Long v. State, 12 Ga 293, 1852; Britt v. State, 7 Humph. 45, 1846.

² Steph. Dig. Crim. Law, art. 296; R. v. Hickman, 1 Leach, 278; R. v. Egerton, R. & R. 375. See R. v. Elmstead, 2 Russ. on Cr. 86; R. v. Stringer, 2 Mood. C. C. 261; Simon's Case, 2 East P. C. 231; People v. McDaniels, 1 Parker C. R. 198, 1839.

³ For threatening letters generally, see *infra*, § 1664. For cases under the English statute, see R. v. Carruthers, 1 Cox C. C. 138; R. v. Miard, *Ibid.* 22; R. v. Robertson, L. & C. 483. A person threatening A.'s father that he would accuse A. of having committed an abominable offence upon a mare, for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price, is guilty of threatening to accuse with intent to extort money, within 24 & 25 Vict. c. 96, s. 47; R. v. Redman, 10 Cox C. C. 159, L. R. 1 C. C. 12. Threat and intent may be inferred, even against the declaration of the prisoner at the time, and in the absence of other proof, from a letter sent, and from other inculpatory facts. R. v. Menage, 3 F. & F. 310; R. v. Coghlan, *infra*. The menace or threat must be of a character to produce in

a reasonable man some degree of alarm or bodily fear, so as to interfere with that free voluntary action which constitutes consent. R. v. Walton, 9 Cox C. C. 268; L. & C. 288; R. v. Hendy, 4 Cox C. C. 243.

The guilt of the party threatened is immaterial as to the question of defendant's guilt; R. v. Cracknell, 10 Cox C. C. 408—Willes; though it is material for the purpose of determining whether the intention was to extort money or to compound a felony. R. v. Richards, 11 Cox C. C. 43. Therefore, although the prosecutor may be cross-examined with a view to show that he is really guilty of the offence imputed to him, yet no evidence will be allowed to be given, *aliunde*, to prove that the prosecutor is really guilty; *Ibid.*; R. v. Menage, 3 F. & F. 310; but see R. v. Richards, 11 Cox C. C. 43. Nor on an indictment for threatening to publish certain matter with intent to extort money, is it necessary that the matter should be libellous. R. v. Coghlan, 4 F. & F. 316.

The prisoner sent to the prosecutor a letter, the language of which was ambiguous; it was held, that the prosecutor might be asked what appeared to him to be the meaning of the letter. R. v. Hendy, 4 Cox C. C. 243. A witness may be asked whether he understood the meaning to be that which the record imputed. *Ibid.* As to interpretation of letter, see R. v. Chalmers, 16 L. T. (N. S.) 363.

natural crime, is not at common law a robbery.¹ By statutes, however, blackmailing is made a substantive offence;² and to extort by threats of any prosecution is at common law an indictable misdemeanor.³

VII. DEFENDANT HAVING TITLE.

§ 853. Where title is *bonâ fide* claimed by the defendant, the case fails.⁴ Thus, in an English case, the prisoner had set wires in which game was caught. The prosecutor, a game-keeper, took them away, while the prisoner was absent. The prisoner demanded his wires and game with menaces, and, under the influence of fear, the prosecutor gave them up. The jury found that the prisoner acted under a *bonâ fide* impression that the game and wires were his property, and that he merely, by some degree of violence, gained possession of what he considered his own. It was held no robbery, there being no *animus furandi*.⁵

When goods are taken under claim of title offence is not made out.

Such, also, is the case when property is taken under alleged beligerent rights.⁶

VIII. SNATCHING.

§ 854. The snatching a thing is not considered a taking by force, but if there be a struggle to keep it, or any violence, or disruption, the taking is robbery,⁷ the reason of the distinction being that, in the former case, we can infer neither fear nor the intention violently to take in face of

Snatching without struggle is not robbery.

¹ *Britt v. State*, 7 Humph. 45, 1846; *ter*, 196, 1856; *Hammond v. State*, 3 Long v. State, 12 Ga. 293, 1852; *R. v. Cold.* (Tenn.) 129, 1866; *Thompson Edwards*, 1 M. & Rob. 257; 5 C. & P. v. Com., (Ky.) 18 S. W. Rep. 1022, 518; *R. v. Henry*, 2 Mood. C. C. 118. 1892. *Supra*, § 283.

It is not necessary, in an indictment for extortion, to set out with technical accuracy the crime charged. *Com. v. Murphy*, 12 Allen, 449, 1866.

² *Infra*, § 1664.

³ *R. v. Woodward*, 11 Mod. 137, (case 195).

⁴ *R. v. Hall*, 3 C. & P. 409; *Brown v. State*, 28 Ark. 126, 1873; *Barnes v. State*, 9 Tex. App. 128, 1880.

⁵ *R. v. Hall*, 3 C. & P. 409. *Supra*, § 848; *infra*, § 883.

⁶ *Com. v. Holland*, 1 Duvall, 182, 1864. See *U. S. v. Durkee*, *McAllis-*

⁷ *R. v. Macaulay*, 1 Leach, 287; *R. v. Baker*, *Ibid.* 299; *R. v. Steward*, 2 East P. C. 702; *R. v. Horner*, *Ibid.* 703; *R. v. Walls*, 2 C. & K. 214; *R. v. Gnosil*, 1 C. & P. 304; *Com. v. Ordway*, 12 Cush. 270, 1853; *McCloskey v. People*, 5 Parker C. R. 299, 1862; *State v. McCune*, 5 R. I. 60, 1857; *Shinn v. State*, 64 Ind. 13, 1878; *Mahoney v. People*, 3 Hun, 202, 1874; *State v. Trexler*, 2 Car. L. R. 90, 1810; *State v. Broderick*, 59 Mo. 318, 1875. See *supra*, § 150; *Fanning v. State*, 66 Ga. 167, 1880; though see

resisting force. If putting in fear be proved, the offence is robbery.¹ And so where the thing is torn from the person, as an ear-ring from the ear.²

IX. AGAINST THE WILL.

§ 855. As a rule, robbery must be against the will;³ at the same time, as in the parallel case of rape,⁴ “against the will,” if there be force, is to be treated as convertible with “without consent;” and hence where the defendant knocked the prosecutor down, and, when the latter was insensible, robbed him, it was held that the robbery was complete.⁵ And so was it held, where the prosecutor was seized by the cravat and forced against the wall, and when thus pinioned his watch was taken without his knowledge.⁶ But the mere taking goods from an unconscious person, *without force*, or the intent to use force, is not robbery.⁷

X. CONSENT.

§ 856. It makes no matter what pretences were employed to induce the owner to surrender possession, if he was put in bodily fear.⁸ Thus, if a man with a sword drawn, or a pistol cocked, asked alms of me, and I give it him, through apprehension of violence, it is as much a robbery as if he had demanded money as a tribute.⁹ So, where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence

State v. John, 5 Jones, (N. C.) 163, 1857; Miller v. State, 12 Lea, 223, 1883; State v. Sommers, 12 Mo. App. 374, 1882; Hanson v. State, 43 Ohio St., 376, 1885.

¹ Moore's Case, 1 Leach, 385; Com. v. Snelling, 4 Binn. 379, 1812; Mahoney v. People, 3 Hun, 202, 1874. See *supra*, § 849.

² *Supra*, § 850. R. v. Macaulay, 1 Leach, 487; Shinn v. State, 64 Ind. 13, 1878.

³ R. v. McDaniel, Fost. 121-8; Long v. State, 12 Ga. 293, 1852; State v. Johnson, Phil. Law, (N. C.) 140, 1867; People v. Clough, 59 Cal. 438, 1881. See People v. Core, Ibid. 390, 1881.

⁴ See *supra*, §§ 556, 562.

⁵ R. v. Lapier, 1 Leach, 320; Foster, 128; R. v. Hawkins, 3 C. & P. 392.

⁶ Com. v. Snelling, 4 Binn. 379, 1812; Wheeler v. Com., 86 Va. 658, 1890; Com. v. Ryan, 154 Mass. 422, 1891. See People v. McElroy, 14 N. Y. Sup. 203, 1891, as to what constitutes an accomplice.

⁷ Brennan v. State, 25 Ind. 403, 1865.

⁸ Dill v. State, 6 Tex. App. 113, 1879.

⁹ 4 Bl. Com. 242; but see State v. Johnson, Phil. Law, (N. C.) 186, 1867.

of payment for them, this was held to be robbery.¹ Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; and after some altercation he went with the driver, under pretence of going before a magistrate, and during their absence the mob pillaged the cart, this was also held robbery.² If thieves come to rob A., and finding little upon him, force him by menace to swear to bring them a greater sum, which he does accordingly, this is robbery, if, at the time he delivered the money, the fear of the menace continued to operate upon him.³ So where the defendant, under compulsion, consents to draw a check or order;⁴ and where money is given to avert a rape.⁵

But if the prosecutor consent to be robbed, simply to prosecute the robber, this is a good defence.⁶

XI. INDICTMENT.

§ 857. An indictment for the common law offence of highway robbery, which charges the offence to have been committed near the highway, is good.⁷ But an indictment charging the robbery to have been committed in the highway is not supported by evidence of a robbery *near* the highway.⁸ The *termini* of the highway need not be given.⁹

An indictment which alleges the taking of the property from the person "feloniously and violently," has been held to sufficiently allege the putting in fear.¹⁰ But it is safer to

Proper
technical
averments
must be
made.

¹ R. v. Simons, 2 East P. C. 712; and in regard to time of discharging and see R. v. Spencer, Ibid. 712. pistol.

Supra, § 146.

² Merriman v. Chippenham, 2 East P. C. 709.

³ 1 Hale, 532. *Supra*, § 146.

⁴ See R. v. Edwards, 6 C. & P. 521.

⁵ R. v. Blackham, 2 East P. C. 711. See Harris v. State, 32 Tex. Cr. 279, 1893.

⁶ R. v. Fuller, R. & R. 408; 1 Russ. on Cr. 890. *Supra*, §§ 141 *et seq.*

⁷ State v. Anthony, 7 Ired. 234, 1847; State v. Wilson, 67 N. C. 456, 1872. Under Missouri statutes, see State v. Howerton, 59 Mo. 91, 1875.

⁸ State v. Cowan, 7 Ired. 239, 1847; see, also, State v. Fallon, (N. Dak.) 52 N. W. Rep. 318, 1892, as to vari-

⁹ State v. Burke, 73 N. C. 83, 1875.

¹⁰ Com. v. Humphrey, 7 Mass. 242, 1875; State v. Cowan, 7 Ired. 239, 1847; 2 East P. C. 788. Such is clearly the old rule. See Whart. Cr. Pl. & Pr. § 267. Under Tennessee statute, see State v. Swafford, 3 Lea, 162, 1879; State v. Kegan, 62 Iowa, 106, 1883; Clemons v. State, 92 Tenn. 282, 1893. In People v. Calvin, 60 Mich. 113, 1866, a common law information for robbery was held not permissible—crime must be laid under statute; State v. Patterson, 42 La. An. 934, 1890; State v. Brown, 113 N. C. 645, 1898.

allege that the prosecutor was put in fear, and that the act was done forcibly,¹ since in this case either of these allegations can be discharged as surplusage. "Against the will" is essential,² and so, at common law, is the allegation "from the person."³

"Feloniously" is at common law essential both to the robbery and the assault.⁴

The rules heretofore laid down for the description of personal property apply to cases of robbery.⁵ Robbery of a "piece of paper" may be enough,⁶ and so of whatever is the subject of statutory larceny.⁷ And it is said that as force or fear is the main ingredient of the offence, the indictment need not specify value.⁸

¹ *Collins v. People*, 39 Ill. 233, 1866; (Mont.) 5 West Coast Rep. 702, 1885; *Anderson v. State*, 28 Ind. 22, 1867; *State v. Jackson*, 26 W. Va. 250, 1885. though see *Glass v. Com.*, 6 Bush, 436, 1869. As to Alabama, see *Chappell v. State*, 52 Ala. 359, 1875. Under the Pennsylvania statute it is not necessary, when "rob" is used, to aver "from his body and against his will."

Acker v. Com., 94 Pa. 284, 1880; *State v. Johnson*, 111 Mo. 578, 1892; *Griffin v. State*, (Tex.) 20 S. W. Rep. 552, 1892; *State v. Ready*, 44 Kans. 697, 1890; *State v. Smith*, 119 Mo. 439, 1893.

² Whart. Cr. Pl. & Pr. § 267. But not "assault," under Texas statute. *State v. Brewer*, 53 Iowa, 735, 1880.

³ *State v. Leighton*, 56 Iowa, 595, 1881. See *State v. Kegan*, 62 Iowa, 106, 1883.

⁴ *R. v. Pelfryman*, 2 East P. C. 783; *Chappell v. State*, 52 Ala. 359, 1875.

⁵ See Whart. Crim. Ev. § 121; and see, also, *Turner v. State*, 1 Ohio St. 422, 1853; *Brennan v. State*, 25 Ind. 403, 1865; *McEntee v. State*, 24 Wis. 43, 1869; *Wesley v. State*, 61 Ala. 282, 1878; *Crumes v. State*, 28 Tex. App. 516, 1890. An indictment for assault with intent to rob need not describe the property which defendant intended to take. *State v. Dilley*, 15 Oreg. 70, 1887; *State v. Helvin*, 65 Iowa, 289, 1884; *Territory v. Bell*,

⁶ *R. v. Bingley*, 5 C. & P. 602. *Infra*, § 880.

⁷ *R. v. Hemmings*, 4 F. & F. 50; *State v. Carro*, 26 La. An. 377, 1874.

⁸ *State v. Burke*, 73 N. C. 83, 1875.

An indictment for robbery, which alleges that the "defendant made an assault upon A., and put him in fear of his life, and did take, steal, and carry away feloniously the money of said A.," is insufficient, because it does not state that the money was taken from the person of A., and against his will, which is an essential averment. *Kit v. State*, 11 Humph. 167, 1850; *People v. Beck*, 21 Cal. 385, 1863; *contra*, *Terry v. State*, 13 Ind. 70, 1859. For forms of indictment, see Whart. Prec. 410 *et seq.*

An indictment was sustained in California which charged the defendant with having feloniously, forcibly, and violently stolen from the person and control of B., and against his will, property belonging to C. It was held not necessary to aver that the property was taken against the will of C., or without his knowledge and consent; or to state that B. had a right of possession. *People v. Shuler*, 28 Cal. 490, 1865; *State v. Brown*, 113 N. C. 645, 1893. See, as to right of

The name of the person robbed, if known, must be stated with the same precision as in larceny.¹

§ 858. Even at common law, if the force be not proved, the defendant while acquitted of robbery may be convicted of larceny if there be an allegation of stealing duly set forth.² May be a conviction of larceny.

possession, *State v. Ah Loi*, 5 Nev. 99, 1869; *State v. Rush*, 95 Mo. 199, 1888; *Crumes v. State*, 28 Tex. App. 516, 1890. But see *Jackson v. State*, 69 Ala. 249, 1881; *Taylor v. State*, 130 Ind. 661, 1891; *State v. Ready*, 44 Kans. 697, 1890; *McCarty v. State*, 127 Ind. 223, 1890; *State v. Perley*, 86 Me. 427, 1894.

¹ Whart. Crim. Ev. §§ 94 *et seq.*; *Smedley v. State*, 30 Tex. 214, 1867; *Com. v. Clifford*, 8 Cush. 216, 1851; *Crews v. State*, 3 Cold. 350, 1866; *People v. Vice*, 21 Cal. 344, 1863; *People v. Jones*, 53 Ibid. 58, 1878; *Parker v. State*, 9 Tex. App. 351, 1880. An averment in an indictment for robbery that the property was feloniously taken will not supply the want of an averment of the intent to rob or steal, under the Ohio statute. *Matthews v. State*, 4 Ohio St. 539, 1855; *Higgins v. State*, (Tex.) 19 S. W. Rep. 503, 1892; *Boles v. State*, 58 Ark. 35, 1893; *State v. Montgomery*, 109 Mo. 645, 1891.

² *Supra*, § 27; *R. v. Birch*, 1 Den. C. C. 185; *Hickey v. State*, 23 Ind. 211, 1864; *State v. Jenkins*, 36 Mo. 372, 1865; *People v. Jones*, 53 Cal. 58, 1878; *U. S. v. Mays*, 1 Idaho, (N. S.) 763, 1880. See *Howard v. State*, 25 Ohio St. 399, 1874, for conviction of felonious assault under indictment for robbery. *Sullivan v. Com.*, (Ky.) 5 S. W. Rep. 365, 1887. But see *State v. Moore*, 106 Mo. 480, 1891, as to what facts may be sufficient to convict of robbery instead of petit larceny. See *People v. Boyle*, 64 Cal. 153, 1883. See *People v. Riley*, (Cal.) 2 West

Coast Rep. 364, 1884; *State v. Sommers*, 12 Mo. App. 374, 1882; *People v. Gannon*, 61 Cal. 476, 1882. See *Haley v. State*, 49 Ark. 147, 1887, as to grand larceny under statutes of Arkansas; *People v. Kennedy*, 11 N. Y. Sup. 244, 1890.

Cases bearing upon the question of admissibility and sufficiency of evidence: *People v. Sansome*, 84 Cal. 449, 1890; *Moses v. State*, 88 Ala. 78, 1889; *People v. Lumyit*, 83 Cal. 130, 1890; *People v. Ching Hing Chang*, 74 Cal. 389, 1887; *People v. Gallagher*, 75 Mich. 512, 1889; *Young v. State*, 50 Ark. 501, 1888; *People v. Kalkman*, 72 Cal. 212, 1887; *People v. Myers*, 70 Cal. 582, 1886; *People v. Ehring*, 2 West Coast Rep. 590, 1884; *Allen v. State*, 12 Lea, 424, 1883; *Patton v. State*, 92 Ga. 457, 1893; *Sheehan v. People*, 131 Ill. 22, 1889; *Barnard v. State*, 88 Ala. 111, 1889; *Rollins v. State*, 32 Tex. Cr. 566, 1894; *People v. Murphy*, 56 Mich. 546, 1885; *State v. O'Connor*, 105 Mo. 121, 1891; *Thompson v. Com.*, 88 Va. 45, 1891; *Morgan v. State*, 48 Ohio, 371, 1891; *Territory v. McKern*, 2 Idaho, 759, 1891; *People v. Nelson*, 85 Cal. 421, 1890; *Ogden v. People*, 134 Ill. 599, 1890; *State v. Sipult*, 81 Iowa, 40, 1890; *State v. Horan*, 32 Minn. 394, 1884; *State v. Sullivan*, 9 Mont. 490, 1890; *People v. Ware*, 1 N. Y. Cr. 166, 1883; *State v. Wyatt*, (Mo.) 27 S. W. Rep. 1096, 1894; *McCarty v. State*, 127 Ind. 223, 1890; *People v. Hong Tong*, 85 Cal. 171, 1890; *State v. Roach*, 11 Mont. 227, 1891; *Clark v. State*, 28 Tex. App. 189, 1889; *People v. Larsen*,

*Attempts at robbery, and assaults with intent to rob, are elsewhere generally discussed.*¹

34 Pac. Rep. 514, 1893; *Carson v.* 1886; *Brown v. State*, 33 Nebr. 354, State, (Tex.) 24 S. W. Rep. 643, 1893; 1891; *Stevens v. State*, 19 Nebr. 647, Com. v. Prewett, 6 Ky. L. R. 195, 1884.

1884; *People v. O'Brien*, 88 Cal. 483, ¹ See *supra*, §§ 173 *et seq.*, 641 *et seq.*; 1891; *People v. Calvin*, 60 Mich. 113, *State v. Howes*, 26 W. Va. 110, 1885.

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

As to Intent.

Indictment for robbery for taking a pinch of snuff. The court charged: 'At common law robbery is defined to be the taking of any property from the person of another by force.' Held error as omitting the very gravamen of the offence, to wit, the felonious intent. *Com. v. White*, 133 Pa. 182, 1890.

In the same case the court also charged: "We caution you again that the value of the property taken from the person of the prosecutor, under the circumstances alleged in this case, has no bearing whatever. If it is anything that belongs to another, no matter how trifling it is, and it is taken from his person by force, the crime of highway robbery is complete, and the defendant may be convicted." Held error. *Com. v. White, supra*.

The court charged: "The jury are instructed that, if they believe from the evidence, beyond a reasonable doubt, that the defendants, James Brown and William Hymes, at the time and place alleged in the indictment, took any money from the person of the prosecuting witness, H. Ottoman, in his presence and against his will, by then and there putting the said H. Ottoman in fear of some immediate injury to his person, and that the said money so taken was then and there the property of the said H. Ottoman, then if the jury so believe, they will find the defendants guilty." Held erroneous as omitting the felonious intent. *State v. Brown*, 104 Mo. 365, 1891.

As to Force Necessary.

Indictment for robbing one G. of a jug of whiskey while defendant was driving with G. in a hack. Defendant requested the court to charge that "If at the time defendant took the jug the said Graham was looking out of the hack at some other object and did not have hold of it (the jug), and it was sitting on the bottom of the hack, not attached to his person, and no other force or violence was used by the defendant than merely to take hold of the jug and carry it away without the knowledge of the said Graham," this would not constitute the crime of robbery. Refused. Held error. *State v. Miller*, 83 Iowa, 291, 1891.

The court charged the jury as follows: "As to the force, the court instructs you that, if a man stealthily filch from the pocket of another, the force necessary to remove the property is all the force that the statute requires." Held error. *Territory v. McKern*, 2 Idaho, 759, 1891.

CHAPTER XIII.

LARCENY.

Larceny is the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner and without his consent, § 862. At common law grand and petit, § 862 *a*.

I. SUBJECTS OF LARCENY.

Treasure trove, estrays, and waifs cannot be the subjects of larceny, nor human remains, but otherwise as to grave-clothes, skins of deer hung up in a camp, ice, gas, and stored water, § 863.

Fixtures not subjects of larceny when unsevered from realty, § 864.

So of gold and other ore, § 865.

So of turpentine, sap, grass, corn, vegetables and flowers, § 866.

But unfastened fixtures are subjects of larceny, § 867.

Articles attached to soil must be first detached, § 868.

Animals *ferae naturae* not subjects of larceny; *e. g.*, deer, wild fowl, hares, fish, and bees, § 868.

And so of eggs of wild animals, § 870.

Otherwise as to animals reclaimed or confined so as to be subject to domestic use, § 871.

Untaxed dogs and ferrets not subjects of larceny, § 872.

But otherwise with oysters when planted for use, § 873.

And so of flesh of dead animals, § 874.

Indictment for stealing animals must show they are the subjects of larceny, § 875.

Choses in action are not subjects of larceny, § 876.

Deeds and mortgages are not "goods and chattels," § 877.

Nor are other securities at common law, § 878.

Negotiable paper may be subject of larceny, § 879.

Larceny of "piece of paper" is indictable, § 880.

So of unissued bank bills, § 881.

Value may be inferentially shown, § 882.

Articles illegal or contraband may be the subjects of larceny, § 882 *a*.

But not an instrument of no value, § 882 *b*.

II. INTENT.

Intent must be to deprive possessor permanently of things taken, § 883.

Taking under an honest claim of right is not larceny, § 884.

And so of taking for mere temporary use, § 885.

And so of borrowing without fraudulent intent, § 886.

Returning or paying for goods does not purge guilt, § 887.

Buying by false pretence is not larceny; but otherwise when only *possession* of the goods, but not the property, is obtained by the false pretence. False personation, § 888.

Seizing weapon in self-defence is not larceny, § 889.

And so of taking by a belligerent,
§ 890.

Whether forced sale is larceny
depends upon circumstances,
§ 891.

Taking the wrong thing and
dropping it is not larceny,
§ 892.

Nor is taking by accident or in
joke, § 893.

Nor is retaking one's own goods,
§ 894.

To larceny *lucri causa* is essential
by Roman law, § 895.

And so by early English law,
§ 896.

Otherwise by later English cases,
§ 897.

Unreasonableness of these rulings,
§ 898.

In the United States qualification
of *lucri causa* required, § 899.

Pawning master's goods with in-
tent to return is not larceny,
§ 900.

Appropriating *animo furandi* lost
goods with ear-marks is lar-
ceny, § 901.

Otherwise when there is no means
of knowing at the time who the
owner was, § 902.

Notice of ownership may be in-
ferred from facts, § 903.

Inference of fraud may be re-
futed by proof of *bonâ fide* at-
tempt to find owner, § 904.

Where there are ear-marks, rea-
sonable diligence should be
shown, § 905.

Intent to restore only for reward
makes offence larceny, § 906.

Returning lost goods does not
purge felony, § 907.

Same rule as to cattle, § 908.

Intent to steal coupled with be-
lief that owner may be found,
constitute larceny, § 909.

But not larceny unless belief that
owner may be found and felo-
nious intent concur, § 910.

Larceny for railroad officer to ap-
propriate things found in cars,
§ 911.

Not larceny for persons employed
to find goods to appropriate
them, § 912.

Nor for assignee of finder to re-
tain goods, § 913.

III. TAKING.

Taking as a trespass must be in
some way proved. Need not
be secret, but must have been
fraudulent, § 914.

Consent of owner to taking does
not bar prosecution in cases
where the consent is that de-
fendant should have only a bare
charge, and where the consent
was not specific or voluntary,
§ 915.

Consent cannot be given by un-
authorized agent, § 916.

No defence that goods were ex-
posed by owner to theft, § 917.

Not larceny for wife to take away
her husband's goods, or for
person merely assisting her,
§ 918.

But otherwise for person assisting
adulterous wife, § 919.

In such case defendant must be
connected with the taking,
§ 920.

Larceny in a man to steal his own
goods from bailee to charge
bailee, § 921.

Joint tenant or tenant in com-
mon of chattel cannot steal
chattel unless in hands of
bailee, § 922.

Distance of moving immaterial,
§ 923.

Taking need not be by hand,
§ 924.

Killing of animals not a sufficient
carrying away, § 925.

Enticing or trapping animals not
taking until seizure, § 926.

Party must be present at taking
as principal, § 927.

A thief carrying goods from county to county may be convicted in either county, § 928.

All assenting to asportation are principals, § 929.

Conflict of opinion as to whether when goods are stolen in one State the thief may be convicted in another State where the goods are brought, § 930.

When several things are taken by one unbroken act this is a single larceny, § 931.

IV. OWNERSHIP.

Ownership, absolute or special, will sustain an indictment, § 932.

Counts may vary ownership, § 932 a.

Ownership may be inferentially proved, § 933.

Variance as to, may be fatal, § 934.

Of joint tenants and tenants in common must be jointly laid, § 935.

General owner may be charged with stealing from special owner, § 936.

Grave-clothes and coffins to be laid as property of executor, § 937.

As against strangers, property may be laid in either bailor or bailee, § 938.

Property cannot be laid in servant or child, § 939.

Nor in married woman, § 940.

Goods of corporation must be laid as such, § 941.

Goods levied on may be laid as property of officer or owner, § 942.

When servant is charged with stealing from master, master's possession must be shown, § 943.

Specific ownership of stolen coin must be shown, § 944.

Goods stolen from thief may be laid as property of either thief or owner, § 945.

Things stolen from mill may be laid as property of owner, § 946.

Clothes of child may be laid as property of father, § 947.

Stealing simultaneously goods of different owners makes more than one offence, § 948.

Owner may be laid as unknown, § 949.

Goods of deceased person to be averred to be property of executor, § 950.

V. VALUE.

Some value must be attached to things stolen, § 951.

Lumping valuation insufficient when conviction is only for stealing part, § 952.

When there is a statutory limit value must conform to statute, § 953.

Larceny may be laid of piece of paper, § 954.

Value may be inferentially shown, § 955.

VI. BY SERVANTS AND OTHERS HAVING BARE CHARGE.

Larceny for servant having bare charge to convert to his own use, § 956.

So as to others having bare charge, § 957.

So as to persons with or by whom goods are inadvertently left or obtained, § 958.

And so of letter-carrier stealing letter, § 959.

And so of clerk, without discretion, stealing goods of employer, § 960.

Otherwise when property of goods is in clerk, § 961.

And where the master has not had possession of goods, § 962.

Reception in master's wagon is reception by master; and so of reception by carrier for master, § 962 *a*.

And so of reception in master's immediate control; but not so as to money secreted or pocketed by servant, § 962 *b*.

VII. BY BAILEES.

Bailee not chargeable with larceny unless there be original fraudulent intent, § 963.

Where bare possession is fraudulently obtained, subsequent conversion is larceny, § 964.

Otherwise when property in goods is passed, § 965.

No such property passes with possession fraudulently obtained from servant or bailee as precludes prosecution for larceny, § 966.

Bailee liable when bulk or package is fraudulently broken, though possession was obtained *bonâ fide*, § 967.

And so where bailment is fraudulently determined by bailee, § 968.

And so where bailment expires by itself, § 969.

By statute bailees are open in other cases to prosecution, § 970.

VIII. BY ASSIGNEE OR VENDEE.

Sale obtained by force does not transfer property, § 971.

Sale to bar larceny must be complete, § 972.

Transfer by trick not such a sale, § 973.

Transfer must be assent of two minds to one thing, § 974.

Conditional transfer does not bar larceny, § 975.

No defence that goods were obtained by legal process when such process is fraudulent, § 976.

IX. INDICTMENT.

Must be formally correct, § 977.

Various counts may be joined, § 978.

Ownership must be stated, § 979.

X. VERDICT, § 980.

XI. RESTORING ARTICLES STOLEN.

By statute stolen goods are to be restored, § 981.

Goods may be followed in hands of assignees with notice, § 981 *a*.

XII. ATTEMPTS, § 981 *b*.

XIII. LARCENY FROM THE HOUSE.

A distinct statutory offence, § 981 *c*.

POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)

§ 862. "THE definitions of larceny," said Baron Parke, an eminent judge,¹ "are none of them complete; Mr. East's

Larceny is the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner without his consent.

is the most so, but that wants some little explanation.

His definition is, 'the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.'

This is defective, in not stating what the definition of 'felonious' in this definition is. It may be explained to mean that there is no color of right or excuse for the act; and the 'intent' must be to deprive the owner, not

¹ R. v. Holloway, 2 C. & K. 945; 1 Den. C. C. 370; T. & M. 40.

temporarily, but permanently, of his property. Cases also show that a taking of goods with an intent to return them is not larceny."

From this definition differ those of Coke, Hawkins, and Blackstone, in the omission of two important requisites: first, the "conversion to the taker's own use;" and secondly, "without the consent of the owner." Blackstone, for instance, contents himself with declaring larceny to be "the felonious taking and carrying away of the personal goods of another." That this definition is defective in omitting "without the consent of the owner" is now universally conceded. Whether it is defective in omitting to include the *lucri causa* will be hereafter discussed.¹ But waiving this question for the present, larceny may be defined to be the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner, without his consent.

§ 862 *a*. At common law, larceny is divided into grand and petit, the latter including all stealing not exceeding twelve pence in value. In England this distinction has been cancelled by statute; and in but few of the United States does it continue to be recognized.²

At common
law grand
and petit.

I. SUBJECTS OF LARCENY.

In what way property laid in an indictment for larceny is to be described has been elsewhere considered.³ The proof of the larceny of a single article among many laid will sustain a conviction.⁴

§ 863. Larceny cannot be committed, at common law, of a thing not the subject of determinate property, as treasure trove, waifs, etc., till seized,⁵ though it would seem that the true owner, though unknown, has still a property in them before seizure by the lord, unless there be circumstances to

Treasure
trove,
human
remains,
waifs, and
estrays

¹ *Infra*, § 895.

laws of the United States. *Ex parte McClusky*, 40 Fed. Rep. 71, 1889.

² That there are no accessories in petit larceny, see *supra*, § 223. In New York, petit larceny is triable and punishable only as a misdemeanor. *People v. Finn*, 87 N. Y. 533, 1882. As to Alabama, see *Borum v. State*, 66 Ala. 468, 1880; and see *State v. Brown*, 73 Mo. 631, 1881. As to Florida, see *Ex parte Bell*, 19 Fla. 608, 1883, where it is held there is no distinction between the two grades. See, also, *supra*, § 819. Larceny is an infamous crime under the

³ Whart. Cr. Pl. & Pr. §§ 206-212; Whart. Crim. Ev. §§ 124 *et seq.*

⁴ Whart. Crim. Ev. §§ 123, 132; *People v. Wiley*, 3 Hill, (N. Y.) 194, 1842.

⁵ 1 Hale, 510; 1 Hawk. c. 33, s. 24. See *R. v. Hore*, 3 F. & F. 315. That the Act of Congress, prohibiting plundering wrecks, etc., does not apply to property abandoned by the owner, see *U. S. v. Smiley*, 6 Saw. 640, 1880.

cannot be the subjects of larceny; but otherwise as to grave-clothes, skins of deer hung up in a camp, ice, and gas, and stored water.

show an intended dereliction of the property.¹ But it has been held in Massachusetts that articles of clothing, taken from a dead body ashore from a wreck, are the subjects of larceny;² and such is clearly the case at common law with grave-clothes³ and coffins in graves,⁴ though it is otherwise as to dead human beings.⁵ Taking deer-skins hung up in the woods at an Indian hunting-camp may be larceny, though the skins were not in the actual possession of any one at the time,⁶ and so of dead animals buried by the owner.⁷ Ice, when put away in an ice-house for domestic use, becomes individual property, so as to be the subject of larceny, though clearly not so when taken from the surface of an open pond or river;⁸ and so gas is the subject of larceny, when severed from the general pipe before it reaches the meter.⁹ Whether seaweed, left by the waves on the shore, belongs to the owner of the land has been questioned.¹⁰ Water, when stored, may be the subject of larceny, though it is otherwise when running.¹¹ An estray when finally abandoned may cease to become the object of larceny.¹² But

¹ 2 East P. C. 606, 607. See *R. v. Thurborn*, T. & M. 67; 1 Den. C. C. 387.

² *Wonson v. Sayward*, 13 Pick. 402, 1833.

³ *Hayne's Case*, 12 Co. 113; *State v. Doepke*, 68 Mo. 208, 1878. *Infra*, § 937.

⁴ *State v. Doepke*, 68 Mo. 208, 1878, where it was held that the ownership might be laid in the person furnishing the coffin.

⁵ *R. v. Haynes*, 2 East P. C. 652. See *Steph. Dig. Crim. Law*, art. 292, where it is queried as to anatomical preparations.

⁶ *Pennsylvania v. Becomb*, Addis. 386, 1799.

⁷ *R. v. Edwards*, 36 L. T. (N. S.) 30.

⁸ *Ward v. People*, 6 Hill, (N. Y.) 144, 1843; 3 *Ibid.* 395, 1842.

⁹ *R. v. White*, 3 C. & K. 368; 17 Jur. 536; 20 Eng. Law & Eq. 585; *Com. v. Shaw*, 4 Allen, 308. A person stole gas for the use of a manufactory

by means of a pipe, which drew off the gas from the main without allowing it to pass through the meter. The gas from this pipe was burnt every day,

and turned off at night. The pipe was never closed at its junction with the main, and consequently always remained full of gas. It was held, that

as the pipe always remained full, there was, in fact, a continuous taking of the gas, and not a series of separate takings. *R. v. Firth*, L. R. 1 C. C. 172; 11 Cox C. C. 234. It was held, also, that even if the pipe had not been thus kept full, the taking would have been continuous, as it was substantially all one transaction. *Ibid.* See *infra*, § 931; *State v. Wallman*, 34 Minn. 221, 1885.

¹⁰ *R. v. Clinton*, Irish R. 4 Crim. Law, 6. See *Com. v. Sampson*, 97 Mass. 407, 1867.

¹¹ *Steph. Dig. Crim. Law*, art. 289; *Ferens v. O'Brien*, L. R. 11 Q. B. D. 21; 15 Cox C. C. 232; *Johnson v. State*, 36 Tex. 375, 1871.

¹² *Infra*, § 908. *Johnson v. State*, 36 Tex. 375, 1871. See *R. v. Matthews*, 12 Cox C. C. 489; *State v. Casteel*, 53 Mo. 124, 1873; *Debbs v. State*, 43 Tex. 650, 1875.

cattle running at large within certain ranges are not regarded in Texas and in other grazing Western States as estrays.¹

§ 864. Larceny cannot be committed of things which belong to the realty,² though otherwise when they are severed.³ This principle is best illustrated by the hypothetical case given by Chief Justice Gibbs, that though "if a thief severs a copper pipe, and instantly carries it off, it is no felony at common law; yet if he lets it remain after it is severed any time, then the removal of it becomes a felony if he comes back and takes it;" and so of a tree which has been some time felled; and so of a door when severed from a house.⁴ And so, generally, of articles which do not adhere to the freehold, and which may be removed without injury to the freehold.⁵

Fixtures
not subjects
of larceny
while un-
severed
from
realty.

§ 865. Gold and other ore, when still reposing in the soil, is not the subject of larceny.⁶ And this is the case with even a nugget of gold separated from the vein by natural causes, until such period as by human care it is removed from the mass of rock.⁷ It is otherwise, however, with ore when so removed.⁸

So of gold
and other
ore.

§ 866. Turpentine, when in the grain of a tree, is not the subject of larceny; but when it has been drawn from the tree, and is collected in troughs excavated in the tree itself, it is detached in such a way that larceny may be committed by stealing it.⁹ The rule, that after severance there may be larceny, applies to maple syrup drawn from a maple-

So of tur-
pentine,
sap, grass,
corn, vege-
tables, and
flowers.

¹ *State v. Everage*, 33 La. An. 120, 104, 1860. See, under Texas statute, 1881; *Beatty v. State*, 61 Miss. 18, 1883; *Harverger v. State*, 4 Tex. App. 26, 1878. *Moore v. State*, 8 Tex. App. 496, 1880. ⁴ *Ex parte Wilkie*, 34 Tex. 155, 1870. See *Crockett v. State*, 5 Ibid. 526, 1879; ⁵ *Infra*, § 867; *Jackson v. State*, 11 Deggs v. State, 7 Ibid. 359, 1879; *Lowe v. State*, 11 Ibid. 253, 1881. *Supra*, § 608. Ohio St. 104, 1860. See *State v. Hall*, 5 Harring. 492; *Langston v. State*, 96 Ala. 44, 1891.

Where such cattle are by statute to be branded, the omission to brand is a matter of defence. *Perry v. State*, 37 Ark. 54, 1881.

In *Smith v. Com.*, 14 Bush, 31, 1878, chandeliers were held not to be fixtures, and were therefore the subjects of larceny.

² 2 Russ. on Cr. 62; *State v. Burrows*, 11 Ired. 477, 1850; *State v. Davis*, 22 La. An. 77, 1870; *People v. Williams*, 35 Cal. 671, 1868; *Com. v. Steimling*, 156 Pa. 400, 1893.

⁶ *People v. Williams*, 35 Cal. 671, 1868.

⁷ *State v. Burt*, 64 N. C. 619, 1870.

⁸ *State v. Berryman*, 8 Nev. 262, 1872.

⁹ *Ibid.*; *Jackson v. State*, 11 Ohio St.

In this case it was held that the allegation in an indictment for larceny

⁹ *State v. Moore*, 11 Ired. 70, 1850. And see *State v. King*, 98 N. C. 648, 1887.

tree ; to fruit ; to corn, and other crops ;¹ to vegetables ;² to grass or flowers ;³ and, as has been seen, to ice formed on open water.⁴

§ 867. Fixtures, when a stationary part of the freehold, are subject to the distinction expressed above by Chief Justice Gibbs. But if they are not *fastened*, so as to be permanently attached, removing them may be larceny.⁵ This is the case with the taking of keys from door locks ;⁶ of detachable sections of machinery in a mill ;⁷ of window sashes which are still unhung, and which are only temporarily and slightly connected with the house.⁸ When, however, either door or window is permanently and finally attached, it becomes part of the realty, and is not the subject of larceny until it becomes detached, and is taken while in a detached state. Such is the law, as stated by the old English authorities ; and however subtle and arbitrary is the distinction, it is still recognized not only in England, but in most jurisdictions in this country.⁹

§ 868. We may, therefore, accept on this point the following propositions :

But things attached to the soil must be first detached.

(a) Whatever is attached to soil or freehold is not, when so attached, the subject of larceny ;

(b) When not so attached, however, it becomes the subject of larceny ;

that the defendant stole “six hundred State *v.* Pottmeyer, 33 Ind. 402, 1870 ; and ten pounds of silver-bearing ore” *Ex parte* Wilkie, 34 Tex. 155, 1870. sufficiently shows that the property ⁶ *Hoskins v.* Tarrence, 5 Blackf. 417, 1840. alleged to have been stolen was personal property which could be the ⁷ *Jackson v.* State, 11 Ohio St. 104, 1860. subject of larceny. See, also, *People v.* Freeman, 1 Idaho, (N.S.) 322, 1870 ; ⁸ *R. v.* Hedge, 2 East P. C. 590 n. ; *Com. v.* Steimling, 156 Pa. 400, 1893. and see *R. v.* Wortley, 1 Den. C. C. 162.

¹ *Holly v.* State, 54 Ala. 238, 1875 ; ⁹ See *Ward v.* People, 6 Hill, (N. Y.) 144, 1843. As maintaining that there is no difference in principle between an interval of one instant and an interval of a day, see *supra*, §§ 27, 288. *State v.* Webb, 87 N. C. 558, 1882 ; *Bradford v.* State, 6 Lea, 634, 1881. As to To the same effect, *Ex parte* Wilkie, 34 Tex. 155, 1870 ; *Jackson v.* State, 11 Ohio St. 104, 1860. See, also, *State v.* Smitherman *v.* State, 63 Ala. 24, 1879. *Burt*, 64 N. C. 619, 1870 ; *People v.* Williams, 35 Cal. 671, 1868, where the rule in the text is followed, though objected to as unreasonable and artificial.

² *Bell v.* State, 4 Baxt. 522, 1875 ; *State v.* Foy, 82 N. C. 679, 1880.

³ 3 Inst. 109.

⁴ *Supra*, § 683.

⁵ *R. v.* Nixon, 7 C. & P. 442 ; see

(c) But an article of this class, to become detached so as to have impressed upon it the character of personalty, and to be made the subject of larceny, must be first removed from its fastenings or original seat. It must be *left* in this detached state, so as to acquire these new characteristics. If taken directly by the thief from the house of which it was a fixture, or the soil in which it was imbedded, or the tree of which it was the fruit, or the field in which (as in the case of corn or vegetables) it was growing,¹ it is a chattel real, and not the subject of larceny. If removed either by himself or another, and left (the process of removal being for the time discontinued) detached, no matter for how short a time, it becomes personalty, and taking it from such detached situation may be larceny.²

(d) The prior existence of the common law, as above stated, may be regarded as recognized by the numerous statutes adopted in England and in the United States, making the stealing of fixtures specifically indictable, which statutes, in some cases expressly, in

¹ *Holly v. State*, 54 Ala. 238, 1875; *Bell v. State*, 4 Baxt. 522, 1875. In *State v. Hall*, 5 Harring. 492, the test was said to be *continuousness*. If the severing and removal are one continuous transaction, the taking is not larceny; it is larceny if there be any interval between severing and taking.

In *Ex parte Wilkie*, 34 Tex. 155, 1870; while the common law as to fixtures being part of the realty, was affirmed, it was held that the very removal involved, at least where the removal required the action of several persons, a pause which made the things removed personal property. "If the appellant," said Ogden, J., "took the doors, as charged, some one must have taken them from him; and as soon as that was done the doors became personal property, and properly the subject of theft." (P. 158.)

² See discussion in *R. v. Townley*, L. R. 1 C. C. 315; 12 Cox C. C. 59. And see *Beall v. State*, 68 Ga. 820.

"Sir M. Hale says (1 Pleas of Crown, 510): 'If a man come to steal trees, or the lead off a church or

house, and sever it, and *after about an hour's time or so* come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and in that interval the property lodgeth in the right owner as a chattel.' The period which must elapse between the severance and the carrying away has been differently stated as 'a day;' 'an hour exactly;' 'any time;' 'afterward.' But the question as to whether the taking be or be not larceny does not depend upon the lapse of time. If the property be detached by the owner or by a person other than the wrong-doer, it becomes *eo instanti* the subject of larceny. If the subsequent carrying away by the wrong-doer be in pursuance of his original trespass involved in the severance, no matter what length of time may elapse between the two, then it would seem, upon principle, not to be a larceny. To hold otherwise is to attempt to avoid one 'subtle and unsatisfactory distinction,' by the engrafting upon it another as subtle and unsatisfactory." 1 Green C. C. 340.

some cases by implication, profess to correct the common law.¹ In States adopting the Roman law, however, whatever is movable is regarded as the subject of larceny.²

§ 869. No larceny at common law can be committed of animals in which there is no property, either absolute or qualified; as of beasts that are *ferae naturae* and unreclaimed, such as deer, rabbits, hares,³ and conies in a forest, chase, or warren;⁴ “coons;”⁵ fish in an open river or pond;⁶ wild fowl, pheasants, partridges,⁷ rooks, for instance,⁸ at their natural liberty,⁹ or turkeys; without proof, direct or inferential, that they are tame.¹⁰ A marten caught in a trap in the woods cannot be a subject of larceny even when it is in the trap;¹¹ and according to Sir Thomas Wilde, C. J., not only is a wild animal itself not the subject of larceny, but it imparts its character to the cage in which it is confined.¹² Bees are *ferae naturae*, and although confined to the top of a tree by the owner of a tree, yet while they remain in the tree, and are not secured in a hive, they are not the subject of larceny,¹³ though it is otherwise when they are reclaimed.¹⁴ But where wild animals are

¹ R. v. Richards, R. & R. 28; R. v. Jones, D. & B. 555; 7 Cox C. C. 498; see R. v. Worrall, 7 C. & P. 516

² Whart. Confl. of L. §§ 297 *et seq.*

³ R. v. Read, L. R. 3 Q. B. D. 131; 37 L. T. 722. See article in London Law Times, Feb. 2, 1884, p. 249.

⁴ See R. v. Townley, L. R. 1 C. C. 315.

⁵ Warren v. State, 1 Greene, 106, 1847. “The principle is well settled,” says Greene, J., “that taking from another’s possession an animal *ferae naturae*, or of a base nature, in contemplation of law, will not render a person liable for larceny; though the right of the owner would be protected by a civil action. As this principle applies, by common law, to monkeys, bears, foxes, etc., it will evidently apply to coons.”

⁶ State v. Krider, 78 N. C. 481, 1878. That a dead whale may be the subject of property, see *infra*, § 874.

⁷ R. v. Roe, 11 Cox C. C. 554; R. v. Head, 1 F. & F. 350.

⁸ Hannam v. Mockett, 2 B. & C. 934; 4 D. & R. 518.

⁹ 1 Hale, 511; Fost. 366; Hannam v. Mockett, 2 B. & C. 934; R. v. Townley, L. R. 1 C. C. 315; 12 Cox C. C. 59; R. v. Read, L. R. 3 Q. B. D. 131; Wallis v. Mease, 3 Binn. 546; Warren v. State, 1 Greene, 106, 1847.

¹⁰ State v. Turner, 66 N. C. 618, 1872; R. v. Mann, s. c. Hawai, 23 Alb. L. J. 445. That a parrot not tamed is not a domestic animal, see Swan v. Saunders, 44 L. T. (N. S.) 424.

¹¹ Norton v. Ladd, 5 N. H. 203, 1830.

¹² R. v. Powell, cited *infra*, § 876.

¹³ Gillett v. Mason, 7 Johns. 16, 810; Wallis v. Mease, 3 Binn. 546, 1811; Cock v. Weatherby, 5 Sm. & M. 333, 1846.

¹⁴ Harvey v. Com., 23 Gratt. 941, 1873; State v. Murphy, 8 Blackf. 498, 1847 *Infra*, § 871.

taken by a thief and killed, and then abandoned, they may be the subjects of larceny.¹

§ 870. Eggs partake of the character of the animal laying them. Hence an indictment for larceny, which charges that the prisoner stole "three eggs, of the value of two pence, of the goods and chattels of S. H.," is bad, for not stating the species of eggs, because it does not show that the eggs stolen might not be such as are not the subject of larceny.²

And so of
eggs of
wild ani-
mals.

§ 871. But when an animal is reclaimed or confined, and may serve for food, it is otherwise;³ for of deer or rabbits so inclosed in a park or field, that they may be taken at pleasure, otter in a trap,⁴ fish in a trunk or net, and pheasants or partridges in a mew, larceny may be committed,⁵ and so of young pheasants or partridges reared by a hen, and thus reclaimed.⁶ Swans, it is said, if lawfully marked, are the subject of larceny at common law, although at large in a public river;⁷ or whether marked or not, if they be in a private river or pond;⁸ and doves and pigeons are also the subject of larceny, when placed in the care and custody⁹

Otherwise
as to ani-
mals re-
claimed or
confined so
as to be
subject to
domestic
use.

¹ *Blades v. Higgs*, 11 H. L. C. 621; *R. v. Townley*, *ut supra*.

² *R. v. Cox*, 1 C. & K. 494; Whart. Cr. Pl. & Pr. § 210.

³ See *Hundsdon's Case*, 2 East P. C. 611. In *R. v. Petch*, 38 L. T. 788; s. c. 14 Cox C. C. 116, the prisoner was employed to trap wild rabbits, and it was his duty to take them when trapped to the head keeper. Contrary to his duty he trapped from time to time rabbits, and took them to another part of the land and placed them in a bag, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence, and nicked them, and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterward took away the bag and the rabbits with the intention of appropriating them to his own use. It was held in a case reserved that the act of the keeper in nicking the rabbits was no reduction

of them into the possession of the master, so as to make the prisoner guilty of stealing them. See *R. v. Read*, L. R. 3 Q. B. D. 131.

⁴ *State v. House*, 65 N. C. 744, 1871.

⁵ 1 Hale, 511; 1 Hawk. c. 33, s. 39.

⁶ *R. v. Garnham*, 8 Cox C. C. 451; *R. v. Cory*, 10 Ibid. 23; *R. v. Shickle*, L. R. 1 C. C. 158; 11 Cox C. C. 189.

⁷ Dalt. Just. 156.

⁸ Ibid.

⁹ *R. v. Brooks*, 4 C. & P. 131; *R. v. Cheafor*, 2 Den. C. C. 361; 5 Cox C. C. 367. In *Stanley v. Birch*, Law Times, May 28, 1881, this protection was extended to carrier pigeons when on short excursions for the purpose of training. When, however, pigeons are wandering at large, with nothing to designate them as reclaimed or tame, it is otherwise. *Com. v. Chace*, 9 Pick. 15, 1879. But if they bear on them the marks of having been reclaimed and tamed, then it is larceny to steal them. *Stanley v. Birch*, *supra*.

of their owners ; and so of tame turkeys ;¹ pea-hens ;² tame mocking-birds,³ and bees in hives, and their honey,⁴ though it is for the jury to say whether animals *ferae naturae* are tamed, so as to be the subjects of larceny.⁵ But all valuable domestic animals, as horses,⁶ and all animals *domitae naturae*, which serve for food, as swine, sheep, poultry,⁷ and the product of any of them, as eggs,

¹ *State v. Turner*, 66 N. C. 618, 1872 ; *R. v. Halloway*, 1 C. & P. 128. But the burden of proving tameness is on the party injured. *R. v. Mann*, *supra*, § 869.

² *Com. v. Beaman*, 8 Gray, 497, 1857. See other cases cited *supra*, § 869.

³ *Haywood v. State*, 41 Ark. 479, 1883.

⁴ *Harvey v. Com.*, 23 Gratt. 941, 1873. See *State v. Murphy*, 8 Blackf. 498, 1847.

⁵ *R. v. Cheafor*, 2 Den. C. C. 361 ; 5 Cox C. C. 367 ; 8 Eng. Law & Eq. 598, Exchequer Chamber, sitting upon Crown Cases Reserved. Present: Lord Campbell, Mr. Baron Alderson, Mr. Baron Platt, Mr. Justice Talfourd, and Mr. Baron Martin. Lord Campbell said : " This case was not argued, but we are called upon to give judgment. It was tried at the Nottingham quarter sessions on the 7th of July, 1851. William Cheafor was indicted for feloniously stealing four tame pigeons, the property of John Mansell, alleged to be reclaimed. The pigeons, at the time they were taken, were in the prosecutor's dove-cote over a stable on his premises, being an ordinary dove-cote, having holes at the top, and having a door on the floor, which was kept locked. The prisoner entered the dove-cote at twelve o'clock at night, and took away the pigeons. The prisoner's counsel contended that the pigeons, being at liberty to go out at any time, were not reclaimed, and were not the subject of larceny. The chairman directed the jury that the view contended for by the prisoner's

counsel was correct, and the pigeons were not the subject of larceny ; but the jury took a better view of the law than the judge, and found the prisoner guilty. Judgment was postponed till the opinion of the court had been given as to whether the direction of the chairman was right, and whether the prisoner was properly punishable. Now we think the direction of the learned chairman was wrong, because it comes to this : Is it possible there can be larceny committed of tame pigeons ? because the pigeon from his nature must have egress to the open air, and unless it has a hole for that purpose it cannot get out. According to the direction of the learned chairman there can be no larceny committed of chickens, of geese, or ducks. It was a pure question of fact for the jury whether the pigeons were tame and reclaimed ; the jury seem to have come to a very proper conclusion that they were tame pigeons and reclaimed. The pigeons were the subject of larceny, although they had the opportunity of getting out and enjoying themselves. We shall direct that judgment be passed at the next quarter sessions." Conviction affirmed. See, also, *R. v. Howell*, reported 1 Ben & Heard Lead. Cases, 65 ; though see *R. v. Brooks*, 4 C. & P. 131.

⁶ *Infra*, § 908. But not when abandoned by owner. *Johnson v. State*, 36 Tex. 375, 1871.

⁷ Including *pea-hens*, as has been seen. *Com. v. Beaman*, 8 Gray, 497, 1857.

milk from the cow while at pasture,¹ and wool pulled from the sheep's back feloniously;² may be the subjects of larceny.³

§ 872. But as to all other animals which do not serve for food, such as dogs and ferrets, though tame and salable,⁴ or other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law.⁵ It is otherwise, however, when they are taxed.⁶

§ 873. *Oysters* have been determined to be subjects of larceny when planted and growing in a market plot, itself the subject of ownership, generally recognized as privately planted, and not part of a bed in which oysters are growing naturally.⁷

Untaxed dogs and ferrets not subjects of larceny.

But otherwise with oysters when planted for use.

§ 874. *Flesh* of dead animals, whether *ferae naturae* or tame, is subject of larceny; and it has been said that the very fact of proffering it for sale reclaims it, and invests it with the character of property which the law protects.⁸

And so of flesh of dead animals.

What act reduces the flesh of a wild animal to the personal property of the reclaimer depends to some extent upon statutory enactments. If there are no game laws, then the flesh of animals, seized and killed upon waste lands, or on the sea, and staked or anchored in any way that may mark the ownership, is susceptible of property in the reclaimer.⁹

¹ Foster, 99.

² R. v. Martin, 1 Leach, 205.

³ 1 Hale, 511.

⁴ R. v. Searing, R. & R. 350; State v. Lyms, 26 Ohio St. 400, 1875; State v. Holden, 81 N. C. 527, 1879; Ward v. State, 48 Ala. 161, 1872. See, however, State v. Latham, 13 Ired. 33, 1851.

⁵ 1 Hale, 512; Findlay v. Bear, 8 S. & R. 571, 1822. That the owner of a dog may maintain a civil action for its loss, see Hinckley v. Emmerson, 4 Cow. 251, 1825; Cummings v. Perham, 1 Metc. 555, 1840; Perry v. Phipps, 10 Ired. 259, 1849; Parker v. Mise, 27 Ala. 480, 1855. As to malicious mischief, see *infra*, § 1076. That a dog is personal property under statute, see Mulaly v. People, 86 N.Y. 365, 1881; State v. Brown, 9 Baxt. 81, 1877; Com. v. Hazelhurst, 84 Ky. 681, 1887. That he is not a "domestic animal," see State v. Harriman, 75 Me. 562, 1883. Cf. 29 Alb. L. J. 205.

⁶ People v. Maloney, 1 Parker C. R. 593, 1859; People v. Campbell, 4 Parker C. R. 386, 1859; Harrington v. Miles, 11 Kans. 480; *Ex parte* Cooper, 3 Tex. App. 489, 1878. See Washington v. Meigs, 1 MacA. 53, 1873.

⁷ State v. Taylor, 3 Dutch. 117, 1858; Fleet v. Hegeman, 14 Wend. 42, 1835.

See, however, State v. Tayler, 13 R. I. 541, 1832. That oysters are "fish," see Caswell v. Johnson, 58 Me. 164, 1870.

⁸ R. v. Gallears, 1 Den. C. C. 501; 2 C. & K. 981; T. & M. 196; 1 Hale, 511; Norton v. Ladd, 5 N. H. 203, 1830; State v. Jenkins, 6 Jones, (N. C.) 19, 1858; State v. Doe, 79 Ind. 9, 1881. See R. v. Edwards, 36 L. T. (N. S.) 30; 13 Cox C. C. 384, where it was held larceny to steal dead pigs buried three feet under soil.

⁹ See Pierson v. Post, 3 Caines, 175; Broughton v. Singleton, 2 N. & McC. 338. In Taber v. Jenny, 1 Sprague,

Indictment for stealing animals must show they are the subjects of larceny.

§ 875. Where the question is open to doubt, the indictment, to be good, must allege the animal to be "tame."¹ So, as has been seen, "eggs" must be shown to be of an animal which is the subject of larceny.² When the carcass of an animal *ferae naturae* is stolen, the indictment must aver the animal to be "dead," so as to make it the subject of larceny.³ When an animal is equally the subject of larceny whether alive or dead, it is not necessary to aver that it is "dead."⁴

"One ham" is a sufficient description, without further designation.⁵

Choses in action are not subjects of larceny.

Deeds and mortgages are not "goods and chattels."

§ 876. *Choses in action*, including bonds and notes of all classes, according to the common law, are not the subjects of larceny, being mere rights of action, having no corporeal existence;⁶ though, as will presently be seen, a person may be indicted for stealing the paper on which they are written.

§ 877. Hence, deeds, mortgages, and leases are not "goods and chattels;"⁷ and at common law are not the subject of larceny.⁸

Nor are other securities at common law.

§ 878. Bonds, notes, bank notes, receipts, and bills, being mere *choses in action*, and of no intrinsic value, are not held the subjects of larceny at common law.⁹ It has been determined in England, indeed, that a railway ticket is a chat-

315, it was held that a whale caught, killed, and anchored near the shore, was the subject of larceny, though it had somewhat drifted from its moorings.

¹ *R. v. Cheafor*, *supra*, § 871; *R. v. Hunsdon*, 2 East P. C. 611.

² *Supra*, § 870.

³ *R. v. Edwards*, R. & R. 497; *Com. v. Beaman*, 8 Gray, 498; *R. v. Gallears*, *supra*; *State v. Jenkins*, *supra*; *Whart. Cr. Pl. & Pr.* § 209.

⁴ See *R. v. Puckering*, 1 Mood. C. C. 242; *State v. Pollard*, 53 Me. 124.

⁵ *R. v. Gallears*, *supra*. See *Whart. Cr. Pl. & Pr.* §§ 208-9.

⁶ *R. v. Green*, Dears. 323; *R. v. Johnson*, 3 M. & S. 539; *Com. v. Rand*, 7 Metc. 475; *People v. Griffin*, 38 How.

Pr. 475, 1869; *State v. Dill*, 75 N. C. 257, 1876; *Whart. Cr. Pl. & Pr.* § 191; *Archb. Crim. Plead.* (9th ed.) 165. As to distinctive Texas rule, see *Sansbury v. State*, 4 Tex. App. 99, 1878.

⁷ *Whart. Cr. Pl. & Pr.* § 191.

⁸ 2 East P. C. 596; *R. v. Westbeer*, 1 Leach, 12; *R. v. Powell*, 14 Eng. L. & Eq. 575; 2 Den. C. C. 403; 5 Cox C. C. 396. An assignment of a mortgage, duly signed, acknowledged, and ready for delivery, is not before delivery a subject of larceny. *People v. Stevens*, 38 Hun, 62, 1885.

⁹ *Archb. Crim. Plead.* (9th ed.) 165; *R. v. Watts*, 24 Eng. C. L. 573; 2 Den. C. C. 14; 4 Cox C. C. 336; *U. S. v. Bowen*, 2 Cranch C. C. 133; *U. S. v. Carnot*, *Ibid.* 469; *People v. Griffin*, 38

tel;¹ but this has been doubted.² By statutes, however, generally adopted, *choses in action* are recognized as property, and the stealing of them made penal. In what way, under the statutes of the several States, bank notes are to be described, has been examined in another work.³ The mode of proving such averments is also distinctively discussed.⁴

In order, under the statutes, to render bonds, notes, etc., the subjects of larceny, they must be, at the time of taking, legally valid and subsisting securities for the payment of money, or some specific article of value.⁵

How. Pr. 475, 1869; *Moore v. Com.*, 8 Barr, 260, 1848; *State v. Tillery*, 1 N. & McC. 9, 1817; *Culp v. State*, 1 Porter, 38, 1834. Bank notes are not excepted from this category because they are issued by an incorporated bank. *R. v. Murtagh*, 1 Crawf. & Dix, 355; *R. v. Pearson*, 1 Mood. 313; *R. v. Morrison*, 8 Cox C. C. 194; Bell C. C. 158; *Thomasson v. State*, 22 Ga. 499, 1857. But of redeemed bank notes, in the hands of the agents of the bank, larceny under the statute may be committed. *Com. v. Rand*, 7 Metc. 475, 1844; see *State v. Bonwell*, 2 Harring. 529.

"The absurd conclusion," says Sir J. F. Stephen, "that a bank note cannot be stolen rests upon no foundation except a wholly unauthorized extension made by Coke in treating of a different subject, of a case in the year-books, which was itself apparently an invention of the judges in the fifteenth century, resting, moreover, upon a principle which does not apply to documents not relating to land." 3 Steph. Hist. Crim. Law, 144.

¹ *R. v. Boulton*, 1 Den. 508; 2 C. & K. 917.

² *R. v. Kilham*, L. R. 1 C. C. 261; Steph. Dig. Crim. Law, art. 288.

An unstamped written agreement for building cottages, under which work has been, and is being carried on, is not capable of being stolen. *R. v. Watts*, Dears. 326.

A pawnbroker's ticket is, under statute, a warrant for delivery of goods and capable of being stolen. *R. v. Morrison*, Bell C. C. 158; Steph. Dig. art. 286, 359. When a note is effective only in case a title to land is accepted, which the payee was not bound to give nor the maker to take, it is not the subject of larceny. *People v. Hall*, 74 Hun, 96, 1893.

³ Whart. Cr. Pl. & Pr. §§ 168 *et seq.*

⁴ Whart. Crim. Ev. §§ 114 *et seq.* See *State v. Wilson*, 2 Rep. Const. Ct. 495; *State v. Holbrook*, 13 Johns. 90, 1815.

In cases of larceny, questions frequently arise as to the meaning of descriptive terms. These terms are considered in another volume as follows:

"Purporting to be," Whart. Cr. Pl. & Pr. § 167; "Receipt," § 185; "Acquittance," § 186; "Bill of Exchange," § 187; "Promissory note," § 188; "Bank note," § 189; "Treasury note," § 189 *a*; "Money," § 190; "Goods and chattels," § 191; "Warrant order," etc., §§ 192-4; "Deed," § 197; "Obligation," § 198; "Undertaking," § 199; "Guaranty," § 200; "Property," § 201; "Piece of paper," § 202.

⁵ *R. v. Craven*, R. & R. 14; *R. v. Phipoe*, 2 Leach, 673; *R. v. Hart*, 6 C. & P. 106; *R. v. Clark*, R. & R. 181; 2 Leach, 1036; *Wilson v. State*, 1 Porter, 118, 1834; Whart. Cr. Pl. & Pr. §§ 213-17.

§ 879. Must a prosecution for larceny of the prosecutor's signature to negotiable paper fail because it has no value to him? This question has received conflicting answers. No doubt the paper, while in the prosecutor's hands, is of no value. But as at the moment it is taken from his hands he is liable to be sued on it, the better opinion is that it is under the statutes subject of larceny.¹

¹ The authorities are thus accurately classified by Van Syckle, J., in *State v. Thatcher*, 35 N. J. 445, 1872: the notes were valuable securities, but all agreed that if they were not, they were goods and chattels.

"This question has been discussed in cases of larceny where the thing stolen must be of some value to the prosecutor. In *Clark's Case*, (Russell & Ryan C. C. 181) the defendant was indicted under 2 George II. c. 25, for stealing reissuable notes, the property of Large & Son, while in the course of transmission to them after they had been paid. It was held that the drawers could not have any valuable property in their own notes, and the prisoner was convicted only of the larceny of the paper and stamps on which they were written.

"In *Phipoe's Case*, (2 East P. C. 599) some of the judges held that the prosecutor's own note could not be said to be of any value to him; others thought it was of value from the moment it was drawn, but that it never was in the possession of the prosecutor, and that it was obtained by duress, and not by larceny.

"In *Walsh's Case*, (Russell & Ryan C. C. 215) the prisoner was charged with stealing a cheque drawn by the prosecutor, and the objection that the stolen instrument was of no value to the prosecutor, in his own hands, prevailed, and the defendant was acquitted.

"In *Vyse's Case*, (1 Mood. C. C. 218) who was convicted for receiving reissuable notes, knowing them to be stolen, the conviction was sustained. Some of the judges doubted whether

"In *Aickle's Case*, (2 East P. C. 675) the conviction was for the larceny of a bill of exchange drawn by the prosecutor, and accepted by another.

"In *Rex v. Metcalf*, (1 Mood. C. C. 433) this point was directly adjudicated. The defendant having been convicted of the larceny of a cheque drawn by the prosecutor, the judge was induced, by a reference to *Walsh's case*, to reserve for the opinion of the judges the question whether the cheque in the hands of the drawer was of any value to him, and could be the subject of larceny. Lord Denman, C. J., Tindal, C. J., and Justices Gaselee, Bosanquet, Alderson, Williams, and Coleridge, affirmed the conviction, Justice Littledale alone doubting. And in *Heath's Case*, (2 Mood. C. C. 33) which was in all respects like the one last cited, the authority of *Metcalf's case* was acknowledged without a dissenting opinion. The Supreme Court of Alabama (*Wilson v. State*, 1 Porter, 118,) ruled that the prosecutor's own note was not the subject of larceny. In reaching this conclusion, *Phipoe's case* was relied upon by the court, no reference having been made to the later cases of *Metcalf* and *Heath*.

"In *The People v. Loomis*, (4 Denio, 380,) where the defendant was tried for the larceny of a receipt, Justice Beardsley said, 'that, although a re-

§ 880. When there is any question as to the application of a statute to a *chose in action*, a count can be introduced for stealing a piece of paper as a common law larceny.¹ In New York, however, it has been held that the stealing of a letter is not indictable, as it is of no intrinsic value.² And in England the law now seems to be that where a *chose in action* is valid and the stealing of it is indictable by statute, the "piece of paper" is absorbed in it, and the indictment must describe the thing stolen as a *chose in action*. Where, however, the *chose in action* is a nullity, the paper itself may be described.³ At all events, if the *chose in action* be one for stealing which no indictment lies, it is, for this purpose, a nullity, and the "piece of paper" becomes the subject of larceny.⁴

A piece of paper on which is a printed list of names and dates ceipt was the subject of larceny under the New York statute, it must be made effective by being issued or delivered before it can become a valuable private instrument. It must be, when stolen, an evidence of some right in action, or an instrument by which a right or title to real or personal property was in some manner affected.' See, as to *People v. Loomis*, *infra*, §§ 882 *b*, 943.

¹ Thus, in an English case, A. was indicted in one count for stealing a cheque, and in another count for stealing a piece of paper. It was proved that the Great Western Railway Company drew in London a cheque on their London bankers, and sent it to one of their officers at Taunton to pay a poor-rate there. He, at Taunton, gave it to the prisoner, a clerk of the company, to take to the overseer, but instead of so doing he converted it to his own use. It was held by the judges that even if the cheque was void under the 13th section of the statute 56 Geo. III. c. 184, the prisoner might be properly convicted for stealing a piece of paper. *R. v. Perry*, 1 C. & K. 725; s. c. 1 Den. C. C. 69; and for other cases to same effect, see *R. v. Clark*, R. & R. 181; *R. v. Bingley*, 5 C. & P. 602; *R. v. Rodway*, 7 Ibid. 784; *R. v. Vyse*, 1 Mood. C. C. 218. *Infra*, § 954; and see Whart. Cr. Pl. & Pr. § 202; *Wilson v. State*, 1 Porter, 118, 1834. In *R. v. Walker*, 1 Mood. 156, stealing a roll of parchment was held indictable at common law, though it had a record engrossed on it. If it concerned realty, it would be otherwise. *Supra*, § 877.

² *Payne v. People*, 6 Johns. 103, 1810. And see *Moore v. Com.*, 8 Barr, 260, 1847. But in neither of these cases was the question of the larceny of "a piece of paper" put to the court distinctively. In *Payne v. People*, the indictment charged "a piece of paper on which a certain letter" was written; in *Moore v. Com.*, simply a receipt.

³ *R. v. Watts*, 24 Eng. Law & Eq. 573; 2 Den. C. C. 14; 4 Cox C. C. 336; *R. v. Powell*, 14 Eng. Law & Eq. 575; 2 Den. C. C. 403; 5 Cox C. C. 396; *R. v. Green*, Dears. 323; *R. v. Vyse*, 1 Mood. C. C. 218. *Infra*, § 951.

⁴ See *infra*, § 954.

is in like manner subject of larceny.¹ And it is hard to see why, on reasoning given in another volume, even supposing a piece of paper may be in one aspect a *chose in action*, the prosecution may not elect to consider it a piece of paper.² If a promise, for instance, were engraved on a gold ring, could this be a defence to an indictment for stealing the ring?

§ 881. Bank bills, complete in form, but not issued, are the property of the bank, and may be so treated in criminal proceedings for receiving them with knowledge of their having been stolen.³ On the other hand, an incomplete engagement—*e. g.*, an unstamped and undated railroad ticket—is not the subject as such of larceny.⁴

§ 882. Some value must be shown to belong to paper alleged to be stolen;⁵ but this value may be inferentially proved. Thus, in a prosecution for the larceny of a bank note it is not necessary to prove that the note is a genuine one and of some value, by any positive evidence. If the jury shall be satisfied from the evidence that the defendant feloniously stole the bank note, and afterward passed it away as a genuine note, the defendant has, by those acts, precluded himself from calling on the prosecution for further proof of the paper being genuine and valuable.⁶ But on the trial of an indictment for stealing foreign bank bills, when such passing is not proved, it is incumbent upon the prosecutor to produce at least *prima facie* evidence of the existence of such banks and of the genuineness of the bills.⁷

Evidence that bills of the same kind have been received and passed away in the ordinary course of business, as part of the

¹ *State v. James*, 58 N. H. 67, 1877. Books containing a phonographic report of the testimony taken upon trial and having no value except for such report are subjects of larceny, and their value to the person who can use the testimony is the proper standard of value. *People v. McGrath*, 5 Utah, 525, 1888.

² Whart. Cr. Pl. & Pr. § 471.

³ *People v. Wiley*, 3 Hill, 194, 1842. See *R. v. Ranson*, R. & R. 232; 2 Leach, 1090, 1093; *R. v. Vyse*, 1 Mood. C. C. 218. As to stolen goods, see *infra*, § 900 b.

⁴ *State v. Hill*, 1 Houst. C. C. 420, 1874; *McCarty v. State*, 1 Wash. St. 377, 1890. And see *State v. Musgang*, 51 Minn. 556, 1892.

⁵ See *infra*, §§ 951 *et seq.*; *U. S. v. Nott*, 1 McLean, 499, 1839.

⁶ *Com. v. Burke*, 12 Allen, 182, 1866; *Cummings v. Com.*, 2 Va. Cas. 128, 1818. *Infra*, § 955.

⁷ *People v. Caryl*, 12 Wend. 547, 1834; but see *Johnston v. People*, 4 Den. 364, 1847; *People v. Jackson*, 8 Barb. 637, 1850. *Infra*, § 955; and see Whart. on Ev. § 1290.

currency of the country, would be proof of value. But the fact that a witness for the prosecution, a broker, had exchanged the bills alleged to have been stolen, and given other money for them, after the larceny, he not speaking of any former knowledge of such bills, or expressing any belief as to their genuineness, has been held to be no evidence that the bills were genuine.¹

§ 882 a. Though the circulation of the bills of the banks of other States is prohibited, and they are declared by local law to be worthless, yet in the hands of a *bonâ fide* holder they are property, and may be the subject of larceny.² The same rule has been laid down in respect to the stealing of warehouse receipts issued without authority by a railroad company.³

Articles
illegal or
contraband
may be
subjects of
larceny.

Money acquired by the illegal sale of intoxicating liquors may nevertheless be the subject of larceny from the possessor,⁴ and so as to the liquor itself.⁵

Nor does the fact that particular articles are used for gaming purposes change the law. Thus larceny lies for stealing gaming materials.⁶ So it is larceny to steal things stolen by the thief.⁷

The question whether goods and chattels include securities has been distinctively discussed.⁸

¹ Johnson v. People, 4 Den. 364, 1847. and in another, as "pieces of paper," the goods and chattels of the prosecu-

² Starkey v. State, 6 Ohio St. 266, 1833. As to parallel case of forgery, see *supra*, §§ 698-9. As to papers actually valueless, see *infra*, § 882 b. tor, and it appeared that the notes had been paid in London, and were in the possession of a partner of the firm, who was taking them to the country

³ State v. Loomis, 27 Minn. 521, 1881. to be reissued, when they were stolen.

⁴ Com. v. Rourke, 10 Cush. 397, 1852; Com. v. Smith, 129 Mass. 104, 1880; State v. May, 20 Iowa, 305, 1865. The judges held that they were properly described in the indictment as goods and chattels; but some of the

⁵ Com. v. Coffee, 9 Gray, 139, 1857. judges doubted whether they were

⁶ Bales v. State, 3 W. Va. 685, 1869. valuable securities within the mean-

⁷ *Infra*, § 945. That it is so as to embezzlement, see *infra*, §§ 1025, 1035, 1038. ing of the statute 8 Geo. IV. c. 29, s. 5. R. v. Vyse, 1 Mood. C. C. 218. The halves of notes, if stolen, should

⁸ Whart. Cr. Pl. & Pr. §§ 168-191. be described as goods and chattels. *Supra*, § 848. R. v. Mead, 4 C. & P. 535. It seems,

Additional English cases may be here noticed. In one of them the defendant was indicted for receiving certain country bankers' notes; and the indictment in one count charged these notes as "valuable securities," however, that a security which is in full force, as an uncanceled bond or note, does not in England fall under the head of "goods and chattels." R. v. Powell, 14 Eng. Law & Eq. 575; 2 Den. C. C. 403. See § 879.

§ 882 *b*. If the instrument stolen be one on which a claim could under no circumstances at any time be maintained, then even under a statute designating such instrument, it is not the subject of larceny. Thus, where a debtor procured his creditor to sign a receipt for the debt, under the pretence that he was about to pay him, and then took it from him with a criminal intent, and without paying the money, it was held that he was not guilty of larceny, the receipt never having taken effect by delivery, and being therefore worthless.¹ But the mere fact that the instrument is one which by the local law cannot be sued on, or that the thing stolen is held for an illegal purpose, does not take from such paper or thing its larcenous character.²

An instru-
ment of no
value not
larcenous.

II. INTENT.

§ 883. To constitute larceny, it is necessary that the goods should be taken feloniously, without the owner's consent. Hereafter we will consider what the law is when such consent is obtained by fraud.³ Under the present head we limit ourselves to inquiring what "feloniously," or "felonious intent," in this sense means. For it should be remembered that every taking of the property of another, without his knowledge or consent, does not amount to larceny. To make it such it must be accompanied by circumstances which demonstrate a "fraudulent or felonious" intention to deprive the possessor permanently of the thing taken.⁴ This "fraudulent" or "felonious"

Intent
must be to
deprive
possessor
perma-
nently of
thing taken

¹ *People v. Loomis*, 4 Den. 380, 689, 1834; *State v. Fisher*, 70 N. C. 78, 1847, cited *supra*, § 879; *infra*, § 943, 1874; *State v. Watson*, 7 S. C. 67, 1875; and cases there cited. See *Bork v. State v. Hawkins*, 8 Porter, 461, 1839; *People*, 91 N. Y. 18, 1883; *Moore v. Williams v. State*, 44 Ala. 396, 1870; *Com.*, 8 Barr, 260, 1848.

² *Supra*, § 882 *a*.

³ *Infra*, § 964.

⁴ *R. v. Holloway*, 2 C. & K. 942; 1 Den. C. C. 370; *T. & M.* 40; *R. v. Godfrey*, 8 C. & P. 563; *R. v. Deering*, 11 Cox C. C. 298; *R. v. McGrath*, L. R. 1 C. C. 205; *Adams v. State*, 45 N. J. L. 448, 1883; *Gardner v. State*, 55 N. J. L. 17, 1892; *Smith v. Shultz*, 1 Scam. 400, 1839; *Phelps v. People*, 55 Ill. 334, 1870; *Hart v. State*, 57 Ind. 102, 1877; *Umphrey v. State*, 63 Ibid. 223, 1878; *Robinson v. State*, 113 Ind. 510, 1887; *Blunt v. Com.*, 4 Leigh, 689, 1834; *State v. Fisher*, 70 N. C. 78, 1847; *State v. Watson*, 7 S. C. 67, 1875; *State v. Hawkins*, 8 Porter, 461, 1839; *Williams v. State*, 44 Ala. 396, 1870; *Johnson v. State*, 73 Ibid. 525, 1883; *Witt v. State*, 9 Mo. 671, 1846; *Long v. State*, 11 Fla. 295, 1867; *State v. Rivers*, 60 Iowa, 381, 1882; *Hite v. State*, 9 Yerg. 198, 1835; *Fulton v. State*, 13 Ark. 168, 1852; *Gooch v. State*, (Ark.) 28 S. W. Rep. 510, 1894; *People v. Dumar*, 106 N. Y. 502, 1887; *Johnson v. State*, 36 Tex. 375, 1871; *Landin v. State*, 10 Tex. App. 63, 1881; *Wolf v. State*, 14 Tex. App. 210, 1883; *Hall v. Com.*, 78 Va. 678, 1884. See *State v. Gaither*, 72 N. C. 458, 1875. *Infra*, §§ 961, 967. That

intent (and the terms are used often convertibly) is an intent, without an honest claim of right, and with the expectation of benefit to self, to take permanently from another goods which are his property. This intent must be concurrent with the taking, which must be without the owner's consent.¹

§ 884. The *intent* being necessary to complete the offence, if a man, under the honest impression that he has a right to the property, take it into his possession, it is not larceny,² if there be a colorable title.³ If, for instance, the sheep of A. stray into the flock of B., and B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowl-

Taking under an honest claim of right is not larceny.

when there are no disputed facts, intent is for the court, see *Johnson v. State*, 73 Ala. 523, 1883.

In *State v. Fenn*, 41 Conn. 590, 1874, an officer of a bank, with which a note of the defendant had been left for collection, called on the defendant with the note for payment. The defendant asked to be allowed to see the note, and on its being handed to him walked out of the room with it, and secreted or destroyed it. It was held that the court below properly charged the jury, that if the defendant obtained possession of the note with felonious intent, the act was theft.

It is not essential that the defendant should intend to appropriate the property to his own use permanently. *State v. Ward*, 19 Nev. 297, 1886.

¹ *Ibid.* and cases cited *infra*, §§ 884 *et seq.*

² *R. v. Hall*, 3 C. & P. 409; *R. v. Halford*, 11 Cox C. C. 88; *Merry v. Green*, 7 M. & W. 623; *People v. Burton*, 1 N. Y. Cr. R. 297, 1882; *People v. Schultz*, 71 Mich. 315, 1888; *State v. Barrackmore*, 47 Iowa, 684, 1878; *McDaniel v. State*, 8 Sm. & M. 401, 1847; *Witt v. State*, 9 Mo. 671, 1846; *State v. Conway*, 18 Ibid. 321, 1853; *State v. Deal*, 64 N. C. 270, 1870; *Newton Co. v. White*, 63 Ga. 697, 1879; *Causey v. State*, 79 Ga. 564, 1887; *Morningstar v.*

State, 55 Ala. 148, 1876; *Morningstar v. State*, 59 Ibid. 30, 1877; *State v. Thomas*, 30 La. An. 600, 1878; *Herber v. State*, 7 Tex. 69, 1851; *Kay v. State*, 40 Ibid. 29, 1874; *Smith v. State*, 42 Ibid. 444, 1875; *Neely v. State*, 8 Tex. App. 64, 1880; *Sisk v. State*, 9 Ibid. 246, 1880; *Sigler v. State*, Ibid. 427, 1880; *Baker v. State*, 17 Fla. 406, 1870; *People v. Devine*, 95 Cal. 227, 1892; *infra*, § 899. This, however, does not apply to a claim founded on an illegal usage. *Com. v. Doane*, 1 Cush. 5, 1848. But a person gleaning corn, erroneously believing he has a right to do so, is not guilty of larceny. *Steph. Dig. Crim. Law*, citing 2 Russ. on Cr. 164-5.

B., a gamekeeper, takes snares set by A., a poacher, and a dead pheasant caught therein. A., honestly believing that the snares and pheasant were his property, and that he had a legal right to them, forces B., by threats, to return them. This is not robbery, and, if no violence were used, would not be theft. *R. v. Hall*, 3 C. & P. 409 (*supra*, § 853), cited *Steph. Dig. ut supra*.

³ *Evans v. State*, 15 Tex. App. 31; 1883; *State v. Homes*, 17 Mo. 379, 1852. But *quære*, Does a mere claim of right to the thing itself exclude larceny, if there is no such claim of right to do the act by which it is obtained? *State v. Caddle*, 35 W. Va. 73, 1891.

edge of their being the sheep of another.¹ If, under color of arrear of rent, although none be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony.² If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be.³

The same rule applies when a person sells property in his possession which he believes he owns,⁴ or which he believes he is authorized to sell.⁵

We may therefore conclude⁶ that where property is taken under a claim of right, if this claim be *bonâ fide* and fair,⁷ the court should direct an acquittal;⁸ for though the reason given by Mr. East, that "it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy,"⁹ does not now hold good here, so far as concerns capital punishment, there is a manifest impropriety, under a penal system, of trying in a criminal court a question of property, which it is the intention of the legislature to relieve from the incidents of imprisonment.¹⁰ But it is no defence, as we have already seen,¹¹ that the party from whom the article in question was taken had no legal title to retain it.¹²

Whether there was a claim of right may be determined by the declarations of the claimant made when he was charged with the offence.¹³

¹ 1 Hale, 506; *Hall v. State*, 34 Ga. 208, 1865. And so if the original taking was negligent. *R. v. Riley*, 6 Cox C. C. 88; cited *infra*, § 886.

² 1 Hale, 509. See *infra*, § 1194.

³ 1 Hale, 509. And see *R. v. Hall*, 3 C. & P. 409; *Com. v. Doane*, 1 Cush. 5, 1848.

⁴ The prisoner's wife hired a bedstead at 1s. per week, and within a fortnight afterward the prisoner sold it to a broker, his wife being present at the sale. Two days after the sale the wife paid 1s. for a week's hire, being all that was paid. There was no evidence that the prisoner knew that the bedstead had only been hired. It was held that a conviction for larceny could not be sustained. *R. v. Halford*, 11 Cox C. C. 88. Where one sells and delivers an animal to one person, and then, without repurchasing it, sells and delivers it to another, he is guilty

of larceny. *Hooper v. State*, (Tex.) 25 S. W. Rep. 966, 1894. And see *Dale v. State*, 32 Tex. Cr. Rep. 78, 1893.

⁵ *State v. Barrackmore*, 47 Iowa, 684, 1878.

⁶ *Supra*, § 883.

⁷ That this condition is essential, see *State v. Bond*, 8 Iowa, 540, 1859.

⁸ See *Littlejohn v. State*, 59 Miss. 273, 1881; *Johnson v. State*, 41 Tex. 608, 1874; *Seymour v. State*, 12 Tex. App. 391, 1882.

⁹ The same reason is given in 3 Greenleaf Ev. § 157.

¹⁰ See, to same effect, 2 Russ. on Cr. 11; 1 Hale, 506; *Evans v. State*, 15 Tex. App. 31, 1883.

¹¹ *Supra*, §§ 882 a; *infra*, § 945.

¹² 1 Hale, 509; *State v. May*, 20 Iowa, 305, 1865. See *supra*, § 882 a.

¹³ Whart. Crim. Ev. §§ 272, 693, 761; *Childress v. State*, 10 Tex. App. 698, 1881.

§ 884 *a*. Taking in order to force the payment of a debt may be larceny when the intention is to deprive the owner permanently of his property in case the debt is not paid.¹ It is otherwise when the taking is in pursuance of an honest claim of title.² Nor, when the object is not to defraud, but to obtain a just settlement, can there be held to be such a fraudulent intent as will sustain a conviction.³

That the taking was to pay debt may be no defence.

§ 885. Taking goods, not with the intention of depriving the owner of his property in them, but with the object of temporarily using them and then returning them, is not larceny.⁴ Hence where a master's horse is taken by his servant without his knowledge, and brought home again;⁵ where a servant, to escape from servitude, rides off on his master's horse, and leaves it on the way, not intending to appropriate the horse;⁶ where a person takes a horse, with intent to abandon it after a short use,⁷ or to return it, merely to carry off more conveniently goods he has stolen;⁸ where goods are taken, not with intent to steal, but simply to induce the owner, a woman, to visit, with a view to sexual intercourse, the defendant's rooms;⁹ where a man takes his neighbor's plough that is left in the field, uses it upon his own land, and then returns it; where an execution debtor takes some of his goods from the sheriff, leaving enough to satisfy the execution;¹⁰ these may be trespasses, but are not felonies, because the returning the thing taken with other facts show that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use.¹¹ It is true that where the original

Taking merely for temporary use, is not larceny.

¹ See *Com. v. Stebbins*, 8 Gray, 492, 1857; *People v. Smith*, 5 Parker C. R. 490, 1863. *Cf.* *Johnson v. State*, 73 Ala. 523, 1883.

² *Supra*, § 884; *R. v. Hemmings*, 4 F. & F. 50. *Supra*, §§ 846, 848, 859.

³ *Infra*, § 1197.

⁴ See cases cited in notes to this section, and to § 886; and see *R. v. York*, 1 Den. C. C. 335; *T. & M.* 20; *s. c.* under name of *R. v. Yorke*, 2 C. & K. 841; *Keely v. State*, 14 Ind. 36, 1859; *People v. Brown*, (Cal.) 38 Pac. Rep. 518, 1894. *Infra*, §§ 906, 909.

⁵ *State v. Self*, 1 Bay, 242, 1792. See *R. v. Crump*, 1 C. & P. 658; *R. v. McMakin*, R. & R. 333 *n*.

⁶ *State v. York*, 5 Harring. 493, 1850; *Whart. Confl. of Laws*, § 968.

⁷ *Dove v. State*, 37 Ark. 261, 1881. See *R. v. Van Muyen*, R. & R. 118; *State v. Shermer*, 55 Mo. 83, 1874; *People v. Flynn*, 7 Utah, 378, 1891.

⁸ *R. v. Crump*, 1 C. & P. 658.

⁹ *R. v. Dickinson*, R. & R. 420.

¹⁰ *Com. v. Greene*, 111 Mass. 392, 1873.

¹¹ See, also, *State v. Ware*, 62 Mo. 597, 1876. Where a party removed a valuable article, part of a wreck, from a wharf on which it had been placed, and had taken it into his own house, and had afterward denied the possession of it; it was held, that the ques-

taking was wrongful, there a subsequent felonious intent makes the offence larceny in all cases in which there is concurrent with such intent, though subsequent to the taking, a fraudulent conversion or transmutation of the goods.¹ This has been held to be the case where a man, driving away a flock of lambs, negligently took a lamb belonging to a third party, and then, upon subsequently finding out the fact of the true ownership, fraudulently converted the lamb to his own use, taking it from the rest of the flock.² But to constitute larceny from an owner who is or could be known, there must be a fraudulent intent when possession is obtained;³ and unless this be the case, no subsequent harboring of such intent can be larceny.⁴ "If," so in another phase of this rule stated, "a man takes away the goods of another openly before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of a trespass, because done openly in the presence of the owner, or of other persons who are known to the owner."⁵

§ 886. We may therefore conclude that mere borrowing, without fraudulent intent, is not larceny.⁶ "If we were to hold," said Lord Denman, "that wrongfully borrowing a thing for a time, with an intention to return it, would constitute a larceny, many very venial offences would be larcenies."⁷ As a rule, to constitute larceny, it is essential that there

tion for the jury was, whether at the time he originally took it he meant to steal it for his permanent use. *R. v. 53.*

Hore, 3 F. & F. 315.

¹ *State v. Coombs*, 55 Me. 477, 1867; *Richards v. Com.*, 13 Gratt. 803, 1857; *Beatty v. State*, 61 Miss. 18, 1883; and *infra*, §§ 900, 964. For "wrongful," as in the text, Sir J. F. Stephen substitutes

"an actionable wrong." Dig. art. 303.

² *R. v. Riley*, 14 Eng. Law & Eq. 545; 6 Cox C. C. 88; 1 Dears. C. C. 149. See *infra*, §§ 901, 958.

³ *R. v. Leigh*, 2 East P. C. 694; *R. v. Mucklow*, 1 Mood. C. C. 160; *R. v. Box*, 9 C. & P. 126; *R. v. Glass*, 1 Den. C. C. 215; 2 C. & P. 395; *Wilson v. People*, 39 N. Y. 459, 1868; *Booth v. Com.*, 4 Gratt. 525, 1848; *Shinn v. Com.*, 32 Ibid. 899, 1880; *State v. Wood*, 46 Iowa, 116, 1877. See, for other cases, *infra*, § 963. That when the party taking goods is so drunk as

⁴ See *infra*, § 966; *R. v. Mucklow*, 1 Mood. C. C. 160, cited *supra*, § 166; *Watkins v. State*, 60 Miss. 323, 1882; *Dow v. State*, 12 Tex. App. 343, 1882. But see *State v. Davenport*, 38 S. C. 348, 1892.

⁵ 2 Russ. on Cr. (9th ed.) 158, reduced from Hale P. C. 509, and approved in *Johnson v. State*, 73 Ala. 523, 1883.

⁶ Steph. Dig. Crim. Law art. 306; 1 Hale P. C. 509; *R. v. Phillips*, 2 East P. C. 662; *R. v. Addis*, 1 Cox C. C. 78; *R. v. Guernsey*, 1 F. & F. 394; *State v. Shermer*, 55 Mo. 83, 1874; *Stokely v. State*, 24 Tex. App. 509, 1887.

⁷ *R. v. Holloway*, 2 C. & K. 942; s. c. 1 Den. C. C. 370; T. & M. 40, per Lord Denman, C. J.; a case where it was held not to be larceny to carry some dressed skins to another part of

should be an intent to deprive the owner *permanently* of his property. But if the original intent were fraudulent, then, on conversion, the larceny is complete.¹

§ 887. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; and such evidence may be overcome by proof of an original intent to defraud. And whenever it appears that the goods were taken with the intention of depriving the owner of them, and appropriating them to the taker's own use, his afterward returning them will not purge the offence.² And although it has been held that taking with intent to pawn and return is not larceny,³ yet if the goods were fraudulently obtained, with the intent to pawn without the means of redeeming, this is larceny.⁴ Nor does paying for stolen goods constitute a defence.⁵

Returning
or paying
for goods
does not
purge
guilt.

a warehouse, and there to claim pay for work falsely pretended to have been done on them. But see *R. v. Richards*, 1 C. & K. 532. *Supra*, § 885.

¹ *Supra*, § 885; *infra*, § 963; and, also, *State v. South*, 4 Dutch. 28, 1859; *Starkie v. Com.*, 7 Leigh, 752, 1836; *Richards v. Com.*, 13 Gratt. 803, 1857; *State v. Bryant*, 74 N. C. 124, 1876; *Fields v. State*, 6 Cold. 524, 1869; and other cases cited *supra*, § 885. As to taking with intent to return for reward, see *infra*, § 906. As to combination of motives see *supra*, § 119.

² See 1 Hawk. c. 34, s. 2; *R. v. Phetheon*, 9 C. & P. 552; *Eckels v. State*, 20 Ohio St. 508, 1870; *State v. Scott*, 64 N. C. 586, 1870; *State v. Bolander*, 71 Iowa, 706, 1886; *Boze v. State*, 31 Tex. Cr. 347, 1892. *Supra*, § 862.

³ *R. v. Wright*, 9 C. & P. 554, note; cited *infra*, § 900.

⁴ *R. v. Trebilcock*, 7 Cox C. C. 408; *Dears. & B. C. C.* 453; *R. v. Phetheon*, 9 C. & P. 552 (in which *R. v. Wright*, *ut supra*, is criticised by the reporter); *State v. Coombs*, 55 Me. 477, 1867; *Com. v. Coe*, 115 Mass. 481, 1874; *Fields v. State*, 6 Cold. 524, 1869. *Supra*, § 119.

In an early case, it was proved that the defendants took two horses out of the prosecutor's stables at night, without his leave, and having rode them about thirty miles left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken on the same day, at the distance of fourteen miles from the inn, walking in a direction from it; the jury found the defendants guilty, but at the same time found, specially, that the defendants meant merely to ride the horses the thirty miles, and to leave them there, without an intention to return for them, or otherwise dispose of them; and ten of the judges held that this was no felony, as there was no intention in the prisoners to change or appropriate the property. *R. v. Phillips*, 2 East P. C. 662.

⁵ *Trafton v. State*, 5 Tex. App. 480, 1879. See *infra*, § 907. But taking a saddle on the pretence of going hunting and leaving more than sufficient property to pay for it, directing this to be done, was held not larceny. *Beckham v. State*, (Tex. Cr. App.) 22 S. W. Rep. 411, 1893.

§ 888. Suppose A. goes to B., and says, "I am C., sell me these goods," and B. delivers the goods to A., believing A. to be C., this being an essential incident of the contract; does any property pass to A.? The better view is in the negative, there being no contract between A. and B.¹ If this be correct, then it is larceny in A. to take goods on this false personation; though there are authorities to the effect that the case is not larceny but false pretences.² If the pretence be, not false personation, but false statement of means, then, as there is a contract of sale, the case is false pretence and not larceny.³ And where A. says, "I am sent by C. to carry the goods to him," which is false; and thus obtains only *possession* of the goods; this is larceny in cases in which B. intends to part only with the *possession* of the goods to A.⁴ But here we encounter a subordinate distinction. Suppose A., pretending to be C., goes to B. and fraudulently obtains from B. certain goods of C., which are in B.'s hands as bailee. Is this larceny? It certainly is, because B. has no intention of passing the property in the goods to A.; or to any one; he (B.) considering himself to have no property in the goods to pass.⁵ This dis-

Buying by false pretence is not larceny; but otherwise when only *possession* of the goods, but not the property, is obtained by the false pretence. False personation.

¹ Pollock on Cont. 408; Benj. on say, L. R. 3 Ap. Cas. 459; aff. Lindsay Sales, 47, 324; Boulton v. Jones, 2 v. Cundy, L. R. 2 Q. B. D. 96; Hard-H. & N. 564; R. v. Little, 10 Cox C. man v. Booth, 1 H. & C. 803; Moody C. 559; R. v. Gillings, 1 F. & F. 36; v. Blake, 117 Mass. 23, 1815; Barker v. Com. v. Lawless, 103 Mass. 425, 1870; Dinsmore, 72 Pa. 427, 1872; State v. State v. Brown, 25 Iowa, 561, 1868. Brown, 25 Iowa, 561, 1868; State v. Lindenthal, 5 Rich. 237, 1851; Harris

² R. v. Atkinson, 2 East P. C. 673; R. v. State, 81 Ga. 758, 1888. *Infra*, v. Adams, 1 Den. C. C. 38; Williams §§ 966, 1142.

³ R. v. Atkinson, 2 East P. C. 673; R. v. State, 81 Ga. 758, 1888. *Infra*, v. Adams, 1 Den. C. C. 38; Williams §§ 966, 1142.

⁴ R. v. Thompson, L. & C. 233; 9 Cox C. C. 222, and other cases cited *infra*, §§ 915, 965. See article in London Law Times, Jan. 28, 1881, p. 220. Where goods were bought with a worthless Confederate bill, this was held to be larceny, though no false statement was made as to the character of the bill. Fleming v. State, 136 Ind. 149, 1893.

⁵ R. v. Gillings, 1 F. & F. 36; R. v. Hench, R. & R. 163; Cundy v. Lind-

⁶ *Infra*, § 916. R. v. Robins, Dears. C. C. 418; R. v. Wilkins, 2 East P. C. 673; R. v. Longstreeth, 1 Mood. C. C. 137. These distinctions are swept away in New York by § 528 of the Penal Code of 1882, which includes larceny, embezzlement, and obtaining property by false pretences under one general definition with the title of larceny. And see State v. Goode, 68 Iowa, 593, 1885. How far it will be possible to work a system which includes under one definition stealing and cheating, offences which all jurists have heretofore regarded as distinct, remains to be seen.

inction has been vindicated in Massachusetts in the following case: "Sanderson had left his watch at a watchmaker's to be repaired, and the defendant went to the shop, pretending to be Sanderson, asked for the watch, paid for the repairing, and took the watch with a felonious intent." "These acts," said Chapman, J., "constitute larceny at common law. The case is like that of *Rex v. Longstreeth*, 1 Mood. C. C. 137. The defendant in that case went to a carrier's servant, and obtained from him a parcel by falsely pretending to be the person to whom it was directed. It was held to be a larceny, because the servant had no authority to deliver it to him, so that no property passed to him, but the mere possession feloniously obtained. So in this case the watchmaker had no authority to deliver the watch to the defendant, and the latter obtained no property in it, not even the qualified property of a bailee, but a mere felonious possession, which is the essence of the crime of larceny."¹

§ 889. To seize a weapon in supposed self-defence is not larceny, though the person so taking, afterward, from a fraudulent subsequent purpose, converts the weapon to his own use.²

Seizing
weapon in
self-de-
fence is not
larceny.

§ 890. The same rule applies to taking by a soldier, recognized as part of a hostile belligerent army.³

And so of
taking by
a bellige-
rent.

§ 891. It depends upon circumstances what offence it is to force a man in the possession of goods to sell them. If the defendant take them and throw down more than their value, this will be evidence that it was only trespass; if less were offered, it would probably be regarded as felony.⁴ And consent obtained by threat is no defence.⁵

Whether
force sale
is larceny
depends
upon
circum-
stances.

§ 892. Taking the wrong thing and dropping it is not larceny. Thus, if a man searches the pocket of another for money and finds none, and afterward throws the saddle from his horse to the ground

¹ *Com. v. Collins*, 12 Allen, 181, 1866. ² *R. v. Holloway*, 5 C. & P. 524; U. See, also, *Com. v. Lawless*, 103 Mass. S. v. *Durkee*, 1 McAllist. 196.

425, 1870. There is a statute in Massa- ³ Whart. Confl. of L. § 911; *Com. v. chusetts* making the obtaining of Holland, 1 Duv. 182, 1863; *Hammond goods by false personation larceny*, v. State, 3 Cold. 129, 1866. *Infra*, but the first, if not the second, of § 1799.

these decisions is based on the com- ⁴ *Burrows v. Wright*, 2 East R. 615. mon law. See, also, *Com. v. Whit- Supra*, § 848; *infra*, §§ 915, 971, 976. man, 121 Mass. 361, 1876; and Sir J. ⁵ *R. v. Lovell*, L. R. 8 Q. B. D. 185; F. Stephen's remarks, *infra*, § 1009. 44 L. T. (N. S.) 319. *Infra*, § 915.

and scatters bread from his packages, he will not be guilty of larceny,¹ though he might certainly have been indicted for feloniously assaulting with an intent to steal, for that offence was complete.

Taking the wrong thing and dropping it is not larceny.

§ 893. Larceny, also, is not constituted by a taking by mere accident, or mistaking another's property for one's own.² The same may be said of taking by way of joke.³ Thus, in a New York case the evidence was that the defendant, with some

Nor is taking by accident or in joke

friends, stopped at A.'s house in the daytime, and asked A.'s daughter for a drink of cider, offering to pay for it. She refused it to him, whereupon he opened the cellar-door and drew some cider in the cellar, he having been previously permitted to do this, though forbidden at this time. It was held that this, though a trespass, was not larceny.⁴

§ 894. It is said that if one man take another man's corn or hay and mingle it with his own corn or hay; or take another man's cloth and embroider it with silk or gold, such other person may retake the whole heap of corn, or cock of hay, or garment and embroidery also; and this retaking is no felony, nor so much as a trespass.⁵ And this has been extended to a case where a man seizes a note given by him in his creditor's hands, on the ground that no title had been made to him of the land for which the note was given.⁶

Nor is retaking one's own goods.

§ 895. We now approach a question as to which there has been a conflict of authority both ancient and modern. Can the taking of the goods of another be larceny when there is no intention on the part of the taker to reap any advantage from the taking? In other words, is it essential to constitute larceny that it should be *lucri causa*?

To larceny *lucri causa* is essential. Roman law.

In answering this question, we are at the outset met by the fact that in all jurisprudences a broad distinction is recognized between a taking with the expectation of benefit and a taking without such expectation. The first has two great elements: the deprivation of another of his property, and the gain of such property for self.

¹ 2 East P. C. 662. But where a (6th Am. ed.) 8. See *People v. Walker*, coat was feloniously taken in the 88 Mich. 156, 1878.

pocket of which was a watch which the thief was not aware of at the time, but afterward appropriated, this was larceny of the watch. *Stevens v. State*, 19 Nebr. 647, 1886.

² Hale, 507, 509; 2 Russ. on Cr.

³ See *Devine v. People*, 20 Hun, 98, 1880.

⁴ *McCourt v. People*, 64 N. Y. 583, 1876.

⁵ 1 Hale, 513.

⁶ *State v. Deal*, 64 N. C. 270, 1870.

This is a serious crime in any aspect, and as such should be highly punished. On the other hand, taking the goods of another, without the expectation of any benefit to sell, may or may not be a high crime. It may be from mere joke, as sometimes occurs when books or clothes are hid from their owners. It may be to prevent some supposed public mischief, as when barrels of whiskey are opened and emptied in the streets, or boxes of tea cast into the sea,¹ or arms are seized by a vigilance committee.² Or it may be from spite to the owner, as when animals are carried away and disfigured or killed. Grave as these offences may be, they all lack the element of expectation of gaining for one's self what is taken from another; they are simply taking from another without gaining for self. The Roman law, whose justice in this respect was appealed to by Lord Mansfield, expressly took this distinction: "*Furtum est contrectatio rei fraudulosa, lucri faciendi gratia, vel ipsius, rei, vel usus ejus possessionisve.*"³ This definition is accepted by the Code Napoléon, and will be recognized as substantially that of the old English common law. The North German Code varies but slightly. "Larceny" (Diebstahl) "is the unlawful and intentional taking (Wegnahme) of another's goods from his control, with the intent to appropriate the same to self" (in der Absicht sich dieselbe anzueignen). This definition is adopted by the codes of Saxony, Bavaria, Austria, and Wurtemberg.⁴ Nor is this because these jurisprudences do not recognize malicious taking not *lucri causa* as an offence. They do so, and specifically provide for its punishment. But the punishment is lighter than that assigned to the taking *lucri causa*, and the crime regarded as of a less heinous grade, no doubt for the same reason that by the English common law malicious mischief is but a misdemeanor, while larceny, *lucri causa*, is a felony. And in this concurrence of all old if not of all the modern codes we may find the expression of a position existing in right reason, namely, that taking *from another for self* is an offence of a more flagrant type, and more perilous to society, than is simply taking *from another*.⁵

¹ Even to the hard tone of English temper at the time of the Boston tea tumult, this appeared simply a riot. There was no attempt to prosecute for larceny.

² See *U. S. v. Durkee*, 1 McAll. 196, 1855.

³ L. 1. § 8. D. de furtis.

⁴ See Berner, *Lehrbuch des Strafrechts* (1871), § 160.

⁵ That such an offence is indictable as malicious mischief, see *infra*,

§ 896. That this was the English common law, as accepted originally in the American colonies, there can be no question. The qualification *lucri causa* was a part of most of the old definitions of larceny; and repeatedly was it decided that unless a taking was with the expectation of advantage to the taker it was not larceny.¹ It is true that *lucri causa* was explained in a broad sense. It was considered to be convertible with "benefit to self;" and hence it was held larceny where a woman took and burned a letter whose contents she feared would do her injury;² where an article was taken with the intention of giving it away, for the reason that before it was given away the taker was to have it for himself;³ and where a post officer secreted a letter in order to escape a penalty incurred by him for its prior non-delivery.⁴ But *lucri causa* was regarded in the earlier cases as in some shape a necessary constituent of larceny.⁵

¹ See *R. v. Holloway*, 1 Den. C. C. 370; 2 C. & K. 942; T. & M. 40, explained *supra*, § 886.

² *R. v. Jones*, 2 C. & K. 236; 1 Den. C. C. 188. (*Infra*, § 9166.) "With regard to larceny," said Lord Campbell, C. J., in a remarkable case hereafter cited (*R. v. Garrett*, 22 Eng. Law & Eq. 607; 6 Cox C. C. 260; Dears. Ibid. 232; *infra*, §§ 1202-3, 6), "we must always see that in the act alleged to constitute the offence the person committing had some advantage, not necessarily a pecuniary advantage, but the gratification of some wish; otherwise it would not be larceny."

In *R. v. Godfrey*, 8 C. & P. 563, it was held that opening and keeping a letter from mere curiosity was not larceny. See cases cited *infra*, § 966.

³ *R. v. White*, 9 C. & P. 344. *Berner*, in justifying this, declares that it was technically larceny even according to the Roman law, in *St. Crispin*, to take, as he is reported to have done, the leather of the rich to make shoes for the poor; for there was a moment, between the taking and the making, when the saint had the leather to himself.

⁴ *R. v. Wynn*, 1 Den. C. C. 365; 2 C. & K. 859. Stealing and selling property and then destroying it to prevent detection is larceny; the act was for the defendant's benefit. *Stegall v. State*, 32 Tex. Cr. 100, 1893.

⁵ Among the illustrations given by Sir J. F. Stephen (*Dig. Crim. Law*, art. 206) are the following:

A., a servant, gets B.'s letters from the post-office and destroys one of them written to B. by C., A.'s mistress, making inquiries of B. as to A.'s character, delivering the rest. A. steals the letter. *R. v. Jones*, 1 Den. C. C. 188.

A., a puddler, throws an iron axle into his furnace in order to increase the apparent amount of iron puddled therein, on which A.'s wages depend. The axle, worth 7s., is destroyed, though the iron of which it is composed, and which is much less valuable, remains for the owner. A. has stolen the axle. *R. v. Richards*, 1 C. & K. 532.

B. uses many bags in his trade, and is supplied with them by C. A., B.'s servant, takes old bags, supplied by C. to B. from B.'s house, and puts

§ 897. The first case in which this doctrine was invaded is the following: A., to screen his accomplice, who was indicted for horse-stealing, broke into the prosecutor's stable, and took away the horse, which he backed into a coal-pit and killed; it being objected at the trial that this was not larceny, because the taking was not with the intention to convert the horse to the use of the taker, *animo furandi et lucri causa*, seven of the judges held that it was larceny; and six of that majority expressed their opinion that, to constitute larceny, if the taking were fraudulent, and with intent wholly to deprive the owner of the property, it was not essential that it should be *lucri causa*; but some of the majority thought that the object of the prisoner might be deemed a benefit to him, and the taking *lucri causa*.¹ Certainly, as it appeared that the defendant was to be greatly benefited by his accomplice's acquittal, the latter view is right.

Otherwise
by later
English
cases.

The next step was on a prosecution against hostlers for using their master's corn to an unauthorized extent, to feed their master's horses, and incidentally to ease themselves from work. In this "easing" was claimed to be the *lucri causa*, which may explain the decision of the judges.²

A further advance was made in a case which came ultimately before the Court of Criminal Appeal. It was proved that the prisoners took from the floor of a barn, in the presence of the thrasher, five sacks of unwinnowed oats belonging to their master, and secreted them in a loft there, for the purpose of giving them to their master's horses, they being employed as carter and carter's boy, but not being answerable at all for the condition or appearance of the horses. The jury found that they took the oats with intent to give them to their master's horses, and without any intent of applying them for their private benefit. The learned judge reserved the case for the opinion of the judges on the point whether the prisoners were guilty of larceny. The greater part of the judges (exclusive of Earle, J., and Platt, B.) appeared to think that this

them in a place outside B.'s house, where new bags were habitually put by C. C., by consort with A., claims payment for the bags from B., as for bags newly supplied. A. is guilty of theft, and C. is an accessory before the fact. R. v. Manning, Dears. C. C. 21.

¹ R. v. Cabbage, R. & R. 292; five of the judges held this conviction wrong. And see, to same effect, R. v. Jones, 1 Den. C. C. 188; 2 C. & K. 236. Cf. R. v. Bailey, L. R. 1 C. C. 347.
² R. v. Morfit, R. & R. 307; and see R. v. Gruncell, 9 C. & P. 365; R. v. Handley, C. & M. 547.

was larceny, because the prisoners took the oats knowingly against the will of the owner and without color of title or of authority, with intent not to take temporary possession merely and then abandon it (which would not be larceny), but to take the entire dominion over them; and that it made no difference that the taking was not *lucri causa*, or that the object of the prisoners was to apply the things stolen in a way which was against the wish of the owner, but might be beneficial to him. But all agreed that they were bound by the previous decisions to hold this to be larceny, though several of them expressed a doubt if they should have so decided, if the matter were *res integra*. Earle, J., and Platt, B., were of a different opinion; they thought that the former decision proceeded, in the opinion of some of the judges, on the supposition that the prisoners would gain by the taking, which was negatived in this case; and they were of opinion that the taking was not felonious, because, to constitute larceny, it was essential that the prisoners should intend to deprive the owner of his property in the goods, which the prisoners in this case could not, if they meant to apply it to his use.¹

§ 898. If this law be good, it is larceny for a cook to take without authority from her master's stores articles to improve her master's cooking, and for a nurse to give without authority the parent's food to be eaten by the child.

Unreason-
ableness
of these
rulings.

So far as concerns the particular question of the use of the master's corn as extra feed for horses, there are no less than three decisions reported of German courts (in Bavaria, in 1844, in Hanover, in 1846, and in Saxony in the same year), prior to the adoption of the North German Code, and at a time, therefore, when the common law which was to be construed was not affected by any statutory prescription. In all of these cases the offence was declared not to be larceny; and the decision is emphatically sustained by Mittermaier.² And the reasons suggested are obvious. In the first place, by rejecting the *lucri causa*, we confound larceny with malicious mischief.³ In the second place, we give a stimulus to peculation by visiting appropriation to self with the same penalty as that assigned to mere wanton injury to another's

¹ R. v. Privett, 1 Den. C. C. 193; 2 § 319. Note V., "Mit recht ist es Cox C. C. 40; 2 C. & K. 114. Under nicht als Diebstahl angenommen." 26 & 27 Vict., however, the offence

stated in the text is no longer larceny. ² This objection is put by Lord Abinger, in R. v. Godfrey, 8 C. & P. 563, cited *supra*, § 896; and by Cockburn, C. J., in R. v. Bailey, L. R. 1 C. C. 347.

³ Mittermaier's ed. of Feuerbach, C. J., in R. v. Bailey, L. R. 1 C. C. 347.

goods. We thus not only brutalize the public mind by doing away with the distinction between the various phases of guilt, but we give a premium to desperate and remunerative criminality. "If I am to be punished all the same, I will be punished for something that will pay."¹ Nor can any detriment to public justice arise from the establishment of this principle, since the particular offences which it is thus attempted to force into the line of larcenies are indictable as malicious mischiefs. The difference is that by preserving the common law distinction, we not only preserve a distinction which is reasonable and just, but we avoid the risk of asking a jury to convict of an offence which they will feel the evidence does not prove.

§ 899. In the United States the qualification "*lucri causa*" has been accepted by several courts as an unquestioned part of the common law.² Between larceny and malicious mischief, it is argued, the line is well marked. Thus it has been frequently held to be a misdemeanor, of the nature of malicious mischief, to kill an animal belonging to another,³ though it has never been held larceny so to kill and

In the United States, qualification of *lucri causa* required.

¹ See this argument used by Helie, vi. p. 569.

In Fuller's *Worthies of England*, vol. ii., Nuttall's ed. p. 88, he says, speaking of Hertfordshire:

"Their teams of horses (oft-times deservedly advanced from the cart to the coach) are kept in excellent equipage, much alike in color and stature, fat and fair; such is their care in dressing and well-feeding them. I could name the place and person (reader be not offended with an innocent digression) who brought his servant with a warrant before a justice of the peace for stealing his grain. The man brought his five horses tailed together along with him, alleging for himself that if he were the thief, these were the receivers, and so escaped." The reason given by Fuller is as sound as it is quaintly expressed. The appropriation of property to its owner's benefit, though it may be a civil trespass, is not larceny.

² As holding that *lucri causa* is essential, may be noticed:

People v. Woodward, 2 N. Y. Cr.

Rep. 32; 31 Hun, 57, 1883 (Learned, J., diss.); *State v. Hawkins*, 8 Porter 461, 1839; *McDaniel v. State*, 8 Sm. & M. 401, 1847; and see *U. S. v. Durkee*, 1 McAll. 196, 1855, where it was held that seizing weapons by a vigilance committee was not larceny. As holding that *lucri causa* is non-essential, see *Keely v. State*, 14 Ind. 36, 1859; *Williams v. State*, 52 Ala. 411, 1875; *Hamilton v. State*, 35 Miss. 214, 1858; *Warden v. State*, 60 Ibid. 638, 1883; *Delk v. State*, 64 Miss. 77, 1886; *Juarez v. People*, 28 Cal. 380, 1865; *State v. Ryan*, 12 Nev. 401, 1877; *State v. Slingerland*, 19 Nev. 135, 1885; *Dignowitty v. State*, 17 Tex. 521, 1856; *State v. Caddle*, 35 W. Va. 73, 1891. Under § 528 of the New York Penal Code of 1882, *lucri causa* is made non-essential —29 Alb. L. J. 239. That it is sufficient if the intent be to convert to the use of any person other than the owner. See *State v. Wellman*, 34 Minn. 221, 1885.

³ As cases in which this was ruled, see *State v. Wheeler*, 3 Vt. 344, 1830; *People v. Smith*, 5 Cow. 258, 1825; *Loomis v. Edgerton*, 19 Wend. 419,

take unless some benefit was expected by the taker. And by a series of statutes, adopted more or less extensively in all the States, malicious destructions of property are made the subjects of criminal prosecution of which the penal consequences are widely different from those attached to larceny. The legislature, by such provisions, it is maintained, says: "Injuring goods of another, without expectation of benefit to self, shall be one offence, called malicious mischief, and shall be a misdemeanor, and subject to a light punishment; while taking goods of another, in order to benefit self, shall be another offence, called larceny, which shall be a felony, and infamous, and subject to a heavy punishment." And this distinction, on the reason heretofore given, is both wise and humane. The severe penalties of larceny, as a system of pillage which society must put down, must be maintained in their rigor; but it will be destructive of the humanities of life to extend these penalties and infamies to every case where property is taken without the taint of selfish greed in the taker. On the other hand, it is plainly larceny, when goods are intentionally taken from the owner, the object being to deprive the owner of their use, and in any way to benefit the taker.¹

§ 900. Where a servant pawns his master's goods, if it appear that the servant only intended to raise money on his master's property for temporary purposes, and had a reasonable expectation of being able shortly to take the article out of pawn and return it, then larceny does not exist. But to justify an acquittal, there must be not only the intent but the probable ability to redeem.²

Pawning
master's
goods with
intent to
return not
larceny.

1838; *Resp. v. Teischer*, 1 Dall. 335, *supra*, § 896. Taking cotton and putting it with other cotton not weighed, 1865; *Henderson's Case*, 8 Gratt. 708, in order to obtain from the owner compensation for cotton which had not been picked by the prisoner, is larceny. 1852; *State v. Scott*, 2 Dev. & Bat. 35, 1836; *State v. Council*, 1 Tenn. 305, 1808; *Wright v. State*, 30 Ga. 325, 1860. See, generally, *Harding v. People*, noticed in 29 Alb. L. J. 299; *State v. Ware*, 10 Ala. 814, 1847; *Witt v. State*, 9 Mo. 671, 1846; *McDaniel v. State*, 8 Sm. & M. 401, 1847. That "philanthropic" intent is no defence, see *supra*, § 119.

¹ See reasoning of court in *Keely v. State*, 14 Ind. 36, 1859; *Hamilton v. State*, 35 Miss. 214, 1858; *Dignowitty v. State*, 17 Tex. 521, 1856. Compare *1838; Resp. v. Teischer*, 1 Dall. 335, *supra*, § 896. Taking cotton and putting it with other cotton not weighed, in order to obtain from the owner compensation for cotton which had not been picked by the prisoner, is larceny. *Hart v. State*, 82 Ala. 50, 1886. But taking a buggy and burning it "to get even" with the owner is not larceny. *Pence v. State*, 110 Ind. 95, 1886. ² *Supra*, § 887; *R. v. Medland*, 5 Cox C. C. 292; *R. v. Phetheon*, 9 C. & P. 552; *R. v. Trebilcock*, D. & B. 453; 7 Cox, 408; 27 L. J. M. C. 103; 4 Jur. (N. S.) 123; *R. v. Poyser*, T. & M. 559; 2 Den. C. C. 233; 5 Cox C. C. 241. *Infra*, § 968.

§ 901. Where the personal property of one is, through inadvertence, left in the possession of another, or in a public place, and the finder, having reasonable ground to believe that its owner will appear, or may be found from ear-marks upon it, fraudulently appropriates it, he is guilty of larceny.¹ In such case the goods may be said to be *mis-laid*, not *lost*. But when goods are *lost*—*i. e.*, when the owner has no trace of them, and they show no trace of the owner—the finder has such a special property in them that, according to the now prevalent view, as will presently be more fully seen, even though he feloniously intends to appropriate them when he finds them, it is not larceny.² In other words, the mere subjective side is insufficient without the objective.³ To constitute larceny there

Appropriating
animo
furandi
lost goods
with ear-
marks is
larceny.

On the trial of a servant for larceny in stealing his master's plate, it appeared that after the plate in question was missed, but before complaint was made to a magistrate, the prisoner replaced it; and it was proved by a pawnbroker that the plate had been pawned by the prisoner, who had not redeemed it; but the pawnbroker also stated that the prisoner had on previous occasions pawned plate, and afterward redeemed it. Hallock, B. (Holroyd, J., being present), left it to the jury to say whether the prisoner took the plate with the intent to steal it, or whether he merely took it to raise money on it for a time and then return it; for that, in the latter case, it was no larceny. The jury acquitted the prisoner. *R. v. Wright*, Car. Crim. Law, 278-9; 9 C. & P. 554, *n.*, criticised *supra*, § 887. See *R. v. Trebilcock*, 7 Cox C. C. 408; D. & B. C. C. 453.

¹ *R. v. Moore*, L. & C. 1; 8 Cox C. C. 416; *Com. v. Titus*, 116 Mass. 42, 1874; *People v. McGarren*, 17 Wend. 460, 1837; *Brooks v. State*, 35 Ohio St. 46, 1878; *State v. Levy*, 23 Minn. 104, 1876; *State v. Williams*, 9 Ired. 140, 1848; *State v. McCann*, 19 Mo. 249, 1853. See *R. v. Riley*, 14 Eng. L. & Eq. 544; 1 Dears. C. C. 149; 6 Cox C.

C. 88; *State v. Farrow*, Phil. (N. C.) 161, 1866. The rule in the text was applied in *State v. Clifford*, 14 Nev. 72, 1879, to a bar of bullion dropped from a stage coach.

A purchaser, by mistake, left his purse on the prisoner's market stall, without himself or the prisoner knowing it. The prisoner afterward seeing it there, but not actually knowing whose it was, appropriated it, and subsequently denied all knowledge of it when inquiry was made by the owner. It was held that the prisoner was guilty of larceny, as the purse was not, strictly speaking, lost property, and, therefore, it was not necessary to inquire whether the prisoner had used reasonable means to find the owner. *R. v. West*, 29 Eng. L. & Eq. 525; *Dears. C. C.* 402; 6 Cox C. C. 415; see *State v. Cummings*, 38 Conn. 260, 1865; *Lawrence v. State*, 1 Humph. 228, 1839; and see, particularly, *R. v. Moore*, L. & C. 1; 8 Cox C. C. 416; cited *infra*, § 909. The question of title to lost property is discussed in an article in 1 Am. Law Journal, 270 *et seq.*

² *Ibid.*; *R. v. Mole*, 1 C. & K. 417; *People v. Cogdell*, 1 Hill, (N. Y.) 94, 1841, *Reed v. State*, 8 Tex. App. 40, 1880. See 1 Hawley's Cr. Rep. 418.

³ See *supra*, notes to § 182.

must be not only the intent to steal, but the thing taken must give on its face grounds from which it may be reasonably believed that the owner can be found.¹ If there be no indications of ownership, then the owner may be inferred to have abandoned the goods, and consequently to consent to the finder taking them. In this way we can reconcile the position now before us with the position that when felonious intent and trespass are united in taking a thing, there is larceny. There is not trespass in taking a thing abandoned.

§ 902. Hence a finder, no matter what may be his intent, of a lost article on which there is no ear-mark, even though this be a purse containing money, or a truck containing goods without any mark, dropped on the highway, or otherwise left without ownership, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found.² And it may be generally held that if a man find property which has been lost, and appropriate it to himself, he is not guilty of larceny for failing to take steps to discover the owner, unless there were at the time indications which afforded the finder an immediate means of knowing who the owner was at the moment when he picked it up and examined it.³ It has always been agreed that if the defendant

Otherwise
when
there is no
means of
knowing
at the time
who the
owner was.

¹ See *Hamaker v. Blanchard*, 90 Pa. 377, 1879.

The New York Penal Code of 1882, § 539, expands the definition of the text by making it larceny when the finder under circumstances which give him means of inquiry as to the owner, appropriates the goods without inquiry.

² 2 Russ. on Cr. (9th Am. ed.) 169; *R. v. Thurborn*, 1 Den. C. C. 387; *R. v. Matthews*, 12 Cox C. C. 489; *R. v. Mole*, 1 C. & K. 417; *R. v. Shea*, 7 Cox C. C. 147; *R. v. Christopher*, 8

Ibid. 91; *Ransom v. State*, 22 Conn. 153, 1852; *People v. Anderson*, 14 Johns. 294, 1816; *Bailey v. State*, 52 Ind. 462, 1876; *Wolfington v. State*, 53 *Ibid.* 343, 1876; *State v. Taylor*, 25 Iowa, 273, 1868; *State v. Dean*, 49 *Ibid.* 73, 1878; *Perrin v. Com.*, 87 Va. 554, 1891.

³ *R. v. Dixon*, 36 Eng. Law & Eq. 597; *Dears. C. C.* 580; *R. v. Matthews*, 12 Cox C. C. 489; *R. v. Gardner*, L. & C. 243; 9 Cox C. C. 253; *Brooks v. State*, 35 Ohio St. 46, 1878.

Thus the finder of money in the

mean to act honestly as to the goods when found, there being no such ear-marks on the property, no subsequent felonious intent can make a conversion larceny.¹ And we must now advance a step further, and say that if, at the time of finding, he has no means of discovering the owner, he is not guilty of larceny, even though at the time of finding he intended to keep the property, no matter who the owner might be.²

§ 903. Whether the finder had, or ought to have had, knowledge of the true ownership is to be inferred from the facts of the case.³ Where a bureau was given to a carpenter to repair, and he found money secreted in it, which he converted to his own use, this was held larceny.⁴ The same conclusion was reached where a bureau was bought at auction, with money secreted in it; though here the qualification was properly introduced that it was no larceny if the defendant had an honest belief that, in buying the bureau, he bought all within it.⁵ Hence it has been ruled that if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is a larceny if he knew the owner, or if he took him up or set him down

Notice of ownership may be inferred from facts.

¹ *R. v. Preston*, 8 Eng. Law & Eq. 589; 5 Cox C. C. 390; 2 Den. C. C. 353; *R. v. Christopher*, 8 Cox C. C. 91; *R. v. Thurborn*, 1 Den. C. C. 387; *Ransom v. State*, 22 Conn. 153, 1852; *People v. Cogdell*, 1 Hill, (N. Y.) 94, 1841; *Tanner v. Com.*, 14 Gratt. 635, 1858; *State v. Ferguson*, 2 McMul. 502, 1842.

² *Supra*, § 901; *R. v. Thurborn*, 1 Den. C. C. 387. (See, for opinion of Parke, J., *infra*, § 909.) 18 L. J. M. C. 140; *R. v. Glyde*, 37 L. J. M. C. 107; L. R. 1 C. C. R. 139; 11 Cox C. C. 103, cited above. See, to same effect, Stephen Dig. Crim. Law, art. 302.

The question as to the larcenous character of goods lost without ear-marks is analogous to that arising in the case of waifs already noticed. *Supra*, § 863. Another analogy may

be found in cases where a man maliciously attempts to injure a non-existent object. A man, for instance, may inflict, with an intent to kill, a

blow on a human body before him, but it turns out that the body is already dead. No amount of malice on his part would make this homicide, because there was no suitable object on which the malice could act. See discussion, *supra*, § 136. In other words, we fall back upon the rule heretofore stated, that to constitute a crime there must be an offender and an object. The object must be one on which an offence can be committed.

³ *R. v. Knight*, 12 Cox C. C. 102; *R. v. Dixon*, Dears. C. C. 580; *R. v. Glyde*, L. R. 1 C. C. 139; *Com. v. Titus*, 116 Mass. 42, 1874; *State v. Weston*, 9 Conn. 527, 1833; *People v. McGarren*, 17 Wend. 460, 1837; *People v. Cogdell*, 1 Hill, 94, 1841; *Tanner v. Com.*, 14 Gratt. 635, 1858.

⁴ *Cartwright v. Green*, 8 Ves. 405; 2 Leach, 952.

⁵ *Merry v. Green*, 7 M. & W. 623. As to *bonâ fide* belief in title, see *supra*, §§ 87, 884; and *R. v. Reed*, C. & M. 306.

at any particular place where he might have inquired for him.¹ Larceny was also held to be made out in a case where the prosecutor accidentally left his purse containing money on an old saddle in a livery stable, where he had placed it while changing his clothes; and the defendant requested a small boy to take it and hand it to him, which he did, when the defendant appropriated the contents to his own use without the owner's consent.²

Whether the inference of an intention at the time to steal is strengthened by failure to advertise has been the subject of conflicting adjudications. On the other hand, it has been ruled that advertising may be a duty dispensing with which is suspicious.³ On the other hand, the duty is held to be obligatory only when made so by surrounding circumstances.⁴ The question depends upon local usage and opportunity. A failure to advertise, when there is nothing on the thing found, or the circumstance of finding, to show that there was an owner, does not, with articles of small value, lead to an inference of intent to steal. And even if it did, this would not be sufficient for conviction, unless there was something to indicate ownership. The inference varies with the thing itself. It is not improbable that a horse or a dog may be abandoned by the owner. It is very improbable that a bundle of bank notes should be so abandoned.⁵

§ 904. Evidence of a *bonâ fide* attempt to discover the owner may destroy the presumption of fraudulent intent. Thus where a shawl, dropped in an exhibition room, was picked up by the defendant, placed in a conspicuous situation, and afterward, not being claimed, was appropriated to his own use, it was held no larceny.⁶ So the conscientious belief of an ignorant person that a note found by him was by law his own may be received to disprove felonious intent.⁷

§ 905. *Reasonable diligence, proportioned to the capacity of the party, in discovering the owner*, however, should be shown by the party finding, if there be any ear-marks or other indications

¹ R. v. Wynne, 2 East P. C. 664; Coffin, 2 Cox C. C. 44; State v. Jenkins, 2 Tyler, 379, 1803.

² R. v. Lamb, 2 East P. C. 664; R. v. Sears, 1 Leach, 415, n. ⁴ R. v. Christopher, 8 Cox C. C. 91; Bell, 27; People v. Cogdell, 1 Hill, (N. Y.) 94, 1841; Lane v. People, 5 Gilman, 305, 1848.

³ Pyland v. State, 4 Sneed, (Tenn.) 357, 1857.

⁵ That the *animus furandi* may be inferred, with other circumstances, from failure to advertise, see R. v.

⁶ State v. Dean, 49 Iowa, 73, 1878.

⁷ R. v. Reed, C. & M. 306.

of ownership.¹ Thus, on the trial of a servant who, being indicted for stealing bank notes the property of her master, in his dwelling-house, set up as her defence that she found them in the passage, and kept them to see if they were advertised, not knowing to whom they belonged, Park, J., held that she ought to have inquired of her master whether they were his or not, and that, not having done so, but having taken them away from the house, she was guilty of stealing them.²

Where there are ear-marks reasonable diligence should be shown.

§ 906. Even the finder of a chattel on the highway, as to which there are ear-marks, or reasonable grounds for the discovery of ownership, if he take it away with the intention of appropriating it to his own use, and only restore it because a reward is offered, is guilty of larceny. The only cases in which a party finding a chattel of another can be justified in appropriating it to his own use are where it may be fairly said that the owner has abandoned it, or where there are no indications on it showing how the owner can be found.³

Intent to restore only for reward makes offence larceny.

§ 907. The fact that the goods were afterward returned does not purge the original taking of its felony.⁴

Returning does not purge felony.

§ 908. It has been argued with much force that in newly settled countries, where the practice as to inclosures is not strict, the rule that larceny is not committed by one who finds goods, the owner of which he supposes cannot be ascertained, does not apply to one who finds cattle at large in a highway and converts them to his own use.⁵ And it has been held to be larceny to take a horse found astray on the taker's land, with

Same rule as to cattle.

¹ 2 Russ. on Cr. 12; *Allen v. State*, 91 Ala. 19.

² *R. v. Kerr*, 8 C. & P. 176.

³ *R. v. Peters*, 1 C. & K. 245, per Rolfe, B.; *Com. v. Mason*, 105 Mass. 163, 1870; *Dunn v. State*, (Tex.) 30 S. W. Rep. 227, 1895. See *Berry v. State*, 31 Ohio St. 219, 1876; *Lawrence v. State*, 1 Humph. 228, 1839; and see, also, *R. v. Spurgeon*, 2 Cox C. C. 102. Compare *R. v. York*, 3 Ibid. 181; 1 Den. C. C. 335; *R. v. Breen*, 3 Craw. & D. 30; *Micheaux v. State*, 30 Tex. App. 660, 1891. See *supra*, §§ 119, 885

⁴ 2 Russ. on Cr. 7; *Eckels v. State*, 20 Ohio St. 508, 1870; *Stepp v. State*, 31 Tex. Cr. 349, 1892. See *State v. Coombs*, 55 Me. 477, 1867; and *supra*, § 887; *infra*, § 909.

⁵ *People v. Kaatz*, 3 Parker C. R. 129, 1856; *State v. Martin*, 28 Mo. 530, 1859; *State v. White*, (Mo.) 29 S. W. Rep. 591, 1895; *Moore v. State*, 8 Tex. App. 496, 1880; *State v. Everage*, 33 La. An. 120, 1881; and other cases cited to this point at close of *supra*, § 863.

intent to conceal it until its owner shall offer a reward for its return, and then to return it, and claim the reward.¹ But it is otherwise when the intention to steal is subsequent to the finding.² After final abandonment, however, an estray is not the subject of larceny.³

§ 909. If there be intent to steal on finding, subsequent conversion, on discovery of owner, is larceny in all cases where, at the time of finding, there were indications by which the owner could be found. We have this distinction illustrated in a case already cited, where it was held that where the defendant *subsequently* discovers the owner of lost property, he is indictable for larceny, if on first finding his intent was to appropriate, he reasonably believing the owner could be found; but that a verdict of guilty should be set aside in a case where the jury found specially, "that the defendant did not know, and had not reasonable means of knowing" (at the time of finding) "who the owner was," though "*he believed at the time he picked up the note that the owner could be found.*"⁴ But there must be an original felonious intent, general or special.⁵

¹ Com. v. Mason, 105 Mass. 163, 1870. See R. v. O'Donnell, 7 Cox C. C. 337. See *supra*, §§ 863, 864, 871.

² Starck v. State, 63 Ind. 285, 1878. And see Lamb v. State, 40 Nebr. 312, 1894. In R. v. Matthews, 12 Cox C. C. 489, the prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterward he was informed by S. that they had been put on his, S.'s, marshes and had strayed, and a few days after that that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them a long distance away as his own property to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. It was held by the Court of Criminal Appeal that a conviction of larceny could not be sustained on a special verdict in which the jury found:

(1) That at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. (2) That at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently. (3) That the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use.

³ *Supra*, § 863.

⁴ R. v. Moore, L. & C. 1; 8 Cox C. C. 416. See *infra*, § 969; and as to intents, see *supra*, § 119; State v. Jenkins, 2 Tyler, 379, 1803; State v. Welch, 73 Mo. 284, 1880.

"The result of the authorities is," says Parke, B., in R. v. Thorborn, 2

⁵ R. v. Dixon, Dears. C. C. 580; 7 Cox C. C. 35; R. v. York, 2 C. & K. 841; 3 Cox C. C. 181.

§ 910. The converse is also true that if there is at the time no reasonable means of discovering the owner, and no reasonable belief that the owner can be found, then even a refusal to surrender, on the owner declaring himself, does not make larceny, even though there was at the finding the intention to appropriate the goods.¹

But not larceny unless belief that owner may be found and felonious intent at finding concur.

§ 911. The law with regard to the finder of lost property does not apply to the case of property of a passenger accidentally left in a railway carriage, and found there by a servant of the company; and such servant is

Larceny for R. R. officers to appropriate things found in cars.

C. & K. 839; 1 Den C. C. 387; aff. R. v. Matthews, 12 Cox C. C. 489, "that the rule of law on this subject seems to be, that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire domain over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But if he has taken them with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as, indeed, in the application of all fixed rules, questions of some nicety may arise; but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it; and if he did not return it to the owner the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking

it up to look at it would not be a taking possession of the chattel."

That there must be a felonious intent at time of finding, see 2 Ben. & H. Lead. Cas. 18, citing Melbourne's Case, 1 Lew. 251; R. v. Breen, 3 Craw. & D. C. C. 30; R. v. Mucklow, 1 Mood. C. C. 160; R. v. Steer, 1 Den. C. C. 349; R. v. Banks, R. & R. 441; R. v. Levy, 4 C. & P. 241; R. v. Thistle, 3 Cox C. C. 575; People v. Anderson, 14 Johns. 294, 1816.

That the felonious intent is not sufficient unless there was reason to believe the owner could be found, see 2 Ben. & H. Lead. Cas. 18, citing R. v. Pope, 6 C. & P. 346; R. v. Beard, 1 Jebb, 9; R. v. Mole, 1 C. & K. 417; R. v. Pierce, 6 Cox C. C. 117; R. v. Peters, 1 C. & K. 245; State v. Weston, 9 Conn. 527, 1833; State v. Ferguson, 2 McM. 502, 1842; Lane v. People, 5 Gilman, 305, 1848; People v. Cogdell, 1 Hill, 94, 1841; People v. McGarren, 17 Wend. 460, 1837; Tyler v. People, 1 Breese, 227, 1829. We must, therefore, conclude that if the defendant reasonably believe at the time that the owner may be found, this is enough when there is at the time an intent to steal. Com. v. Titus, 116 Mass. 42, 1874. For a full discussion of the points in the text, see Griggs v. State, 58 Ala. 425, 1877.

¹ R. v. Glyde, L. R. 1 C. C. 139; 11 Cox C. C. 103; R. v. Knight, 12 Ibid.

guilty of larceny, if, instead of taking it to the station or superior officer, he appropriates it to his own use.¹

§ 912. Where the finder is employed by the owner to search for the article, and on finding it appropriates it, this is embezzlement, not larceny. Thus, a person having lost a carpet bag in the street employed another to find it. The bag was found, but after possession, *bonâ fide* obtained, was fraudulently concealed by the finder. This was properly held to be breach of trust, but not larceny.²

Not larceny for person employed to find goods to appropriate them.

§ 913. The same rule has been applied to retention by assignee of finder. Thus, it has been held that if A., in expectation of a reward, withholds from the owner, whom he knows, a lost cheque *received from the finder*, B., he is not guilty of larceny.³

Nor for assignee of finder to retain goods.

III. TAKING.

§ 914. Taking, as a trespass, may be inferred from the possession of the property,⁴ but must in some shape be proved.⁵ Thus, if the owner's assent to a transfer of property be given, this is a defence;⁶ though this want of assent must be in some way inferred from the evidence in the case.⁷ But there must be some taking amounting to a trespass, or there is no larceny.⁸ But it is not necessary that the taking should be secret, though secrecy may go to prove fraud.⁹ It is

Taking must be in some way proved: need not be secret, but must be fraudulent.

102; *Tanner v. Com.*, 14 Gratt. 635, 1858; *State v. Roper*, 3 Dev. 473, 1832; *Randall v. State*, 4 Sm. & M. 349, 1845; and cases heretofore cited. See *supra*, §§ 902-3-7.

¹ *R. v. Pierce*, 20 L. J. 182; 6 Cox C. C. 117.—Per Williams, J.

² *State v. England*, 8 Jones, (N. C.) 399, 1862. See *infra*, § 967.

³ *R. v. Gardner*, 9 Cox C. C. 253; L. & C. 243.

⁴ *Infra*, § 923; *Pennsylvania v. Myers*, Addis. 320, 1796.

⁵ 2 Russ. on Cr. (9th Am. ed.) 145; *R. v. Gruncell*, 9 C. & P. 365; *R. v. Walsh*, 1 Mood. 14; *R. v. Hall*, 2 C. & K. 947; 1 Den. C. C. 881; *Hite v. State*, 9 Yerg. 198, 1836; *People v. Murphy*, 47 Cal. 103, 1873. As to the extent of moving requisite to taking, see *infra*, § 923.

⁶ *Infra*, § 991; *Zink v. People*, 77 N. Y. 114, 1879; 6 Abb. New Cas. 413, reversing 16 Hun, 396, 1878.

⁷ *Spruill v. State*, 10 Tex. App. 695, 1881.

⁸ *State v. Copeland*, 86 N. C. 691, 1882. See *McAfee v. State*, 14 Tex. App. 668, 1883, to the effect that it is not larceny to buy goods to which the purchaser knew the vendor had no title, there being in such case no trespass.

⁹ *State v. Fenn*, 41 Conn. 590, 1874; *Johnson v. Com.*, 24 Gratt. 555, 1874; *Williams v. U. S.*, 22 Wash. L. Rep. 457; *Barnes v. State*, (Ala.) 15 So. Rep. 901, 1894. See *R. v. Bailey*, L. R. 1 C. C. 349; *McDaniel v. State*, 8 Sm. & M. 401, 1847. See *infra*, § 923. It has been held in North Carolina that some clandestinity is essential. *State v. Ledford*, 67 N. C. 60, 1872; *State v.*

essential, however, that the taking and the fraudulent intent should have been concurrent.¹

§ 915. The general bearing in this connection of the maxim *Volenti non fit injuria* has been heretofore abundantly discussed.² It may be now generally stated that while a prosecutor cannot maintain larceny for goods taken from him with his consent,³ and that while it is incumbent on the prosecutor to prove, at least inferentially, want of consent,⁴ yet there are two important qualifications with which these positions are to be received. In the first place, his giving his goods to a servant, porter, messenger, or other agent having bare charge, does not amount to a consent on his part that such agent should dispose of such goods.⁵ Secondly, his consent to a bailee taking possession of such goods, if such consent was obtained from him by fraud, does not avail to protect such bailee if the latter undertake to convert the *property* in the same to his own use.⁶ And consent to pass property from one to another in this sense must be the concurrence of two contracting minds as to the same exact act.⁷ Thus A. may apply to B. for C.'s goods in B.'s possession; and B., deceived by A., may consent to give these goods to A., supposing A. to be C. Yet notwithstanding this consent, A. is indictable for larceny if he convert these goods; because B. never consented to give the *property* in them to A. His inten-

Consent of owner to taking does not bar prosecution in cases where the consent is that defendant should have only a bare charge, or where the consent was not specific or voluntary.

Deal, 64 Ibid. 270, 1870. See *State v. Fisher*, 70 Ibid. 78, 1874. So in Georgia, *Moye v. State*, 65 Ga. 754, 1880. Acquiring possession lawfully and afterward concealing is not larceny. *People v. Taugher*, (Mich.) 61 N. W. Rep. 66, 1894.

¹ *Supra*, § 885.

² See *supra*, § 141.

³ The rule in the text was applied in *Moye v. State*, 65 Ga. 754, 1880, to a case where money was taken from the pocket of a person partially intoxicated on a promise to return it. And see *Love v. State*, 15 Tex. App. 563, 1884; *Haley v. State*, 49 Ark. 147, 1887.

⁴ See *R. v. Jones*, C. & M. 611; *Witt v. State*, 9 Mo. 671, 1846; *Anderson v. State*, 14 Tex. App. 49, 1883; *Dresch v. State*, Ibid. 175, 1883; *Wilson v. State*,

45 Tex. 76, 1876. In Wisconsin the court has gone so far as to hold that when the owner of the goods could have been brought into court, to prove want of consent, there can be no conviction without his testimony. *State v. Moon*, 41 Wis. 684, 1877. But this cannot be sustained. See *Whart. Cr. Ev.* § 360. And it is no defence that the party plundered was at the time asleep. *Hall, v. People*, 89 Mich. 717, 1878.

⁵ *Infra*, §§ 956-61.

⁶ *Infra*, § 964.

⁷ *Infra*, § 974. Hence, where the consent of a tobacconist was that matches might be taken to light cigars, this did not prevent the taking of a box of matches from being larceny. *Mitchum v. State*, 45 Ala. 29, 1871.

tion was to give this property to C.¹ The same rule applies when a donee or vendee intentionally takes the wrong goods.² There is, in the latter case, no concurrence of minds as to the identity of the thing to be transferred,³ and there being no such concurrence, there is no transfer of property of any kind.⁴ This is the case, for instance, where a creditor takes up and appropriates a hundred dollar bill handed him in mistake for a ten dollar bill.⁵ An apparent consent, also, produced by threats, works no transfer.⁶ But if there be a free consent (no matter how fraudulently obtained), both as to the taker and to the thing taken, this is a defence to larceny.⁷

§ 916. A difficult question arises, when money or goods are feloniously taken from an agent with his consent, as to whether such agent has authority to bind his principal by such consent. It has been held that the cashier of a bank has such power committed to him by the bank, and hence that a person fraudulently receiving money from him on a forged cheque cannot be convicted of larceny.⁸ But, said Blackburn, J., in the latter case, if "the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession the offence will be larceny." And so it was held larceny to fraudulently, *animo furandi*, take from a post-office clerk money he had no authority to pay.⁹ And no con-

¹ See, as to false personation, *supra*, 972, 1130. Whart. on Cont. §§ 171-§ 888. 211.

² *Peck v. State*, 9 Tex. App. 70, 1880.

³ See *infra*, § 974; Whart. on Cont. §§ 4 *et seq.*

⁴ Sir J. F. Stephen gives as an illustration of this the opinion of eight judges in *R. v. Middleton*, L. R. 2 C. C. 38, that where A. gives a cabman a sovereign for a shilling, and the cabman, seeing that it is a sovereign, keeps it, this is larceny. Benj. on Sales, (2d Am. ed.) 373. Pollock on Cont. 407. But see *R. v. Ashwell*, 16 B. D. 190; *R. v. Flowers*, Id. 643.

⁵ *State v. Williamson*, 1 Houst. C. C. 155, 1864. *Infra*, § 974.

⁶ *R. v. Lovell*, L. R. 8 Q. B. D. 185; 44 L. T. (N.S.) 319; cited *infra*, § 971. See *supra*, § 891; *infra*, §§ 971, 976.

⁷ *Supra*, § 888; *infra*, §§ 965, 971,

⁸ *R. v. Prince*, L. R. 1 C. C. 150; 11 Cox C. C. 193. *Infra*, § 966. But where the defendant cheated a bank by a trick, getting from the cashier \$1600 on a note for \$16, this was held larceny. *Com. v. Eichelberger*, 119 Pa. 254, 1888; *C. F. Hulster v. State*, 32 Tex. Cr. 621, 1894.

⁹ *R. v. Middleton*, 12 Cox C. C. 260; L. R. 2 C. C. 38.

"In this case" (*R. v. Middleton*), said Bovill, C. J., "the prisoner had received a warrant or authority from the postmaster-general entitling him to repayment of 10s. (being part of a sum of 11s. which he had deposited) from the post-office at Notting-hill, and a letter of advice to the same effect was sent by the postmaster-

sent by an unauthorized agent will protect the thief from the charge of larceny.¹ Authority in such cases, however, may be inferred from an implied recognition by the principal of agency, as well as from express delegation.²

§ 917. It is no defence that the felony was induced by the artifice of the owner, when that artifice was exercised for the purpose of entrapping the thief.³ Thus, in a leading case, overtures were made by a person to a servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and the former by the direction of the latter, some weeks after, opened a communication with the person who had made the overtures, in consequence of which he came to the master's

No defence that goods were exposed by owner to theft.

general to that post-office, authorizing the payment of the 10s. to the prisoner. Under these circumstances we are of opinion that neither the clerk to the postmistress, nor the postmistress personally, had any power or authority to part with the five-pound note, three sovereigns, the half-sovereign, and silver and copper, amounting to £8 16s. 10d., which the clerk placed upon the counter, and which was taken up by the prisoner. In this view the present case appears to be undistinguishable from other cases where obtaining articles *animo furandi* from the master of a post-office, though he had intentionally delivered them over to the prisoner, has been held to be larceny, on the principle that the postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail-bags by pretending to be the mail-guard, as in *Reg. v. Pearce* (2 East P. C. 603); the obtaining a watch from the postmaster by pretending to be the person for whom it was intended, as in *Reg. v. Kay* (D. & B. 231; 7 Cox C. C. 298, where *Reg. v. Pearce* was relied upon in the judgment of the court); the obtaining letters from the postmaster under pre-

tence of being the servant of the party to whom they were addressed, as in *Jones's Case* (1 Den. 188), and in *Reg. v. Gillings* (1 F. & F. 36), were all held to be larceny. The same principle has been acted upon in other cases where the person having merely the possession of goods, without any power to part with the property in them, has delivered them to the prisoner, who has obtained them *animo furandi*; for instance, such as obtaining a parcel from a carrier's servant by pretending to be the person to whom it was directed, as in *Reg. v. Longstreeth* (1 Mood. C. C. 137), or obtaining goods through the misdelivery of them by a carman's servant, through mistake, to a wrong person, who appropriated them *animo furandi*, as in *Reg. v. Little* (10 Cox C. C. 559), were in like manner held to amount to larceny." See *supra*, § 888.

¹ *R. v. Longstreeth*, 1 Mood. C. C. 137; *R. v. Hornby*, 1 C. & K. 305; *Hite v. State*, 9 Yerg. 198, 1836.

² *Ibid.*; *R. v. Harvey*, 9 C. & P. 353; *R. v. Sheppard*, *Ibid.* 121.

³ *McAdam v. State*, 8 Lea, 456, 1882; *Pigg v. State*, 43 Tex. 108, 1875. *Supra*, §§ 149, 231 a.

premises. The master, having previously marked some money, by his direction was placed upon the counter by the servant, in order that it might be taken up by the party who had come for the purpose. It being so taken up, the offence was held larceny.¹ And this is the generally accepted law.² If the chattel is *given* to the thief, by the owner's action or consent, this is not larceny; but if the owner limits himself to putting facilities in the thief's way, and then the thief steals the chattel, the larceny is complete.³

§ 918. If a wife carry away and convert to her own use her husband's goods, it is no larceny at common law, as husband and wife are but one person.⁴ And if a person merely assist a married woman who has not committed, or intended to commit, adultery, in carrying away the goods of her husband without the knowledge or consent of the latter, though with intent to deprive the latter of his property, he cannot be convicted of stealing the goods.⁵

§ 919. It has been held, however, that it is a larceny for a man who elopes with another man's wife to take his goods, though with the consent and at the solicitation of the wife.⁶ Even if no adultery

¹ R. v. Williams, 1 C. & K. 195. See R. v. Hedge, 2 Leach C. C. 1033; R. & R. 160. *Supra*, § 149.

² 2 East P. C. 494; R. v. Egginton, 2 B. & P. 509; 2 Leach, 915; R. v. Donnelly, R. & R. 310; R. v. Lawrence, 4 Cox C. C. 438; R. v. Lyons, C. & M. 217; R. v. Johnson, C. & M. 218; R. v. Bannen, 1 C. & K. 295; U. S. v. Foye, 1 Curt. 364, 1852; Connor v. People, 18 Colo. 373, 1893; Conner v. State, 24 Tex. App. 245, 1887.

³ *Supra*, §§ 149, 231 a. Where the officer feigned a drunken slumber and allowed the thief to rob him, this was held no evidence of consent. People v. Hanselman, 76 Cal. 460, 1888.

⁴ 1 Hale, 514. See R. v. Avery, Bell C. C. 150; R. v. Kenny, 13 Cox C. C. 397; Lamphier v. State, 70 Ind. 317, 1880. *Infra*, § 992. Under married woman's act, see *infra*, § 940.

⁵ R. v. Avery, Bell C. C. 150; 8 Cox C. C. 184. See R. v. Tollett, C. & M. 112—Coleridge, J.; R. v. Glassie, 7 Cox C. C. 1.

⁶ R. v. Thompson, 1 Eng. Law & Eq. 542; 2 Craw. & D. 491; R. v. Featherstone, 26 Eng. Law & Eq. 570; 6 Cox C. C. 376; R. v. Berry, 8 Ibid. 117; R. v. Harrison, 12 Ibid. 19; R. v. Tollett, C. & M. 112; People v. Schuyler, 6 Cow. 572, 1827.

The prosecutor left his wife in the care of his house and property, and during his absence the prisoner, who had lodged for some time previously in the house, took a great many boxes, etc., from the house, and left them at a house to which he had gone a day or two before with the prosecutor's wife, passing her for his own, and where he had hired lodgings. He soon afterward brought her with him to the lodgings, where they lived together till he was apprehended. The wife took a small basket with her, and she swore that all of the property she had herself taken or given to the prisoner to take, and the jury found that the prisoner stole the property jointly with the wife; it was held, on a case

has actually been committed, but the goods of the husband are removed by the wife and the intended adulterer, with an intent that the wife should elope with him, this taking of the goods is in point of law a larceny.¹ It does not alter the case that the defendant was in the husband's employ, and acted under the wife's direction.² It is said, however, to be otherwise when it is the wife's wearing apparel only that is removed.³ Where, however, the husband's goods are fraudulently taken by a third party, the wife in no way coöperating, such third party is principal in taking them and is guilty of larceny, if it appear that the taking was without the husband's consent, even though no adulterous intercourse with the wife was contemplated.⁴ But if the wife is principal in the taking and the third party merely abets her, then (at least at common law) there can be no conviction unless it be proved that the taking was in contemplation of adultery.⁵

But otherwise for person assisting adulterous wife.

reserved, that this was larceny in the prisoner, for though the wife consented, it must be considered that it was done *invito domino*. *R. v. Tolfree*, 1 Mood. C. C. 243; *R. v. Featherstone*, 26 Eng. Law & Eq. 570; *Dears. C. C.* 369.

¹ *R. v. Flatman*, 42 L. T. (N. S.) 159; 14 Cox C. C. 396. See comments in *London Law Times*, Ap. 17, 1880, 437.

² *R. v. Mutters*, L. & C. 511; 10 Cox C. C. 50.

³ *R. v. Fitch*, D. & B. C. C. 187.

So far as concerns the wife's right in such cases to bind her husband, we may accept the strong expression of Lord Campbell, C. J., in *R. v. Featherstone*, *Dears. C. C.* 369, that when a woman becomes an adulteress, "she thereby determines her quality of wife; and her property in her husband's goods ceases." As is stated by the author of a learned note (1866), *Note to Mutter's Case*, L. & C. 519, the "wife thus assumes the position of a mere stranger, and can no longer invoke the protection of that quality which she has herself determined."

⁴ *Supra*, § 918. Where the prisoner claims that the taking of the husband's goods was with the consent of the wife, and therefore not larcenous, it was ruled in New York, in 1871, that it is for the jury to say, from all the circumstances connected with the transaction—as the knowledge by the prisoner of the close vicinity and near return of the husband to the place of taking, and that the property was owned by the husband and not the wife—whether the prisoner received the property from the wife believing that she had any right or authority to deliver it. And it is not necessary to render such taking larcenous that the property should be appropriated to facilitate adulterous intercourse with the wife. *People v. Cole*, 43 N. Y. 508, 1871 (Grover, J.); and see *R. v. Berry*, Bell C. C. 95; 8 Cox C. C. 117. It is enough if the defendant knew that the husband did not consent to the alienation of the goods. *Supra*, § 149; so, also, *R. v. Flatman*, 14 Cox C. C. 396; 42 L. T. (N. S.) 159.

⁵ *R. v. Avery*, Bell C. C. 150; 8 Cox C. C. 184.

§ 920. But an adulterer cannot be convicted of stealing the goods of the husband, brought by the wife alone to his lodgings, and placed by her in the room in which the adultery is afterward committed, merely upon the evidence of their being found there; though it seems it would be otherwise if the goods could be traced in any way to his personal possession.¹ In such case, however, there may be a conviction for receiving stolen goods.²

In such case defendant must be connected with the taking.

§ 921. Larceny may be committed by the owner of goods feloniously taking them from the hands of a bailee, when the taking them has the effect of charging the bailee.³ Thus where thirty bales of nux vomica, which pays no duty on exportation, but a large duty if intended for home consumption, were deposited by A. with B., who gave the usual bond to the custom-house, and were sent by B., under the care of C., to be shipped on board a foreign vessel for exportation, and A., by collusion with C., took the nux vomica from the bales, substituted cinders for it, and shipped the bales on board the vessel, this was held, by a majority of the judges, to be larceny, because the taking rendered B. chargeable to the custom-house, and liable to a suit upon his bond.⁴ The rule has been still more extended in New York, where it has been said that larceny may be committed by a man stealing his own property, wherever the intent is to charge another with the value. Possession, however, in such case must be in the bailee.⁵ There must, also, be in such case, in order to support a conviction, a felonious design.⁶

Larceny in a man to steal his own goods from bailee to charge bailee.

§ 922. Where there are joint tenants or tenants in common of a

¹ *R. v. Rosenberg*, 1 C. & K. 233; 1 Cox C. C. 21, per Lord Denman, C. J., Parke, B.; and see, to same effect, *R. v. Taylor*, 12 Cox C. C. 627.

² *R. v. Deer*, 9 Cox C. C. 225; Leigh & C. 240.

³ 2 East P. C. 645; *R. v. Bramley*, R. & R. 478; *Kirksey v. Fike*, 29 Ala. 206, 1856; *People v. Thompson*, 34 Cal. 671, 1868. See *Com. v. Tobin*, 2 Brewst. 570, 1870.

⁴ *R. v. Wilkinson*, R. & R. 470.

⁵ *People v. Palmer*, 10 Wend. 165, 1832; *People v. Wiley*, 3 Hill, 194, 1842; S. P., *People v. Thompson*, 34 Cal. 671, 1868.

The prisoner assigned his goods to trustees for the benefit of his creditors; but before the trustees had taken possession, and while the prisoner remained in possession of them, he removed the goods, intending to deprive his creditors of them. The jury found that the goods were not in his custody as agent of the trustees. It was held that he was not guilty of larceny. *R. v. Pratt*, 26 Eng. Law & Eq. 574; *Dears. C. C.* 360; 6 Cox C. C. 373.

⁶ *Adams v. State*, 45 N. J. L. (16 Vroom) 448, 1883. *Supra*, § 636.

personal chattel, and one of them carries away and disposes of it, this is no larceny;¹ there is, in fact, no taking, for he is already in possession; it is merely the subject of an action of account, or bill in equity. But if he were to take it out of the possession of a person in whose hands it is for safe custody, and the effect of the taking would be to charge the bailee, it would be otherwise.² And when joint ownership terminates, it is larceny for one ceasing to have an interest to steal from what was once the common property.³

Joint tenant or tenant in common of chattel cannot steal chattel unless in hands of bailee.

§ 923. The taking of another's goods out of the place where they were put, though the taker be detected before they are actually carried away, is larceny.⁴ To taking it is essential that the thing should be moved from the particular portion of space which it occupied before the alleged taking, although the whole of it need not be moved from the whole of such space.⁵ To take a thing from a *person* it is necessary that the taker should at some particular moment have adverse possession of the

Distance of moving immaterial

¹ 1 Hale, 513; *Com. v. Superintendent*, 9 Phila. 581, 1872; *State v. Kent*, 22 Minn. 41, 1875; *Bell v. State*, 7 Tex. App. 25, 1879.

² *R. v. Burgess*, Leigh & C. 299. Where a member of a benefit society entered the room of the person with whom a box containing the funds of the society was deposited, and took and carried it away, this was held to be larceny, the bailee being answerable to the society for the funds. *R. v. Bramley*, R. & R. 478; *People v. Thompson*, 34 Cal. 671, 1868; *Bell v. State*, *ut supra*. See, for other cases, *infra*, § 935.

Where one got staves upon the land of another, upon contract to have half for getting them, it was held that while they remained on the land undivided the manufacturer was neither a tenant in common with the owner of the land, nor a bailee of the staves, and therefore he, or any other person with his connivance, might be guilty of larceny in taking them. *State v. Jones*, 2 Dev.

& Bat. 544, 1837. See, also, *State v. Copeland*, 86 N. C. 691, 1882.

³ *Webb v. State*, 87 N. C. 558, 1882; *Bonham v. State*, 65 Ala. 456, 1879.

⁴ *Supra*, § 914; *R. v. Walsh*, 1 Mood. C. C. 14; *State v. Wilson*, Coxe, 439; *State v. Carr*, 18 Vt. 571, 1841; *Harrison v. People*, 50 N. Y. 518, 1872; *Eckels v. State*, 20 Ohio St. 508, 1870; *State v. Hecox*, 88 Mo. 531, 1884; *Garris v. State*, 35 Ga. 247, 1866. See *Com. v. Luckis*, 99 Mass. 431, 1868; *State v. Jackson*, 65 N. C. 305, 1871, and cases cited *supra*, § 867. In Texas, asportation is not necessary. *Nichols v. State*, 28 Tex. App. 105, 1889; *Doss v. State*, 21 Ibid. 505, 1886.

⁵ *R. v. Simpson*, 6 Cox C. C. 422; *Dears*. 421; *R. v. Coslet*, 1 Leach, 236; *Harrison v. People*, 50 N. Y. 518, 1872; *State v. Craige*, 89 N. C. 475, 1883. In *State v. Jones*, 65 Ibid. 395, 1871, the mere upsetting, with intent to steal, of a barrel of turpentine, was held not to be larceny.

thing. But this independent, absolute control need endure only for an instant.¹

¹ *State v. Chambers*, 20 W. Va. 779, 1882. See Steph. Dig. Crim. Law, art. 284. Sir J. F. Stephen gives the following illustrations:

"(1) A. removes a parcel from one end of a wagon to another. This is a taking and carrying away. *Coslet's Case*, 1 Leach, 236."

In *State v. Craige*, 89 N. C. 475, 1883, it was held larceny to move from one garner to another (the defendant's) in a mill. See, also, *Flynn v. State*, 42 Tex. 301, 1875.

"(2) A. lifts a sword partly out of its scabbard. A. has taken and carried away the sword. *R. v. Walsh*, 2 Russ. on Cr. 153 (from MS. of Bayley, J.). An odd point would arise if the sword and scabbard were merely twisted round in the place which they occupied before they were touched. I suppose this would not be an asportation.

"(3) A. causes a horse to be led out of a stable for him to mount. A. has led away the horse. *R. v. Pitman*, 2 C. & P. 423.

"(4) A., a postman, instead of delivering a letter in due course, or bringing it back in his pouch, which would be his duty if he could not deliver it, puts it in his pocket intending to steal it. This is a taking and carrying away. *R. v. Poynton*, L. & C. 247.

"(5) A. snatches a diamond earring from a lady's ear, tearing it out of the ear; it drops from his hand into her hair, and is found there by her afterward. A. has taken and carried away the ear-ring. *Lapier's Case*, 1 Leach, 320." *Supra*, §§ 849 *et seq.*

To these the following cases may be added:

Where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book

was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket, this was considered a sufficient asportation to constitute larceny. *R. v. Thompson*, 1 Mood. C. C. 78; *State v. Henderson*, 66 N. C. 627, 1872; *State v. Chambers*, 22 W. Va. 779, 1883. *Cf. McLin v. State*, 29 Tex. App. 171, 1890. But see *Com. v. Luckis*, 99 Mass. 431, 1868, in which case there was no positive evidence that the defendant's hand touched the pocket-book, but the prosecutrix's pocket was torn, and the book fell to the ground. In another case the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through the buttonhole of the waistcoat, and kept there by a watch-key at the other end of the chain, turned so as to prevent the chain from slipping out. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain and watch-key out of the buttonhole, but the point of the key caught upon a button, and, the prisoner's hand being seized, the watch remained there suspended. It was held that the prisoner was guilty of stealing from the person, as the watch and chain were in his possession, and severed from the person of the prosecutor for the interval of time after the key was drawn out of the buttonhole, and before it caught the button. *R. v. Simpson*, 29 Eng. Law & Eq. 530; 6 Cox C. C. 422. Otherwise, where the evidence failed to show whether the defendant got the money in hand or merely knocked it out of the prosecutor's hand, when it was lost. *Thompson v. State*, 94 Ala. 535, 1891.

§ 924. The taking need not be by the *hand*. Thus, asportation was held to be complete when gas was subtracted from a main pipe by the fraudulent insertion of another pipe.¹ And so, no doubt, would it be held as to wine subtracted from a cask by means of a tube or pipe. In such cases the larceny, so far as concerns the continuous flow under a single impulse, is not divisible.²

Taking
need not
be by the
hand.

As will be hereafter seen, a taking by fraudulent legal process may be larceny.³

§ 925. *Animals*, merely by being killed, are not sufficiently carried away to sustain an indictment for larceny.⁴ But where the defendants took away several sheep from a field, and left them, having first killed them and skinned one of them under a tree in an adjoining field, it was held that there was sufficient evidence of asportation,⁵ though it would be otherwise if the animal were shot and skinned without being removed.⁶ And any change of site⁷ enables an asportation to

Killing of
animals
not a suffi-
cient
carrying
away.

Where the thief set a package on end, in the place where it lay, for the purpose of cutting open the side of it to get out the contents, and was detected before he had accomplished his purpose, this was held not to be larceny. *R. v. Cherry*, 2 East P. C. 556; and see *State v. Jones*, 65 N. C. 395, 1871; and the same conclusion was reached where the thief was not able to carry off the goods on account of their being attached by a string to the counter; *Anon.* 2 East P. C. 556; and see *People v. Myer*, 75 Cal. 383, 1888; or to carry off a purse, on account of some keys attached to the strings of it being entangled in the owner's pocket. *R. v. Wilkinson*, 1 Hale, 598. See 2 Russ. on Cr. 155; *Com. v. Luckis*, 99 Mass. 431, 1868. The distinction between the latter cases and that above given, where the point of the watch-key caught in a buttonhole while the watch was being withdrawn, is, that in one case there was a moment when the goods were loose, but not so in the other. Taking, also, was held not to be proved where a man being compelled by fear to drop

his goods, the thief fled before taking them up. *Supra*, § 914. The removal of a drawer containing money from a safe, leaving it outside of the safe, but taking it no further, is a sufficient asportation. *State v. Green*, 81 N. C. 560, 1879.

¹ *R. v. White*, Dears. 203; 3 C. & K. 363; *Com. v. Shaw*, 4 Allen, 308, 1862; *R. v. Firth*, cited *supra*, § 863; *infra*, § 931.

² *Infra*, § 931; *supra*, § 27.

³ *Infra*, § 976.

⁴ *State v. Seagler*, 1 Rich. 30, 1844; *People v. Murphy*, 47 Cal. 103, 1873. *Cf. Kemp v. State*, 89 Ala. 52, 1889. See *Crowell v. State*, 24 Tex. App. 404, 1888; *Nightengale v. State*, (Ga.) 21 S. E. Rep. 221, 1894.

⁵ *State v. Carr*, 13 Vt. 571, 1841.

⁶ *State v. Alexander*, 74 N. C. 232, 1876. *Supra*, § 874.

⁷ *R. v. Williams*, 1 Mood. C. C. 107; *R. v. Clay*, R. & R. 387; *State v. Alexander*, 74 N. C. 232, 1876. See *R. v. Townley*, L. R. 1 C. C. 315; *Lundy v. State*, 60 Ga. 143, 1878.

That taking milk from a cow is larceny, see *R. v. Martin*, 1 Leach, 205, cited *supra*, § 871.

be presumed, *e. g.*, moving and skinning the animal when dead with intent to appropriate the hide.¹

§ 926. To lead or even to entice by food an animal from its range is a "taking;"² but the larceny is not complete until the animal is in the thief's control;³ nor is selling an animal larceny, unless the animal is in some way taken by the thief.⁴ Nor has "trapping" been held larceny until the period when the animal trapped has been seized by the thief.⁵ But the larceny is complete when the animal falls under the control of the thief.⁶

Enticing
or trap-
ping ani-
mals not
taking,
etc., until
seizure.

§ 927. In larceny a party cannot be convicted as a principal unless he were actually or constructively present at the taking and carrying away of the goods. His previous consent to, or procurement of the caption and asportation, will not, at common law, make him a principal, nor will his subsequent reception of the thing stolen, or his aiding in concealing or disposing of it, have that effect.⁷

Party
must be
present at
taking to
be prin-
cipal.

§ 928. Where a larceny has been committed in one county and the thief removes the stolen property into another county (*animo furandi*), he is, in the eye of the law, guilty of the larceny, in every county into which the goods may thus have been carried.⁸ The rule

¹ *McPhail v. State*, 9 Tex. App. 141, 1887. If he is acting in pursuance of a common design, his

² *Mooney v. State*, 8 Ala. 328, 1846; *State v. Gazell*, 30 Mo. 92, 1860. See *Eckels v. State*, 20 Ohio St. 508, 1870; *Baldwin v. People*, 2 Ill. 304, 1886; *Delk v. State*, 64 Miss. 77, 1886.

³ *Edmonds v. State*, 70 Ala. 8, 1881; *Oroom v. State*, 71 Ibid. 14, 1881; *Min-ter v. State*, 26 Tex. App. 217, 1888.

⁴ *Hardeman v. State*, 12 Tex. App. 207, 1882.

⁵ *State v. Wisdom*, 2 Porter 511, 1835. See *Kemp v. State*, 11 Hump. 320, 1850; *State v. Martin*, 12 Ired. 157, 1851; *Molton v. State*, (Ala.) 16 So. Rep. 795, 1895.

⁶ *Ibid.* *State v. Gazell*, 30 Mo. 92, 1860; *People v. Smith*, 15 Cal. 409, 1860.

⁷ *Supra*, §§ 205 *et seq.*; *R. v. Samways*, 26 Eng. Law & Eq. 576; *Dears. C. C.* 371; *State v. Hardin*, 2 Dev. & Bat. 407, 1837; *Collins v. State*, 24

Tex. App. 141, 1887. If he is acting in pursuance of a common design, his bodily presence is not essential. *Blain v. State*, 24 Tex. App. 626, 1888; *Gentry v. State*, *Ibid.* 478, 1888; *Montgomery v. State*, (Tex.) 23 S. W. Rep. 693, 1893; *Trimble v. State*, (Tex.) 26 S. W. Rep. 727, 1894. A person who plans a robbery, the execution of which is entrusted to others, may, on its successful accomplishment, be convicted of larceny. *Com. v. Hollister*, 157 Pa. 13, 1893.

⁸ *Supra*, § 291; *R. v. Parkin*, 1 Mood. C. C. 45; 1 Hale, 507; 1 Hawk. P. C. c. 38, s. 52; 3 Inst. 113; *State v. Underwood*, 49 Me. 181, 1860; *Com. v. Dewitt*, 10 Mass. 154, 1813; *Com. v. Hayes*, 140 Mass. 366, 1886; *Haskins v. People*, 16 N. Y. 344, 1857; *People v. Burke*, 11 Wend. 129, 1833; *Com. v. Cousins*, 2 Leigh, 708, 1831; *State v. Margerum*, 9 Baxt. 362, 1878; *John-*

applies as well to property which is made the subject of larceny by statute, as to property which is the subject of larceny by the common law.¹

A thief carrying goods from county to county may be convicted in either county.

The rule, however, does not apply to cases where there has been a transmutation of the property on its transit; so that an indictment describing it as it was when originally stolen would cease to describe it as it was when it arrives at the county where the trial takes place;² nor to cases where after a joint larceny there has been a severance before asportation;³ nor to statutory modification of larceny,⁴ as stealing from dwelling-houses.

§ 929. One aiding or abetting in a larceny in one county, and afterward concerned in the possession and disposal of the stolen property in another county, though the goods were removed to the latter county without his agency, may be convicted of larceny in the latter county.⁵ But for a con-

All assenting to asportation are principals.

son *v. State*, 47 Miss. 671, 1873; *State v. Brown*, 8 Nev. 208, 1872; *People v. Mellon*, 40 Cal. 648, 1871; *Clark v. State*, 23 Tex. App. 612, 1887; *Kidd v. State*, 83 Ala. 58, 1887. See *Moore v. State*, 55 Miss. 432, 1878; *Lucas v. State*, 62 Ala. 26, 1878; *Morrissey v. People*, 11 Mich. 327, 1862.

¹ *Com. v. Rand*, 7 Metc. 475, 1844. As to Texas rule, see *Roth v. State*, 10 Tex. App. 27, 1881; *Dixon v. State*, 15 Ibid. 480, 1884.

A. took the horse, wagon, and harness of B. from his stable by a trespass, and drove to a neighboring town. While on the way he changed the horse for another, which was in a pasture by the roadside. He then drove to another county, and there sold the second horse. It was held, that although when he took the property he intended to return it, he might nevertheless be convicted of larceny in the county where he committed the trespass. *Com. v. White*, 11 Cush. 483, 1853.

² *R. v. Halloway*, 1 C. & P. 127; *R. v. Edwards*, R. & R. 497. As where turkeys are stolen alive in one county and there killed, and carried dead into another county. Ibid. Or where a brass furnace has been stolen in

one county and there broken up and the pieces carried into another county. *R. v. Halloway*, 1 C. & P. 127. In such case the indictment must describe the chattel as it was in the county where the indictment was found. *Com. v. Beaman*, 8 Gray, 497, 1857.

³ *R. v. Barnett*, 2 Russ. on Cr. 174. But if there be a joint larceny in one county, and one of the thieves carry the goods into the other county, and they afterward all concur in securing the goods in the latter county, they may be jointly indicted in that county. *R. v. County*, Ibid. 329.

When there is one continuing transaction, though there may be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first or intermediate act. *State v. Trexler*, 2 Car. L. R. 90; *R. v. Firth*, L. R. 1 C. C. 172. *Infra*, § 931.

⁴ *R. v. Thomson*, 2 Russ. on Cr. 174; *R. v. Millar*, 7 C. & P. 665. Nor does it apply to theft from the person. *Nichols v. State*, 28 Tex. App. 105, 1889; *Gage v. State*, 22 Ibid. 123, 1886.

⁵ *Com. v. Dewitt*, 10 Mass. 154, 1813. See *supra*, § 291.

viction it is essential that he should in some way have assented to the removal.¹ And he must in some way have consented to the original taking, and have removed the property with felonious intent.²

§ 930. Asportation as between independent States has been already considered.³ It may be here added that by the Revised Statutes of New York it is provided that when larceny is committed in another State, and the stolen property brought into that State, and there converted to the taker's use, the offence may be punished to the same effect as if the original larceny had been there committed.⁴

Conflict of opinion as to whether when goods are stolen in one State the thief may be convicted in another State where the goods are brought.

Similar statutes exist in Alabama,⁵ and in Texas.⁶

In New York, however, before the passage of the statute, such was not the law. Where a man stole a horse in Vermont, and afterward carried it into New York, the Supreme Court of New York held that when the original taking was out of the jurisdiction of the State the offence does not continue and accompany the thing stolen, as it does in the case where a thing is stolen in one county and the thief is found with the property in another county.⁷ Such is the rule in Pennsylvania, as declared by a majority of the court after elaborate argument, it being held that in such a case the defendant must be acquitted, and be detained to wait a requisition from the State where the larceny was committed.⁸ And such is the law in New Jersey, North Carolina, Georgia, Indiana, Nebraska, Nevada, and Tennessee.⁹ In Massachusetts the opposite doctrine has been held, and convictions for larcenies in other States, when the property stolen has been brought

¹ *R. v. Simmonds*, 1 Mood. C. C. 408. rectness; and *Savage*, C. J., stated

² *Ibid.*; *Welsh v. State*, 3 Tex. App. 413, 1878; *Scales v. State*, 7 *Ibid.* 361, 1880. that he had drawn the bill in *People v. Gardner*, and had always been convinced that the offence existed at common law. *People v. Burk*, 11 Wend. 129, 1833. See *supra*, § 291.

³ *Supra*, § 291.

⁴ Rev. Stat. 694. See, as to venue, Whart. Crim. Ev. § 111. *Supra*, § 291. ⁵ *Simmons v. Com.*, 5 Binn. 618, 1813

⁶ *State v. Seay*, 3 Stewart, 123, 1830. ⁷ *State v. La Blanche*, 2 Vroom, (N. J.) 82, 1864; *State v. Brown*, 1 Hayw

⁸ *State v. Morales*, 21 Tex. 298, 1858. ⁹ *People v. Gardner*, 2 Johns. 477, 1807; *People v. Schenck*, *Ibid.* 479, 1807. In New York, in a case under the Revised Statutes, the principle ruled in *People v. Gardner*, as cited above, was reexamined, and doubts were thrown out as to its original cor-

within her limits, have repeatedly taken place.¹ The Connecticut Court of Errors, in an opinion which received the unanimous assent of the judges, asserted at an early period the same doctrine,² and in this conclusion other courts have joined.³ That such convictions are good by statute, if not by common law, has been held in Maryland, though not without much argument,⁴ in Mississippi,⁵ in Kentucky,⁶ in Ohio,⁷ in Iowa,⁸ in Oregon,⁹ in Michigan,¹⁰ in South Carolina.¹¹ In some jurisdictions the courts have gone further, and, transcending the common law limits, have held that when goods were stolen in Canada and brought into one of the United States, the latter has jurisdiction.¹² But this view is strongly contested.¹³

In England, if a larceny is committed out of the kingdom, though within the king's dominions (*e. g.*, in Jersey), bringing the things stolen into England will not make it larceny.¹⁴

Indictments for stealing goods thus asported, when the indictment is held by the court to be based exclusively on statute, in departure from the common law, must, it is said, aver specially the facts of asportation, so as to bring the case within the statute.¹⁵

§ 931. When two or more articles are taken successively, it is to be considered whether such taking is continuous, so as to form part of one transaction, to be indictable as such. And the answer is, if the transaction is set in motion by a single impulse, and operated upon by a single unintermittent

When several things are taken by one contin-

¹ *Com. v. Cullins*, 1 Mass. 116, 1804; *Com. v. Andrews*, 2 Ibid. 14, 1836; *Com. v. Uprichard*, 3 Gray, 434, 1855; *Com. v. White*, 123 Mass. 430, 1878. See *Com. v. Holder*, 9 Gray, 7, 1857, where it is said that the rule applies to States "which derived their jurisprudence from the English common law." See § 296; Whart. Crim. Ev. § 111.

² *State v. Ellis*, 3 Conn. 185, 1819; S. P., *State v. Cummings*, 33 Conn. 260, 1865. See, fully, *supra*, § 291.

³ See cases cited *supra*, § 291.

⁴ *Cummings v. State*, 1 H. & J. 340. In *Worthington v. State*, 58 Md. 403, 1882, it was held that taking the goods into another State was a new larceny in the latter State.

⁵ *Watson v. State*, 36 Miss. 593, 1859.

⁶ *Ferrill v. Com.*, 1 Duv., 153, 1863.

⁷ *Hamilton v. State*, 11 Ohio, 435, 1842.

⁸ *State v. Bennett*, 14 Iowa, 479, 1863.

⁹ *State v. Johnson*, 2 Oreg. 115, 1864.

¹⁰ *People v. Williams*, 24 Mich. 156, 1871. See *supra*, § 291.

¹¹ *State v. Hill*, 19 S. C. 435, 1883. So in Arkansas; *State v. Johnson*, 38 Ark. 568, 1882.

¹² *State v. Bartlett*, 11 Vt. 650, 1839; *State v. Underwood*, 49 Me. 181, 1860. See *State v. Barnett*, 15 Oreg. 77, 1887.

¹³ *Com. v. Uprichard*, 3 Gray, 440, 1855; *Stanley v. State*, 24 Ohio St. 166, 1873.

¹⁴ *R. v. Prowes*, 1 Mood. C. C. 349; S. P., *R. v. Madge*, 9 C. & P. 29; *R. v. Debruiel*, 11 Cox C. C. 207. See, generally, *supra*, § 291; Whart. Crim. Ev. § 111.

¹⁵ *Alsey v. State*, 39 Ala. 664, 1866; *State v. Morales*, 21 Tex. 298, 1858. But it is otherwise when the offence is held to be such at common law. *Haskins v. People*, 16 N. Y. 344, 1857.

uous act
this is a
single
larceny.

force, it forms a continuous act, and hence must be treated as one larceny, not susceptible of being broken up in a series of offences, no matter how long a time the act may occupy.¹ So has it been decided in reference to gas feloniously drawn, during a long space of time, from a main pipe, by means of a fraudulent pipe;² and so is it where a series of articles are removed a few minutes apart, by one impulse, in execution of a general fraudulent plan.³ And when a particular shaft of coal is fraudulently opened and quarried, in pursuance of a continuous design, by a series of innocent agents, for several years, the transaction, if there be one tapping or orifice of the vein, is single, and to be indicted as such.⁴ Such is also the rule of the modern Roman law with regard to the subtraction of wine from vats by a tube fraudulently applied. No matter how long the suction lasts, or how much wine is removed, the transaction is single as long as it rests on the original attachment of the tube.

If this reasoning be correct, there can be, when there is such continuousness, but a single prosecution; and one prosecution for a section or part of the things taken absorbs the offence. If the prosecutor elect to take such a section, he cannot split up the transaction into a series of cases commensurate in number with the particles of the mass taken. Such is the reasoning by which eminent German jurists have reached the conclusion that for a continuous offence there can be but a single prosecution, unless some extrinsic force necessitates the breaking of the offence into fragments.⁵ The same view is practically accepted in England and the United States.⁶ But if broken up, as is stated, by extrinsic action, then separate in-

¹ See, on this topic, Whart. Cr. Pr. 9 Cox C. C. 437; *State v. Nelson*, 29 & Pl. § 470, where the question is discussed in detail; and as to divisibility generally, see *supra*, § 27; *State v. Martin*, 82 N. C. 672, 1880; *State v. Wagner*, 118 Mo. 626, 1893; *State v. Ward*, 19 Nev. 297, 1886.

² *R. v. Firth*, L. R. 1 C. C. 172; 11 Cox C. C. 234. *Supra*, §§ 863, 924.

³ *R. v. Jones*, 4 C. & P. 217; *R. v. Birdseye*, Ibid. 386. *Supra*, § 27.

⁴ *R. v. Bleasdale*, 2 C. & K. 765.

⁵ See Bar, Priv. Int. § 557; Geyer, Holtz. Ency. *in loco*. *Supra*, § 27.

⁶ *R. v. Brettell*, C. & M. 609; and see, also, *R. v. Knight*, L. & C. 378; § 589.

dictments are necessary.¹ This perhaps occurs when articles of different owners are taken by a continuous act;² and certainly when the continuous act spreads over two or more distinct jurisdictions,³ or is arrested by the intervention of other occupations.⁴

IV. OWNERSHIP.

§ 932. To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be either the absolute or special property of the alleged owner,⁵ provided that such owner be not

¹ *Joslyn v. State*, 128 Ind. 160, 1890. As to divisibility of offences, see *supra*, § 27.

² See *infra*, § 948; Whart. Cr. Pl. & Pr. § 470. But see *State v. Morphin*, *supra*; *State v. Larson*, 85 Ia. 659, 1892; *State v. Warren*, 77 Md. 121, 1893; *People v. Johnson*, 81 Mich. 573, 1890.

³ *Supra*, § 291. See, for authorities on this point, Whart. Confl. of Laws, § 931; *Moore v. Illinois*, 14 How. 13, 1852.

⁴ *R. v. Birdseye*, 4 C. & P. 386, where it was held that where there was an intermission of two minutes between the taking of two articles, this was one transaction; but that it was otherwise when there is an intermission of half an hour; and see Whart. Crim. Ev. § 589.

⁵ That either absolute or special ownership will sustain indictment, but that one of the two is necessary, see 2 East P. C. 652; *State v. Somerville*, 21 Me. 14, 1842; *State v. Pettis*, 63 Ibid. 124, 1873; *State v. Furlong*, 19 Ibid. 225, 1841; *Com. v. Morse*, 14 Mass. 217, 1817; *Com. v. Sullivan*, 104 Mass. 552, 1870; *People v. McDonald*, 43 N. Y. 61, 1870; *State v. Lyon*, 45 N. J. L. 272, 1883; *State v. Jackson*, 1 Houst. C. C. 561, 1879; *State v. Chambers*, 22 W. Va. 779, 1883; *State v. Clapper*, 59 Iowa, 279, 1882; *State v. McIntire*, 59 Ibid. 267, 1882; *State v. Hardison*, 75 N. C. 203, 1876; *State v. Everage*, 33 La. An. 120, 1881; *Langford v. State*, 8 Tex. 115, 1852; *Black-*

burn v. State, 44 Ibid. 457, 1876; *Moseley v. State*, 42 Ibid. 78, 1875; and cases cited *infra*, § 938. As to the manner of setting out the names of owners, see Whart. Pl. & Pr. §§ 109 *et seq.* As to variance in names, see Whart. Crim. Ev. §§ 94 *et seq.*

On the subject of ownership we have the following from Sir J. F. Stephen (Dig. Crim. Law, art. 281):

“A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner, to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

“A movable thing is in the possession of the husband of any woman, or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure. The word ‘servant,’ here includes any person acting as a servant for any particular purpose or occasion.

“The word ‘custody’ means such a relation toward the thing as would constitute possession if the person having custody had it on his own account.

“If a servant receives anything for his master from a third person, not being a fellow-servant, he has the possession, as distinguished from the custody of it, until he has put it into his master’s possession, by putting it into a place or thing belonging to his master, or by some other act of the same

Either absolute or special will sustain an indictment

technically the defendant.¹ If the defendant had even the right to mix his money with that fraudulently appropriated by him, the money cannot be laid as the property of another person.² But it is not necessary that the

sort, whether the servant himself has B.'s, possession. *R. v. John Smith*, 2 Den. 449.

"If a servant receives anything belonging to his master from a fellow-servant who has received it from their common master, such thing continues to be in the possession of the master, unless the servant who delivered it delivered it with the intention to pass the property therein to the servant to whom it is delivered, having authority to do so from the master.

"If a servant receives anything belonging to his master from a fellow-servant who has received it on the master's account, and has done no act to put it into the master's possession, it is in the possession of the servant who so receives it, and not in his custody merely.

"*Illustrations.*—(1) A., the master of a house, gives a dinner party. The plate and other things on the table are in his possession, though from time to time they are in the custody of his guests or servants. Founded on 1 Hale P. C. 506.

"(2) A. assigns the goods in his house to trustees for the benefit of his creditors. The trustees leave him undisturbed and do not in any way interfere with the goods. A., and not the trustees, is in the possession of the goods. *R. v. Pratt*, Dears. 360.

"(3) A. produces a receipt stamp, and gets B. to write a receipt on it in A.'s presence, as for money paid by A. to B. The stamp is in A.'s, not

"(4) A. buys a bureau from B. at a sale, with money in a secret drawer, of the existence of which neither A. nor B. is aware. The money is not in B.'s possession (though the bureau which contains it is) because B. cannot be presumed to intend to act as the owner of it when he discovers it. *Cartwright v. Green*, 8 Ves. 405; *Merry v. Green*, 7 M. & W. 623.

"(5) A. is clerk to B., a banker; money is paid to A. on B.'s account; A. keeps it for a short time, and then puts it into the till. The money is in A.'s possession till it is put into the till, when it passes into B.'s possession, though A. may have the custody of it. *Bazeley's Case*, 2 Leach, 835. This case led to the first act against embezzlement by clerks and servants. No opinion was publicly delivered in it, but the judges seem to have considered that the act was not felony. Several similar cases are quoted in the argument." (If the taking the money by A. was not larceny, this was because it had never come into B.'s hands. *Infra*, § 943.)

"(6) B. leaves a watch with its maker to be regulated. A. writes to the maker to send the watch to B. at a certain post-office. A. then goes to the post-office, and, pretending to be B., gets the watch. As soon as the watch reaches the post-office, addressed to B., it is in B.'s possession, as the postmaster, as regards the letter and

¹ *State v. McCoy*, 89 N. C. 466, 1883; *People v. McKinley*, 9 Cal. 250, 1858.

² *Infra*, § 1033; *supra*, § 922.

alleged owner should be legally entitled to hold the property. It is enough if he in any sense have title.¹

§ 932 *a*. The proper practice is to insert counts charging the ownership in as many ways as there are parties interested; but, as a general rule, it will be sufficient if either general or special ownership be alleged. Hence, when bailed goods are stolen by a stranger, the ownership may be laid either in bailor or bailee, or in principal or agent.²

Counts
may vary
property.

§ 933. Ownership may be inferentially proved. It is not necessary, however, to prove by the person whose property is charged to have been stolen that the property belonged to him; the testimony of other persons who know the fact is sufficient.³ And such ownership may be inferred from the circumstances of the case.⁴

Ownership
may be in-
ferentially
proved.

§ 934. The property of the stolen goods must be averred to be in the right owner, general or special, if known, or in some person or persons unknown.⁵ If the owner be misnamed; if the name

watch, is the servant of the owner. *R. v. Kay*, D. & B. 236. See Bramwell, B.'s, remarks on this case in *R. v. Middleton*, L. R. 2 C. C. 58.

"(7) B., being prevented by a crowd from getting near the pay-place at a railway station, hands a sovereign to A., who is close to it, to pay for her ticket, and give her the change. The sovereign is in B.'s possession, but in A.'s custody. *R. v. Thompson*, L. & C. 225;" s. c. cited *infra*, §§ 956, 961, 963. Compare *infra*, § 1009.

¹ *Infra*, §§ 945, 1025, 1035, 1038.

² *Infra*, §§ 938, 978.

F., the cashier of a bank, as such had received a sealed package containing bank notes. The package was in a bag in his hands. He, while on his way to his bank, went into an eating saloon, placed the bag on a hat-rack, with his hat, and then sat down at a table a few feet from the hat-rack, and in such a direction from it as to leave the bag behind him and out of his sight and reach while sitting at the table. While there the bag was stolen, but was not missed until F.

arose from the table and went to get it, in leaving the saloon, some ten minutes after the defendant had gone from the saloon. It was held, that there was evidence for the jury to find the possession to be in F., so as to sustain the allegation of property in him. *Com. v. Butts*, 124 Mass. 449, 1878.

³ 1 Archbold's C. P. (9th ed.) 167; *Lawrance v. State*, 4 Yerg. 145, 1833; *State v. Primeaux*, 39 La. An. 673, 1887. See *State v. Morey*, 2 Wis. 494, 1853; *Stewart v. State*, 9 Tex. App. 321, 1880; *Coleman v. State*, (Tex.) 22 S. W. Rep. 41, 1893. *Supra* §§ 914 *et seq.*

⁴ Whart. Crim. Ev. §§ 1-20; *State v. Stanley*, 48 Iowa, 221, 1878; *State v. Cardelli*, 19 Nev. 319, 1886.

Where the alleged owner of goods averred to have been stolen, though he had lost such property, would not swear to it, nor that he had not sold the same to some other person than the defendant, this is not sufficient proof of ownership of the alleged stolen property. *State v. Furlong*, 19 Me. 225, 1841.

⁵ Whart. Cr. Pl. & Pr. § 111; Whart.

thus stated be not either his real name or the name by which he is usually known ; or if it appear that the owner of the goods is another and different person from the person named as such in the indictment, the variance will be fatal, and the defendant, at common law, must be acquitted.¹ What is a variance at common law is fully discussed in another work.²

Variance
in owner-
ship is
fatal.

§ 935. Joint tenants, or tenants in common, as we have seen, have not generally an ownership as against each other upon which an indictment for larceny can be sustained.³ And the property of such owners must at common law be laid jointly, and the names of all the owners correctly given.⁴ It is otherwise when one of the partners or joint owners has a special property, in which case the goods may be laid as his.⁵

Ownership
of joint
tenants and
tenants in
common
must be
jointly
laid.

§ 936. It has been already stated⁶ that a man cannot be convicted of stealing his own goods, but that one having the *property* in goods may be guilty of larceny in stealing them from one to whom (*e. g.*, a bailee) he has given them in custody as special possession.⁷ In such case ownership must be laid in the bailee.⁸ The owner of goods, also,

General
owner may
be charged
with steal-
ing from
special
owner.

Crim. Ev. § 97. As to "unknown," see *States* this is remedied by statute. See *infra*, § 949. That an averment of joint ownership will not be sustained by proof of ownership in severalty, see *Lasure v. State*, 19 Ohio St. 44, 1869; *State v. Cunningham*, 21 Ia. 433, 1866.

¹ Whart. Crim. Ev. § 94; *Pitts v. State*, (Tex.) 22 S. W. Rep. 410, 1893. See English *v. State*, 29 Tex. App. 174, 1890; *State v. Hanks*, 39 La. An. 284, 1887; *Pisano v. State*, (Tex.) 29 S. W. Rep. 42, 1895.

² Whart. Crim. Ev. §§ 91 *et seq.* ³ 2 Russ. on Cr. (6th Am. ed.) 86. *Supra*, § 922.

⁴ *State v. McCoy*, 14 N. H. 364, 1843; *Com. v. O'Brien*, 12 Allen, 183, 1866; *State v. Owens*, 10 Rich. 169, 1856; *Pamier v. State*, 41 Ala. 416, 1868; *McCowan v. State*, 58 Ark. 17, 1893; *Widner v. State*, 25 Ind. 234, 1865; *People v. Bogart*, 36 Cal. 245, 1868; *Henry v. State*, 45 Tex. 84, 1876; *McDowell v. State*, 68 Miss. 348, 1891. In most

⁵ *R. v. Burgess*, 9 Cox C. C. 302; *R. v. Webster*, *Ibid.* 13. *Supra*, § 922.

⁶ *Supra*, § 982. ⁷ 2 East P. C. 654; *R. v. Wilkinson*, R. & R. 470; *Adams v. State*, 45 N. J. L. 448, 1883; *People v. Stone*, 16 Cal. 369, 1860; and *supra*, § 921.

⁸ *Supra*, § 932; *Palmer v. People*, 10 Wend. 165, 1832; *State v. McCoy*, 89 N. C. 466, 1883; and see *State v. Dewitt*, 32 Mo. 571, 1862.

In these cases it was held that a man could be indicted for stealing his own goods when in the possession of a constable who had levied on them. *Supra*, § 921; *infra*, § 942. In *Bruley v. Rose*, 57 Iowa, 651, 1882, it was held larceny for a pledgor to steal from a pledgee.

is guilty of larceny when he clandestinely takes them from the possession of one who has in them a lawful lien.¹ And so, on the other hand, one having special property in the goods may be guilty of larceny by converting them, and thus depriving the owner of his property.² But should it appear that his object was, not to deprive the bailor of his property, but to injure other parties, the indictment cannot be sustained; and hence when A., who owns personal property seized by the sheriff, carries off such property with intent to defraud the attaching creditors, it is larceny, though it would be otherwise where no vested interest is prejudiced.³ And in any case a felonious intent must be shown.⁴

It is settled that theft may be committed by a member of a corporation to the prejudice of that corporation of a thing which is the property of the corporation.⁵

§ 937. An indictment for stealing grave-clothes or coffins must state them to be the goods and chattels of the executor or administrator;⁶ or if there be no will or no administration, it would seem that they may be laid to be the goods of the person who defrayed the expenses of the burial, or of the ordinary, if the shroud were not purchased with the money of the deceased. So, if a coffin be stolen, it may be described in the same manner; or if from length of time it be difficult to ascertain the personal representatives of the deceased, it may be laid as the property of a person unknown; but it cannot at common law be described as the property of the church-wardens of the parish from which it was stolen.⁷

Grave-clothes and coffins to be laid as property of executor.

§ 938. Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either,⁸ and "every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not divested if the special owner parts

As against strangers property may be laid in either bailor or bailee.

¹ *People v. Long*, 50 Mich. 249, 1888.

² *Infra*, §§ 956 *et seq.*

³ *Com. v. Greene*, 111 Mass. 892, 1878. Surrender by the attaching officer in such case is a question of fact.

Com. v. Brigham, 123 Mass. 248, 1878.

⁴ *Adams v. State*, 45 N. J. L. (16 Vroom) 448, 1883; *supra*, § 921.

⁵ *Ibid.*, citing Roscoe's Crim. Ev. (8th ed.) 652.

⁶ 2 Hale, 181; *Haynes's Case*, 12 Co. 113. *Supra*, § 863. *Infra*, § 950.

⁷ *Anon.*, 2 East P. C. 652.

⁸ *Supra*, § 932; *R. v. Remnant*, R. & R. 136; 4 C. & P. 391; *R. v. Vincent*, 9 Eng. Law & Eq. 548; 3 C. & K.

with the possession under a mistake.”¹ Thus, goods left at an inn,² or intrusted to a person for safe keeping,³ or for sale,⁴ or to a carrier to carry;⁵ cloth to a tailor to make into clothes; linen to a laundress to wash;⁶ and goods pawned for money may be laid as the property either of the owner or of the person in whose custody they were at the time.⁷

Every person who has obtained by any means possession of any movable thing is deemed to be the special owner thereof, as against any person who cannot show a better title thereto.⁸

The bailee may be laid as owner even when the thing came into his actual possession and control fortuitously or by mistake.⁹

246; 2 Den. C. C. 467; 5 Cox C. C. P. C. 568. That in such cases goods may be laid as the property of the consignee, see *Walker v. State*, 9 Tex. App. 38, 1880.

State, (Ala.) 14 So. Rep. 860, 1894; ⁶ 1 Leach, 357, n.

Com. v. O'Hara, 10 Gray, 469, 1858; ⁷ 1 Hawk. P. C. c. 33, s. 47; *Com.*

Com. v. Butts, 124 Mass. 449, 1878; *v. O'Hara*, 10 Gray, 469, 1858. *Infra*, § 944.

Kennedy v. State, 31 Fla. 428, 1893; ⁸ It seems, however, that goods let

People v. Bennett, 37 N. Y. 117, 1867; with a ready furnished lodging must

People v. McDonald, 43 N. Y. 61, 1870; be described as the lodger's goods,

Phelps v. People, 72 N. Y. 334, 1878; and not as the original owner's. 2

Huling v. State, 17 Ohio St. 583, 1867; *Russ. on Cr.* (6th Am. ed.) 85. Where

Yates v. State, 10 Yerg. 549, 1837; a person borrows a horse to go to

Owen v. State, 6 Humph. 330, 1846; church with, and while there the

State v. Mullen, 30 Iowa, 203, 1870; horse is stolen, the custodian is not

State v. Stanley, 48 Ibid. 221, 1878; legally in possession of the horse, so

Moseley v. State, 42 Tex. 78, 1875; as to make it necessary to show that

Langford v. State, 8 Ibid. 115, 1852; the taking was without his consent.

Skipworth v. State, 8 Tex. App. 135, 1880. But see *State v. Washington*, 15

Rich. 39, 1867; *Conner v. State*, 24 ⁹ *Emerson v. State*, (Tex.) 25 S. W. Rep.

Tex. App. 245, 1887; and *infra*, §§ 289, 1894.

944, 1009; *supra*, § 932. That the in- ⁸ *State v. Ware*, 44 La. An. 954,

dictment should negative the consent 1892; *Stephen's Dig. Crim. Law*, art.

of both to the taking, see *Swink v.* 283, giving the following illustrations:

State, 32 Tex. Cr. 530, 1894. “(1) A. finds a bezoar-stone in the

street and shows it to B., a jeweller,

¹ *Steph. Dig. Crim. Law* art. 262; to ascertain its value. B. keeps it. A.

citing *R. v. Vincent*, 2 Den. C. C. 464; has a right to the stone as against B.

5 Cox C. C. 537. *Armory v. Delamirie*, 1 Sm. L. C. 357.

² *R. v. Todd*, 2 East P. C. 653. “(2) A. steals B.'s watch. C. picks

³ *R. v. Taylor*, 1 Leach, 395; *Yates* A.'s pocket of the watch. C. steals

v. State, 10 Yerg. 549, 1837. from A. Founded on 1 Hale P. C.

⁴ *People v. Smith*, 1 Parker C. R. 507.”

329, 1852. ⁹ See *People v. Phelps*, 72 N. Y.

⁵ *R. v. Deakin*, 2 East P. C. 653. 334, 1878.

See *R. v. Spears*, 2 Leach, 825; 2 East A person who hires a pistol from

§ 939. If the person named as owner is merely servant to the real owner without any special trust, the defendant must be acquitted;¹ for a mere servant has not a special property in the goods, the possession of the servant being the possession of the master.² The same distinction applies to a child left temporarily by his father in charge of his goods.³ But it has been held that the property of goods under care of an express company may be laid in the driver of the coach from which they are taken.⁴

Property cannot be laid in servant or child.

§ 940. Should the property be laid in a married woman, the defendant must be acquitted, because in law the wife's goods are the property of the husband;⁵ even though she be living apart from her husband, upon an income arising from property vested in trustees for her separate use, because the goods cannot be the property of the trustees, and, in law, a married woman has no property.⁶ Such is even the case with money given the wife for her support and that of her children, her husband having been three years absent at sea.⁷ But under recent legislation, giving married women independent control of their separate property, such property may be laid as their own;⁸ though the better view is that the husband, when living with the wife, has such special property that the goods may be laid as his.⁹

Nor in married woman.

the State has such a property therein Russ. on Cr. 158; Heygood v. State, 59 Ala. 49, 1877.

of it, it may well be alleged to be his property. Jones v. State, 13 Ala. 153, 1848.

¹ R. v. Green, 37 Eng. Law & Eq. 597; 7 Cox C. C. 186; Dears. & B. 113. But a child's necessities may be laid as his own. *Infra*, § 947.

Where leather has been delivered to a person to be manufactured into boots, which when made are to be delivered to the employer, the boots, when in the manufacturer's possession, may be laid as his. State v. Ayer, 3 Foster, (N. H.) 301, 1851. See R. v. Mucklow, 1 Mood. C. C. 160.

⁴ State v. Nelson, 11 Nev. 334, 1876. ⁵ 1 Hale, 513; Com. v. Cullins, 1 Mass. 116, 1804; Hughes v. Com., 17 Gratt. 565, 1867; Lavender v. State, 60 Ala. 60, 1878.

As we have already seen (*supra*, § 922), when a tenant labors on shares on another's farm, the property of the entire crop remains in his employer until the shares are separated; and until then the property must be laid in the employer. State v. Jones, 2 Dev. & Bat. 544, 1837. See State v. Frame, 4 Harring. 569, 1847.

⁶ R. v. French, R. & R. 491. See R. v. Wilford, Ibid. 517; Archbold's C. P. (9th ed.) p. 29.

⁷ Com. v. Davis, 9 Cush. 283, 1851. See Davis v. State, 17 Ala. 415, 1850.

⁸ Com. v. Martin, 1 Am. Law Reg. 434; Stevens v. State, 44 Ind. 469, 1873; Rollins v. State, 98 Ala. 79, 1892; Johnson v. State, (Ala.) 13 So. Rep. 377, 1893; 14 So. Rep. 627, 1894; Ellis v. State, 76 Ala. 90, 1884.

¹ 2 East P. C. 652.

² R. v. Hutchinson, R. & R. 412; 2 State v. Wincroft, Ibid. 38, 1877. See

§ 941. *Goods belonging to a corporation* must be laid as the property of the corporation by its corporate name, and not as the property of the individual corporators, though they be all named;¹ but where there has been no act of incorporation, the trustees or joint owners must be named *seriatim*.² Whether incorporation should be averred is elsewhere considered.³

A member of a corporation may be guilty of larceny in stealing the goods of the corporation.⁴ When a special interest in goods is acquired by a State officer in the interest of the State, an indictment for stealing the goods may aver ownership in the State.⁵

§ 942. Where property is levied on by a constable or sheriff, he acquires a special property in it, and, if stolen, it may be charged in an indictment or complaint as his property,⁶ or as that of the

Thomas v. Thomas, 51 Ill. 162, 1868, to the effect that under Married Women's Act the husband is not guilty of larceny in taking the wife's property. See *supra*, § 918.

As to wife, under recent statutes, stealing husband's goods, see *R. v. Brittleton*, 15 Cox C. C. 431.

In Louisiana, under the Roman law, marital goods may be laid as the property either of the husband or of the wife, each having a special property therein, or as the property of the two in community. *State v. Gaffery*, 12 La. An. 265, 1857.

But in California the wife's consent to the taking of community property has been held not to be a sufficient defence. *People v. Swalm*, 80 Cal. 46, 1889.

And in Massachusetts it is ruled that personal property in the possession of a married woman is to be presumed, in the absence of other evidence, to be the property of the husband, notwithstanding the statute of 1855, c. 304, enabling married women to have property in their own right, and to their own use, and to trade on their own account; and must be described as the property of the husband in an indictment for stealing

it. *Com. v. Williams*, 7 Gray, 337, 1856. But an indictment charging larceny of property of a wife may be sustained under the Massachusetts General Statutes, c. 172, § 12, by proof of larceny of property of her husband in her possession. *Com. v. McLaughlin*, 103 Mass. 435, 1870.

Where, before indictment, a single woman marries, it is a variance that the evidence and the record in respect to her name do not correspond. *Com. v. Brown*, 2 Gray, 358, 1854.

In Ohio, under the Married Women's Act, the goods must be laid as of the wife. *Pratt v. State*, 35 Ohio St. 514, 1880.

¹ Whart. Cr. Pl. & Pr. § 110; *McGary v. People*, 45 N. Y. 153, 1871.

² 2 Russ. on Cr. (6th Am. ed.) 100; Whart. Cr. Pl. & Pr. § 110. See *Lithgow v. Com.*, 2 Va. Cas. 297, 1822; *Smith v. State*, 28 Ind. 321, 1867; *Wallace v. People*, 63 Ill. 451, 1872. *Supra*, § 716. *Infra*, § 979.

³ Whart. Cr. Pl. & Pr. § 110. See *Johnson v. State*, 73 Ala. 483, 1883.

⁴ *Supra*, § 936.

⁵ *Phelps v. People*, 72 N. Y. 334, 1878.

⁶ *Palmer v. People*, 10 Wend. 165,

owner.¹ But where a bailee of a sheriff received from him personal chattels which had been attached, giving an accountable receipt, with a promise to redeliver the same on demand, it was held that the bailee had no such special property in the chattels as to support an indictment.² The receiptor of the goods taken by the sheriff in execution has not even a special property, and in a larceny of the goods they cannot be laid as the property of the receiptor.³ Goods in the hands of an acting receiver, though his bonds are not yet perfected, may be laid as his.⁴

Goods levied on may be laid as property of officer or owner.

§ 943. When a servant is charged with the larceny of his master's goods, it is essential, in order to sustain an averment of property in the master, to prove that the goods at the time of the larceny were in the master's possession. The distinctions bearing on this complex topic are discussed in future sections.⁵

When servant is charged with stealing from master, master's possession must be proved.

§ 944. On the same reasoning, when it is alleged that coin is stolen, the specific coin charged in the indictment must be proved to have been stolen. It will not be enough to prove that a less amount was taken; *e. g.*, if the indictment charges the larceny of a gold dollar, it will be a fatal variance if there is proof of the larceny of only fifty cents.⁶ But it cannot be objected that money alleged to be stolen as the property of A. B. had been mingled by A. B., prior to the larceny, with certain money of a third person; provided the property alleged to be stolen of A. B. is susceptible of identification.⁷

Specific ownership of stolen coin must be shown.

§ 945. If the goods of A. be stolen by B., and afterward be stolen from B. by C., an indictment against the latter may allege the title to be in either A. or B., at the election of the pleader.⁸

Goods stolen from thief may be laid as the property of thief.

§ 946. Bank notes or other articles stolen from the mail may be laid as the property of the person forwarding them.⁹

Things stolen from mail.

1832. See cases cited *supra*, § 936; Crim. Ev. §§ 122-3; Whart. Cr. Pl. & State v. Mazyck, 3 Rich. 291, 1832; Pr. § 218; *infra*, § 965.

State v. Dewitt, 32 Mo. 571, 1862; People v. Williams, 24 Mich. 156, 1871.

¹ R. v. Easthall, 2 Russ. on Cr. 158; State v. Clapper, 59 Iowa, 279, 1882. ⁸ R. v. Wilkins, 1 Leach, 522; 1 Hale, 537; 2 East P. C. 654; Ward v.

² Com. v. Morse, 14 Mass. 217, 1817. People, 3 Hill, 395, 1842. *Supra*,

³ Norton v. People, 8 Cow. 137, 1826. § 882 *a*; *infra*, § 993.

⁴ State v. Rivers, 60 Iowa, 381, 1888. ⁹ U. S. v. Burroughs, 3 McLean, 405,

⁵ *Infra*, §§ 962 *et seq.* 1845.

⁶ See, on this topic, fully, Whart.

§ 947. Clothes or other necessities furnished by a father to his child may, it seems, be laid as the property either of the father or of the child, particularly if the child is of tender age;¹ but when the child is of full growth, they are more properly alleged to be his property.² But a saddle furnished by a father to his minor son may be laid in the indictment either as the property of the father or of the son.³ The same liberty exists, it seems, as to money of ward stolen from guardian.⁴

§ 948. The stealing of several articles of property at the same time may be treated as one offence, and even the circumstance of several ownerships of the property, it is intimated, cannot create two offences,⁵ though this conclusion has been stoutly contested.⁶

The verdict may be for a part of the articles, if duly pleaded.⁷

§ 949. *If the owner be unknown*, the goods may be laid as "the goods of a person to the jurors unknown," for otherwise it would be impossible for felonies of this class to be punished.⁸ So if in an indictment for receiving stolen goods the principal felon be unknown, he may be described in like manner; but if the name of the owner or principal felon appear in evidence before the grand jury, and his name is on the back of the bill, such an indictment cannot at common law be supported.⁹

¹ R. v. Haynes, 12 Co. 113; 2 East 659, 1887. That this sufficiently negatives ownership in the defendant, see P. C. 654; R. v. Hughes, C. & M. 593.

² See R. v. Forsgate, 1 Leach, 463, 464, n.; State v. Koch, 4 Harring. 570, 1847; Phillips v. State, 1 Pickle, 551, 1887.

³ State v. Williams, 2 Strob. 229, 1847. And see Bazan v. State, (Tex.) 24 S. W. Rep. 100, 1893.

⁴ Thomasson v. State, 22 Ga. 499, 1857.

⁵ See *supra*, § 931; but see Com. v. Butterick, 100 Mass. 9, 1868.

⁶ *Supra*, § 931. The authorities on either side of this vexed question will be found in Whart. Cr. Pl. & Pr. § 470.

⁷ Whart. Cr. Pl. & Pr. § 134.

⁸ 1 Hale, 512; Whart. Cr. Pl. & Pr. § 113; McVey v. State, 23 Tex. App.

659, 1887. That this sufficiently negatives ownership in the defendant, see Thompson v. State, 9 Tex. App. 301, 1880. As to grand jury's diligence in trying to ascertain owner's name, see Swink v. State, 32 Tex. Cr. 530, 1894.

If the ownership appear during the trial, the variance is immaterial. People v. Fleming, 14 N. Y. Sup. 200, 1891.

⁹ See Whart. Cr. Pl. & Pr. §§ 111-3; Whart. Crim. Ev. § 97; R. v. Walker, 3 Camp. 264. In R. v. Robinson, Holt's N. P. 595, the indictment was for plundering the wreck of a brig. In one count the property of the brig was laid in persons therein named; in the other, it was laid in persons unknown. The witness could not recol-

§ 950. *Goods of a deceased person* must be averred, until distribution, to be the property of the executor or administrator by name; though it is not necessary to insert the words "executor of A., deceased." An executor or administrator has, *per se*, such a special property as will permit the goods to be described as his individually.¹

Goods of deceased persons to be averred to be property of executor.

V. VALUE.

§ 951. In order to constitute the offence of larceny, or of receiving stolen goods, it is necessary at common law that the thing stolen or received be of some value, however small.²

Some value must be attached to things stolen.

§ 952. Where the indictment gives a lumping valuation to a series of distinct articles, of different kinds, and when either the jury convict the defendant of stealing a part, or the evidence only goes to a part of the articles charged,

Lumping valuation insufficient when

lect the Christian names of some of the owners laid in the first count, and on the second count Richards, C. B., held he could not say the owners were unknown. And the prisoner was acquitted. He quoted a case at Chester, where the property being laid in a person unknown it was clear at the trial that he was known, and might easily have been ascertained. tracing the *goods*, without identifying the person of the thief; it is different in the case of an accessory *before* the fact, where the identity of the person to whom the accession is charged must be made out by naming and showing him to the jurors in the indictment, or stating, as an excuse for the omitting his name, that he was unknown.

Lord Kenyon directed an acquittal.

In *R. v. Caspar*, 2 Mood. C. C. 101; s. c. 9 C. & P. 289, (*gold-dust case*) the Caspars were indicted in different counts as accessories before the fact, in an indictment which charged "that a certain evil-disposed person feloniously stole certain goods, and that Caspar feloniously *incited* the said evil-disposed person to commit the said felony, and that C. D. and E. F. feloniously *received* the said goods, knowing them to be stolen." This was held bad as against the Caspars; for though in the case of receiving stolen goods (first assimilated to the offence of an accessory *after* the fact, by 3 W. & M. c. 9, s. 4, and now by 7 & 8 Geo. IV. c. 29, s. 54), the whole offence may be brought home by

But it was held good against the other persons charged as *receivers* as for a substantive felony, without stating the name of the principal felon. The 7 & 8 Geo. IV. c. 29, s. 54, confirms the old law as to *accessaries*, though it also gives another mode of proceeding for a substantive felony. See Whart. Crim. Ev. § 97; Whart. Cr. Pl. & Pr. § 111. *Infra*, §§ 977, 982.

¹ *Cole v. Com.*, 5 Gratt. 696, 1849; *State v. Woodley*, 25 Ga 235, 1858. *Supra*, § 937.

² *State v. Fenn.*, 41 Conn 590, 1874; *People v. Wiley*, 3 Hill, 194, 1842; *State v. Allen*, R. M. Charl. 518, 1837; *State v. Smart*, 4 Rich. 356, 1851; *Boyle v. State*, 37 Tex. 359, 1873. See Whart. Crim. Ev. § 126; Whart. Cr. Pl. & Pr. §§ 213-6.

the conviction is for stealing only a part. no judgment can be legally entered.¹ But a conviction of stealing part, upon a gross valuation of the whole collectively, will, at least in Massachusetts, be sustained, when

the articles thus lumped are of the same class. Thus in an indictment for stealing "a quantity of bank notes current within this Commonwealth, amounting together to one hundred and fifty dollars, and of the value of one hundred and fifty dollars," it was held that the defendant could be convicted of stealing specific bank notes of a less value than that averred in the indictment.²

When there is a general verdict of guilty, it seems a value in gross is always sufficient.³

If value be given to some of the articles stolen and none to the remainder, the defendant should be acquitted as to the non-valued articles,⁴ or judgment must be arrested as to the same.⁵

There are cases, it should be remembered, when a lumping value is necessary, from inability on the part of the pleader to attach specific and separate values, as in the case of coin or notes stolen in a parcel and retained by the defendant. In this case, if the indictment excuse the non-specification by want of knowledge in the grand jury, the general lumping statement will be enough.⁶ And it has been held even precise enough to aver the bills stolen to be "divers bank bills, amounting in the whole to \$17,000, and of the value of \$17,000."⁷

¹ *R. v. Forsyth*, R. & R. 274; *Hope* 1853; *People v. Bogart*, 36 Cal. 245, *v. Com.*, 9 Metc. 134, 1845; *Com. v.* 1868. That they may be described as Cahill, 12 Allen, 540, 1866; *State v.* so much money and not specified in Brew, 4 Wash. St. 95, 1892; *Whart.* detail, see *Riggs v. State*, 104 Ind. 261, Cr. Pl. & Pr. §§ 212-16. *Whart. Crim.* 1885; *Goldstein v. State*, (Tex.) 23 S. Ev. § 127. And see, as to lumping W. Rep. 686, 1893; *State v. Carter*, 113 valuations, generally, *State v. Beatty*, N. C. 639, 1893; *State v. King*, 37 La. 90 Mo. 143, 1886; *State v. Gerrish*, 78 An. 91, 1885; *Com. v. Mann*, (Ky.) 14 Me. 20, 1885. S. W. Rep. 685, 1890; *Wofford v.*

² *Com. v. O'Connel*, 12 Allen, 451, *State*, 29 Tex. App. 536, 1891; *contra*, 1866; and see, particularly, *Com. v.* *Merwin v. People*, 26 Mich. 298, 1873; *Lavery*, 101 Mass. 207, 1869, cited *State v. Tilney*, 38 Kans. 714, 1888; *Whart. Crim. Ev.* § 127. *Territory v. Shipley*, 4 Mont. Ter. 468,

³ See *Clifton v. State*, 5 Blackf. 224, 1882; *Burney v. State*, 87 Ala. 80, 1888. But where the particular kind is 1839; *State v. Murphy*, 8 Blackf. 498, 1847. specified, though unnecessarily, it

⁴ *Whart. Cr. Pl. & Pr.* §§ 212-16; must be so proved. *Lewis v. State*, *Whart. Crim. Ev.* § 127. See *Davis* 113 Ind. 59, 1887.

v. State, 32 Tex. Cr. 377, 1893.

⁵ *Com. v. O'Connel*, *supra*; *Larned* *Com. v. Smith*, 1 Mass. 245, 1804; *v. Com.*, 12 Metc. 240, 1846; *Com. v.* *People v. Wiley*, 3 Hill, 194, 1842. *Sawtelle*, 11 Cush. 142, 1853; *State v.*

⁶ *Com. v. Sawtelle*, 11 Cush. 142, *Taunt*, 16 Minn. 109, 1870. *Contra*,

§ 953. When a statute (*e. g.*, as in grand and petit larceny) divides larceny into two or more classes, according to the value of the thing stolen, it is not necessary to aver the thing stolen to be "of value more" or "of value less" than the statutory test. It is enough to state the value at a specific sum; and if this be found by the jury, the court will assign such punishment as the sum according to the statute calls for.¹ And if the indictment aver the value to be *above* the statutory test, the jury, by a special finding, may assess the value *below* the statutory test, in which case only the minor punishment will be imposed.²

When there is a statutory limit values must conform to statute.

The *verdict* in this relation is distinctively considered in another volume.³

§ 954. In New York a conviction was opened where the subject of larceny was "a piece of paper, on which a certain letter of information was written, of the value of \$12.50."⁴ Still, however, as has already been noticed, counts have been sustained in England for the larceny of a piece of paper of the value of one penny, etc.,⁵ though this seems only to be the case where the instrument is on its face invalid. When it is valid, it is said that it must be described by its technical name.⁶

May be larceny of a piece of paper.

§ 955. There need not be direct evidence of value of an article stolen. The value may be inferred generally from the facts in evidence;⁷ though a satisfactory test is what the thing would bring at a well-conducted sale.⁸ With current bank notes or treasury notes mere production is sufficient.⁹ Thus, on the trial of an indictment for larceny in stealing

Value may be inferentially shown.

Low *v.* People, 2 Parker C. R. 37, 1848; 181; R. *v.* Bingley, 5 C. & P. 602. State *v.* Hinckley, 4 Minn. 345, See *supra*, § 880. 1860.

⁶ *Supra*, § 880.

¹ Whart. Cr. Pl. & Pr. § 753. See Com. *v.* McKenney, 9 Gray, 114, 1857; People *v.* Winkler, 9 Cal. 234, 1858; Stokes *v.* State, 58 Miss. 677, 1881.

⁷ Whart. on Ev. § 1290; Com. *v.* Burke, 12 Allen, 182, 1866; State *v.* Fenn, 41 Conn. 590, 1874; People *v.* Caryl, 12 Wend. 547, 1834; Cummings *v.* Com., 2 Va. Cas. 128, 1818; Wolverton *v.* Com., 75 Va. 909, 1882; Whalen *v.* Com., (Va.) 19 S. E. Rep. 182, 1894; Houston *v.* State, 8 Eng. (Ark.) 66, 1852.

² See Williams *v.* People, 24 N. Y. 405, 1862; McCorkle *v.* State, 14 Ind. 39, 1859; State *v.* Bunten, 2 N. & McC. 441, 1820.

³ Whart. Cr. Pl. & Pr. §§ 736 *et seq.*

⁴ Payne *v.* People, 6 Johns. 103, 1810. See, also, Moore *v.* Com., 8 Barr, 260, 1848. *Supra*, § 880.

Production of the article may be enough. Com. *v.* Burke, 12 Allen, 182, 1866; Collins *v.* People, 39 Ill. 233, 1864. See *supra*, § 882.

⁵ R. *v.* Perry, 1 C. & K. 725; s. c. 1 Den. C. C. 69; R. *v.* Clark, R. & R.

⁸ State *v.* James, 58 N. H. 67, 1877.

⁹ Collins *v.* People, 39 Ill. 233, 1864;

“promissory notes,” a witness testified that the bills stolen “were of the currency ordinarily known as greenbacks.” It was held that this proof was some evidence at least of their genuineness, and that, when taken in conjunction with the further fact, to which he testified, that they were of the denomination of one hundred dollar bills of that currency, there was enough evidence, also, of the value to sustain a conviction.¹ And so is it generally as to proof of currency.

VI. BY SERVANTS AND OTHERS HAVING BARE CHARGE.

§ 956. If a servant or other agent, who has merely the care and oversight of the goods of his master—as the butler of plate, a messenger or runner of money or goods, a hostler of horses, the shepherd of sheep, and the like—convert such goods to his own use, without his master’s consent, this is a larceny at common law;² because the goods, at the time they are taken, are deemed in law to be in the possession of the master—the possession of the servant in such a case being the possession of the master. The same rule is applicable to all cases in which a person to whom goods are given for a particular purpose (as the agent of another) has bare possession. Thus where A., going on a journey, left his shop in the care of the defendant under the superintendence of A.’s brother, and the latter, on account of the defendant’s drunkenness, dismissed him; and A., on returning, found his goods missing, and pursuing the defendant overtook him with some of them in his possession, the court sustained a conviction.³ Where the defendant, who was carter to the prosecutor, went away with and disposed of his master’s cart, the larceny was held complete;⁴ and so where the defendant, a porter to

Duvall *v.* State, 63 Ala. 12, 1879; and C. 565; U. S. *v.* Clew, 4 Wash. C. C. see Com. *v.* Stebbins, 8 Gray, 492, 1857; 700, 1827; Com. *v.* O’Malley, 97 Mass. Com. *v.* Burke, 12 Allen, 182, 1866; 584, 1867; Com. *v.* Berry, 99 Ibid. 428, State *v.* Smart, 4 Rich. 356, 1851, to 1868; Com. *v.* Davis, 104 Ibid. 548, the effect that general proof that the 1870; Com. *v.* Barry, 116 Ibid. 1, 1874; bills were current is enough to show Phelps *v.* People 72 N. Y. 334, 1878; value. *Supra*, § 880. People *v.* Wood, 2 Parker C. R. 22,

¹ Remsen *v.* People, 57 Barb. 324, 1870.

² 1 Hale, 506; R. *v.* Robinson, 2 1869; People *v.* Belden, 37 Cal. 51, 1869; East P. C. 565; R. *v.* Harvey, 9 C. & People *v.* Perini, 94 Cal. 578, 1892; P. 353; R. *v.* Manning, Dears. 21; R. and see R. *v.* Harding, R. & R. 125. *v.* Samways, Ibid. 371; R. *v.* Bunkall, ³ State *v.* White, 2 Tyler, 352, 1803. L. & C. 371; R. *v.* Paradise, 2 East P. ⁴ R. *v.* Robinson, 2 East P. C. 565.

the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them.¹ Where a person employed to drive cattle sells them, it is larceny,² and so where a lighterman embezzles corn he was sent to land from a vessel.³ And on the same reasoning, if money be given by the owner to a servant or agent to carry to another,⁴ or to exchange,⁵ and the servant or agent apply it to his own use, it is larceny. It is otherwise, however, when the property is passed to the servant,⁶ or when the servant appropriates, not the money given to him, but the change received for it.⁷

§ 957. The rule may be amplified by saying that where one having only the care, charge, or custody of property for the owner converts it *animo furandi*, it is larceny.⁸

So as to
other per-
sons hav-
ing bare
charge.

Thus, where the holder of a promissory note, having received a partial payment from the maker, handed it to him to indorse the payment, and he took it away, *animo furandi*,

¹ R. v. Bass, 2 East P. C. 566; and see R. v. Harding, R. & R. 125.

² R. v. M'Namee, 1 Mood. C. C. 368; R. v. Harding, R. & R. 125.

³ R. v. Abrahams, 2 Leach, 824; R. v. Spear, Ibid. 825; 2 East P. C. 568.

⁴ R. v. Lavender, 2 Russ. on Cr. 201; 2 East P. C. 562; R. v. Reed, Dears. C. C. 257; R. v. Brown, Ibid. 616; R. v. Hayward, 1 C. & K. 518; R. v. Paradise, 2 East P. C. 565; R. v. Goode, C. & M. 582; R. v. Beaman, Ibid. 595; R. v. Cooke, L. R. 1 C. C. 295. *Infra*, §§ 961, 963, 1140.

⁵ R. v. Atkinson, 1 Leach, 302. See R. v. Thompson, L. & C. 225; Com. v. O'Malley, 97 Mass. 584, 1867; Justices v. People, 90 N. Y. 12, 1882; People v. Abbott, 53 Cal. 284, 1878; Murphy v. People, 104 Ill. 528, 1882.

The distinction between this position and that taken in R. v. Thomas, cited *infra*, § 965, is subtle, but may be thus stated. Where the mere custody of money is given to a servant so that he has a bare charge, and he is told to take care of it, and if he can find change for it to bring back the change, but if not, to bring back

the money itself, then it is larceny for him fraudulently to appropriate it.

On the other hand, if the absolute property be given to the servant, and the owner never expects to see it again except in change, then for the servant to appropriate it or its proceeds is embezzlement, not larceny. *Infra*, § 965.

Sir J. F. Stephen (Dig. art. 297) gives the following:

"Theft may be committed by converting, without the consent of the owner, anything of which the offender has received the custody as the servant of the owner, or in order that the thing may be used by the offender for some special temporary purpose, in the presence or under the immediate control of the owner or his servant."

⁶ *Infra*, §§ 960-965.

⁷ *Infra*, § 965.

⁸ R. v. Cheeseman, L. & C. 140; R. v. Smith, 1 C. & K. 423; People v. Call, 1 Denio, 120, 1845; Robinson v. State, 1 Cold. (Tenn.) 120, 1860; Marcus v. State, 26 Ind. 101, 1866; State v. Schingen, 20 Wis. 74, 1865. As to clerks, see *infra*, § 960.

and refused to give it up, this was held larceny.¹ And so where a guest at an inn converted plate set before him for his use,² and where A. appropriated a hundred dollar bill given to him by B. by mistake for a ten dollar bill.³

§ 958. Where personal property of one is, through inadvertence, left in the possession of another who conceals it, *animo furandi*, knowing the owner, he is guilty of larceny.⁴ And so when, having intended, on finding it, to keep it, knowing the owner, he afterward converts it.⁵ And it is larceny to appropriate, with intent to steal, goods obtained through the inadvertence of an expressman, carrier, postmaster, or other bailee.⁶ But to constitute larceny, in receiving an over-payment, the defendant must know at the time of the over-payment, and must intend to steal.⁷

And so of letter-carrier stealing letters. § 959. A letter-carrier may be indicted for larceny in stealing a letter given to him for delivery.⁸

And so of clerk without discretion, stealing goods of employer. § 960. A clerk taking money or goods from his employer's safe, till, or shelves, is guilty of larceny, unless it appear that he is authorized to dispose of such money or goods at his discretion.⁹

The same rule is applied where the clerk is in possession, but without any discretion, under explicit directions.

¹ People v. Call, 1 Denio, 120, 1845. it, and being asked why he had not delivered it, produced it unopened, and the coin safe within, from his trousers pocket, stating, untruly, that the house where it ought to have been delivered was closed. Upon an indictment for stealing the letter, the jury found him guilty, and that he detained it with the intention of stealing it. It was held, that so dealing with the letter amounted to larceny.

See Dignowitty v. State, 17 Tex. 521, 1856. *Supra*, § 899.

² 1 Hale P. C. 506.

³ State v. Williamson, 1 Houst. C. C. 155, 1864. *Supra*, § 915.

⁴ People v. McGarren, 17 Wend. 460, 1837. *Supra*, § 901.

⁵ R. v. Riley, 14 Eng. Law & Eq. 544; 1 Dears. C. C. 149; 6 Cox C. C. 88. *Supra*, § 901.

⁶ *Infra*, § 966; R. v. Webb, 5 Cox C. C. 154; R. v. Little, 10 Ibid. 559; Com. v. Lawless, 103 Mass. 425, 1870.

⁷ Bailey v. State, 58 Ala. 414, 1877.

⁸ R. v. Poynton, L. & C. 247; 9 Cox C. C. 249. In this case a letter-carrier, whose duty it was, in case he was unable to deliver any letter, to bring it to the post-office, on his return from delivery, not having delivered a letter containing money, gave no account of

⁹ R. v. Manning, Dears. 21; R. v. Hammon, R. & R. 221; Walker v. Com., 8 Leigh, 743, 1837; Marcus v. State, 26 Ind. 101, 1866; Cobletz v. State, 36 Tex. 353, 1871. *Infra*, § 1027. *Supra*, § 943.

Thus, where a cancelled cheque, the property of an insurance company, has passed from the hands of the messenger, who received it at the bank, to the prisoner, a clerk in the employment of the company; whose duty it

In such case he is a bare servant, and the possession is that of his employers, and if he steals the goods he is guilty of larceny.¹ Thus where a confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange unindorsed, over which he had no authority, got it discounted, and absconded with the produce of it, the offence was held larceny.²

Where a person employed by a mercantile firm as a salesman in their store, having no general control over the goods in the store-room and the money in the cash drawer, abstracted a part of the goods and money, with a fraudulent intent to convert the same to his own use, this was held larceny.³

was to keep it for the directors; it was held, first, that as the cheque, when it came into his custody, had arrived at its ultimate destination, it was really in the possession of the directors, who had a special property in the cheque, and, therefore, that the prisoner, who had unlawfully abstracted it, was guilty of larceny, not of embezzlement; secondly, that where the directors of a company have a special property in cheques or other articles, the interest of a shareholder in the company gives him no property in it, and that he may be indicted for stealing property from the directors. *R. v. Watts*, 1 Eng. Law & Eq. 561; s. c. 2 Den. C. C. 14.

In a case tried at Philadelphia, in 1848, and which received the benefit of the consideration of both the Federal and the State courts, the evidence was that the defendant was a clerk to the treasurer of the United States mint, but not charged or credited with public moneys there or elsewhere, and had abstracted a considerable amount of these moneys from the closet in which they were kept, of which he had a key, though he had no charge of the key to the outer vault, of which this closet was a part. It was held by the judges of both courts that the case was not embezzlement, under the fed-

eral statutes, but larceny at common law. *Com. v. Hutchinson*, 2 Parsons, 384, 1848; *U. S. v. Hutchinson*, reported Whart. Prec. 205. *Infra*, § 1027.

¹ *R. v. Low*, 10 Cox C. C. 168.

² *R. v. Chipchase*, 2 Leach, 805; and see *R. v. Atkinson*, 1 Leach, 302; and cases cited, §§ 956 *et seq.*

³ *Walker v. Com.*, 8 Leigh, 743, 1837. *Supra*, § 959.

So in a case above cited, a servant's duty was to give out materials to be wrought up, and pay the workmen when the work was finished; and for this purpose he received cash from his masters, and at the end of each week he accounted with them for sums so received and paid. The cash was kept by him, but he was not authorized to apply the money in any other way. He paid C. 13s., and fraudulently charged his employers as having paid 14s. 8d., and appropriated the 1s. 8d. to his own use. This was held to amount to larceny. *R. v. Low*, 10 Cox C. C. 168. The same view was taken where the defendant was foreman of a currier establishment, and as such obtained from the cashier, by fraudulent misrepresentation, a certain sum of money to be used in paying off the workmen; and the evidence was that on the pay-roll made out by the defendant the sum of £1 10s. 4d. was

In fine, wherever an agent obtains from his principal bare possession of goods for a specific object, and does not apply them to that object, but fraudulently converts them to his own use larceny, is made out.¹

§ 961. It is otherwise when the property in the goods has passed to the agent. Thus if, by means of false accounts, a clerk fraudulently obtain the absolute property of money from his employer, this, on the principle already so often stated, is not larceny.² The same rule applies to servants obtaining money from their master to settle for payments falsely represented to have been made by the servants.³ Where, however, a clerk receives money for third parties, and swells the amount due such third parties by false accounts, and appropriates to himself

Otherwise
where
property in
goods is
in clerk.

set down as due one of the workmen ; whereas, only £1 8s. was due ; and the 2s. 4d. were fraudulently appropriated by him, he intending so to appropriate it at the time he received it. *R. v. Cooke*, 12 Cox. C. C. 10 ; L. R. 1 C. C. 295.

¹ See *infra*, § 963.

Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself by certain bank notes, entering the payment in the book as being made to "a man;" this was held to be a larceny of the bank notes. *R. v. Hammon*, R. & R. 221 ; 2 Leach, 1083 ; 4 Taunt. 304. *Supra*, § 892. And so where a clerk and packer took goods from his employer's shop, he having keys by means of which, at the time in question, he entered the shop after it was closed, he not being a salesman, although the owners had occasionally allowed him to take and sell goods for them. *Com. v. Davis*, 104 Mass. 548, 1870. In this case Morton, J., said: "The instructions of the court that, 'upon the undisputed evidence in the case,

Brown did not sustain such a relation to the property in question as would make his felonious appropriation of it an act of embezzlement, but that his taking of the same, if the jury found the other elements necessary to constitute the offence would be larceny,' were correct. Brown was a mere servant of the owners of the property alleged to be stolen by him. We cannot see in the case any testimony which tends to show that he had even the bare custody of the goods, much less the legal possession. They were in the possession and custody of the owners, and the felonious taking and appropriation of them by Brown was clearly larceny and not embezzlement. Upon the facts in this case an indictment against him for embezzlement could not be sustained."

It is larceny for the teller of a bank to open at night a safe which he has no right to open, and to abstract money intrusted to his care during the day. *Com. v. Barry*, 116 Mass. 1, 1874.

² *R. v. Barnes*, 2 Den. C. C. 59 ; T. & M. 387 ; *R. v. Green*, Dears. C. C. 323 ; 6 Cox C. C. 296 ; *R. v. Thompson*, L. & C. 233 ; 9 Cox C. C. 222.

³ *Infra*, § 1140 ; *supra*, § 956.

the excess, this is larceny, for the owner of the money transferred to the clerk only its possession.¹

§ 962. As we have already seen, goods cannot be averred to be the master's which have never been in his possession, and which the servant, before they come into such possession, converts to his own use.² It is not necessary, however, to make such conversion larcenous, that the goods should come actually into the master's hands. They are held to come into his possession under the following circumstances :

And where the master has not had possession of the goods.

§ 962 a. Reception in a wagon belonging to the master, even though it be driven by the servant, is reception by the master; and hence it is larceny for the servant to take them from the wagon for his own use.³

Reception in master's wagon is reception by master; and so of reception by carrier for master.

A fortiori is it larceny for the servant to take goods deposited in the hands of a common carrier to be forwarded to the master,⁴ or intermediately placed by the master's agent in the hands of the servant.⁵

§ 962 b. It is also larceny for a servant to steal money which, after receiving for his master, he deposits in his master's till,⁶ or to steal hay which he has bought for his master, and has then, before the theft, deposited at his master's stable door.⁷ But it is embezzlement, not larceny, for the servant to appropriate to his own use money he draws from a bank on his master's cheque.⁸ And it has hence been held not to be larceny for the servant, after depositing the money in his pocket,⁹ or secreting it in some hiding

And so of reception in master's immediate control; but not so as to money secreted or pocketed by servant.

¹ R. v. Low, 10 Cox C. C. 168; R. Wright, D. & B. 431; 7 Cox, 413; v. Cooke, 12 Ibid. 10, cited *supra*, § 960. Com. v. Barry, 116 Mass. 1, 1874;

² *Supra*, § 943; 2 East P. C. 568; *supra*, § 960; *infra*, § 1036.

R. v. Bull, 2 Leach, 841; R. v. Whate,

1 Ibid. (3d ed.) 33; R. v. Sullens, 1

Mood. 129; R. v. Walsh, R. & R. 215.

³ R. v. Reed, 2 C. L. R. 607; Dears. 257; 18 Jur. 67. See *infra*, §§ 968, 1027.

⁴ *Supra*, § 956; R. v. Abrahath, 2 Leach, 824; 2 East P. C. 569; Whart. Confl. of Laws, § 417; *supra*, § 961.

⁵ Phelps v. People, 72 N. Y. 334, 1878.

⁶ R. v. Hammon, R. & R. 221; 2 Leach, 1043; 4 Taunt. 304; R. v.

⁷ R. v. Haywood, 1 C. & K. 518. *Infra*, §§ 968, 1027.

⁸ R. v. Sullens, Car. C. L. 319; 1

Mood. 129; R. v. Walsh, R. & R. 215; Com. v. King, 9 Cush. 284, 1851; Kibs v. People, 81 Ill. 599, 1876. See

infra, §§ 966, 968.

⁹ R. v. Waite, 1 Leach, 28; R. v. Betts, Ball, 90; 8 Cox C. C. 140; R. v. Bazeley, 2 Leach, 835. See R. v. Brackett, 4 Cox, 274; Com. v. Barry,

ut supra.

place on his master's premises, but known only to himself,¹ to take it out and appropriate it to his own use; though it has been held that where the deposit is in the place where it is the duty of the servant to make it, even though on his own person, this, if specifically designated by the master, makes a subsequent conversion by the servant larceny.² As a rule, to sustain a prosecution for larceny the master must have such a possession as would enable him to maintain trespass.³ But wherever, by the customs of trade, the goods are, on purchase, constructively in the master's possession (as where a cargo of corn is purchased by a corn-factor), then the purchaser has such a possession as would sustain trespass.⁴

VII. BY BAILEE.⁵

§ 963. If a mere servant appropriate money given to him on a bare charge, it is not necessary to prove an original fraudulent intent, as his possession is that of his master.⁶ If, however, a bailee who has a special possession of his own, convert the money, it is necessary, in order to convict, to prove fraudulent intention on his part at the time of bailment, by which fraud he obtained such special possession.⁷ Where there is such original fraudulent

To servant's subsequent conversion, original fraudulent intent is not necessary; otherwise as to bailee.

¹ R. v. Dingley, cited in 2 Leach, (4th ed.) 840; 1 Show. 53. It was this decision which prompted the embezzlement statute.

² R. v. Watts, 2 Den. 14; 4 Cox, 336; L. & C. 34; cited *infra*, § 960.

³ R. v. Smith, 9 Eng. Law and Eq. 532; 2 Den. 499; 5 Cox, 533; R. v. Frampton, 2 C. & K. 47. (*Infra*, § 996.) People v. Loomis, 4 Denio, 380, 1847 (cited *supra*, §§ 879, 882 b); Bork v. People, 91 N. Y. 18, 1883.

⁴ R. v. Abrahath, *ut supra*.

⁵ Sir J. F. Stephen (Dig. Crim. Law, art. 285) defines bailment as follows: "When one person delivers, or causes to be delivered, to another any movable thing, in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as a pledge by the person to whom delivery is made,

or that it may be carried, or that work may be done upon it, by the person to whom delivery is made, gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered, either to the person making the delivery, or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee." See, fully, *infra*, § 1009.

⁶ See §§ 956-59; and see R. v. Goode, C. & M. 582; R. v. Beaman, Ibid. 595; R. v. Metcalf, 1 Mood. C. 433; Com. v. Yerkes, 12 Cox C. C. 208.

⁷ *Supra*, §§ 885, 960 *et seq.*; R. v. Leigh, 2 East P. C. 694; R. v. Banks,

intent, then subsequent conversion (property remaining in the owner) is larceny.¹ And by recent statutes it is larceny to make such conversion even though there be no original fraudulent intent.²

§ 964. At common law the principle is, that where the owner retains the *property* of the goods in himself, and only parts with the *possession*, he may maintain larceny against the person who, *animo furandi*, obtains from him such possession and then converts the goods.³ Thus, it is held that hiring a horse, on pretence of taking a journey, and immediately selling it, is larceny; because there is *animus furandi* in making the contract, and the

When bare possession is fraudulently obtained, subsequent conversion is larceny.

R. & R. 441, overruling *R. v. Tunnard*, 2 East, 689; *R. v. Cornish*, *infra*, § 967; *R. v. Levy*, 4 C. & P. 241; *R. v. Thompson*, L. & C. 225; *R. v. Thistle*, 1 Den. C. C. 502; 2 C. & K. 842; T. & M. 264; 3 Cox C. C. 573; *Abrams v. People*, 6 Hun, 491, 1876. See *R. v. Waller*, 10 Cox C. C. 360; *Com. v. Lester*, 129 Mass. 101, 1880. That taking without fraudulent intent is not larceny, see *supra*, § 885.

¹ 2 East P. C. 658; *State v. Watson*, 41 N. H. 533, 1860; *Com. v. Barry*, 124 Mass. 325, 1878; *Wolfstein v. People*, 6 Hun, 121, 1875; *Hildebrand v. People*, 56 N. Y. 394, 1874; *Loomis v. People*, 67 Ibid. 322, 1876; *State v. Jarvis*, 63 N. C. 556, 1869; *State v. Williams*, 35 Mo. 229, 1864; *People v. Abbott*, 53 Cal. 284, 1878; *People v. Raschke*, 73 Cal. 378, 1887; *State v. Ducker*, 8 Oreg. 394, 1879; and cases cited *infra*, § 964.

"It is a fraud *per se* for a bailee to convert to his own use the property committed to his care. The conversion is *prima facie* evidence of the fraud. Larceny at common law involves something more. It requires the *animus furandi*. There must be a felonious taking. Not so with larceny as bailee. It requires merely a fraudulent conversion" under the Pennsylvania statute. *Paxson, J., Hutchison v. Com.*, 82 Pa. 472, 1876.

The defendant, by false pretences,

induced a tradesman to send by his servant goods of the value of 2s. 10d. to a particular house, with the change for a crown piece. On the way he met the servant, and induced him to part with the goods and change a crown piece, which was afterward found to be bad. Both the tradesman and servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, though the former admitted that he intended to sell the goods. This was held larceny. *R. v. Small*, 8 C. & P. 46. And so where the defendant obtained money from the prosecutrix on the pretence of buying with it a railway ticket for her and returning the change. *R. v. Thompson*, L. & C. 225. See, for other cases, *infra*, § 967.

² *Infra*, § 1055. As to New York statute, see note to § 888.

³ See cases cited *supra*, §§ 883, 963, and see *R. v. Johnson*, 2 Den. C. C. 310; 14 Eng. Law & Eq. 570; *R. v. Hey*, T. & M. 209; 1 Den. C. C. 602; *R. v. Buckmaster*, 20 Q. B. D. 182; *U. S. v. Rodgers*, 1 Mackey, 419, 1882; *State v. Watson*, 41 N. H. 533, 1860; *Smith v. People*, 53 N. Y. 111, 1873; *People v. Morse*, 99 N. Y. 662, 1885; *State v. MacRae*, 111 N. C. 665, 1892; *Grunson v. State*, 89 Ind. 533, 1883; *Huber v. State*, 57 Ind. 341, 1877; *State v. Williams*, 35 Mo. 229, 1864; *Starkie v.*

nature of the property has not been changed by the parting with the possession merely.¹ Even where a person hires for an indefinite period a horse or carriage, fraudulently pretending it to be a mere hiring, and converts it to his own use, he may be convicted of larceny if his original intent was felonious,² and to the offence even proof of a subsequent conversion is not necessary.³ But it is essential that there should be a larcenous intent at the hiring.⁴

The same rule applies to all cases of bare possession obtained by trick or fraud.⁵ Thus, in a case where a prisoner procured the mail-bags to be let down to him by a string from the window of a post-office, with intent to steal, under the pretence that he was the mail-guard, he was held guilty of larceny.⁶ The same distinction exists

Com., 7 Leigh, 752, 1836; Vaughn v. Com., 10 Gratt. 758, 1854; Defrese v. State, 3 Heisk. 53, 1871; Collins v. State, 15 Lea, 68, 1885; State v. Thurston, 2 McMull. 382, 1842; State v. Gorman, 2 N. & McM. 90, 1819; State v. Lindenthall, 5 Rich. 237, 1852; Elliott v. Com., 12 Bush, 176, 1876; Com. v. Williamson, (Ky.) 27 S. W. Rep. 812, 1894; People v. Smith, 23 Cal. 280, 1890; Devor v. Territory, (Okla.) 37 Pac. Rep. 1092, 1894.

"Where by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and the title still remains with the owner, larceny is established. . . . Where title as well as possession is absolutely parted, the crime is false pretence." Miller, J., Loomis v. People, 67 N. Y. 329, 1876. Cf. R. v. Thomas, 9 C. & P. 741, cited *infra*, § 965. See, also, 2 Russ. on Cr. 38-40, etc.; R. v. Cooke, 12 Cox C. C. 10; L. R. 1 C. C. 295; White v. State, 11 Tex. 769, 1854. *Infra*, § 973.

¹ R. v. Pear, 2 East P. C. 685; s. c. 1 Leach, 212; R. v. Kendall, 12 Cox C. C. 598; State v. Williams, 35 Mo. 229; Smith v. Com., (Ky.) 27 S. W. Rep. 852, 1894; State v. Woodruff, 47 Kans. 151, 1891.

² R. v. Semple, 1 Leach, 420; 2 East P. C. 691; and see R. v. Charlewood, 1 Leach, 409; 2 East P. C. 689. *Supra*, § 883. See, however, as diverg-

ing from text, Felter v. State, 9 Yerg. 397, 1836, where it was held that hiring with fraudulent intent was not larceny.

³ R. v. Janson, 4 Cox C. C. 82.

⁴ R. v. Banks, R. & R. 441; otherwise if he take *animo furandi* after the horse is returned to its destination. *Infra*, § 969; R. v. Charlewood, 1 Leach, 409. *Infra*, § 1062.

⁵ R. v. Pratt, 1 Mood. C. C. 250; R. v. Horner, 1 Leach, 270; R. v. Williams, 6 C. & P. 390; U. S. v. Rodgers, 1 Mackey, 419, 1882; State v. Thurston, 2 McMull. 382, 1842; Frazier v. State, 85 Ala. 17, 1887; People v. Tomlinson, 102 Cal. 19, 1894; State v. Hall, 76 Iowa, 85, 1888; Com. v. Lannen, 153 Mass. 287, 1891. *Supra*, § 962; *infra*, §§ 937, 973. As to false personation, see § 888.

⁶ R. v. Pearce, 2 East P. C. 603.

The prisoner, in another case, was hired for the special purpose of driving sheep from one farm to another, and instead of so doing drove them, the day after he had received them, a different road, and sold them; the jury having found that at the time the prisoner received the sheep he intended to convert them to his own use, instead of driving them to the specified farm, the judges were unanimously of the opinion that he was rightly convicted of larceny. R. v. Stock, 1 Mood. C. C. 87.

where the defendant fraudulently obtains possession of money from the prosecutor, on the false statement that he lives near to H., to whom he is to pay it; or upon any other false device;¹ where a gun is borrowed by a guest from a landlord, on the pretence that it is to be used in shooting robins, and is then sold;² where a gypsy or other pretended witch obtains the possession though not the property of money on the pretence of fortune-telling;³ where goods are obtained by a common carrier, as the jury find, with an original fraudulent intent to convert, but on the pretence that they will be delivered at the place of destination, and are on the road appropriated to the carrier's use;⁴ where the owner is fraudulently induced to deposit goods in the hands of a third person for sale, which are then fraudulently obtained from such third person;⁵ where a watch and some money are deposited by the prosecutor with the defendant, induced by the fraud of "ring-dropping;"⁶ where the goods are simply deposited, under fraudulent inducements, for the defendant's inspection, who then steals them;⁷ where money is deposited, also under fraudulent inducements, as security for a pretended bet, and then stolen by the party obtaining such money;⁸ and where a person falsely personates another, and obtains goods belonging to such other from a bailee.⁹

Where only possession is obtained, yet though on borrowing the intention were to return, the fact that the bailment was fraudulently

¹ R. v. Brown, 36 Eng. Law & Eq. 610; Dears. C. C. 616; R. v. Johnson, 2 Den. C. C. 310.

² Richards v. Com., 13 Gratt. 808, 1857. See *supra*, § 886.

³ R. v. Bunce, 1 F. & F. 523.

⁴ State v. Thurston, 2 McMull. 382, 1842.

⁵ R. v. Campbell, 1 Mood. C. C. 179.

⁶ *Infra*, § 973.

⁷ *Infra*, § 974.

⁸ Ibid.

⁹ *Supra*, § 888.

In a remarkable case decided by the Philadelphia Common Pleas in 1872, and reported in England in the twelfth volume of Mr. Cox's reports, with a note stating that the case is reprinted "because of its copious and

exhaustive review of the nice distinctions between larceny and false pretences," the evidence was that the defendant, an agent, authorized to purchase city bonds for the sinking fund of the city of Philadelphia, obtained through his clerk, by falsely alleging that he had purchased \$33,000 of the city loan, a check for that amount. This check was obtained *animo furandi*, and was then fraudulently converted. It was held by a majority of the court, that as the owner of the check (the city treasurer) did not intend to part with the property of the check, but only its possession, the defendant was rightly convicted of larceny. *Com. v. Yerkes*, 12 Cox C. C. 208. See *Supra*, § 963; *infra*, § 971.

obtained saturates the whole transaction with felony, and makes the subsequent conversion larceny.¹

§ 965. If, however, the property in the goods is passed, not conditionally but absolutely, then at common law (aside from the statutes to be hereafter noticed)² a prosecution for larceny must fail.³ Thus, when a cheque is given to a servant by his master, to be handed to a third party, and the servant appropriates the cheque, this is larceny;⁴ but if the cheque be given to the defendant absolutely, as agent for a creditor to whom it is to be handed, the property passes out of the master, and larceny cannot be maintained.⁵ And where money is given to A. to have changed, the property of the money being surrendered by the owner, A. cannot be convicted of stealing the money, when no property in it was retained by the owner,⁶ nor can he be convicted of stealing the change, for this the owner of the money never had.⁷ If, however, the property is not passed to the party taking, he is indictable for larceny.⁸ And this is the case where the property in the money is not passed to the defendant, but he obtains it by mistake of the owner.⁹

§ 966. Where a servant or bailee has bare possession of goods, not being authorized to pass the property in the same, it is larceny fraudulently to obtain from him such possession and then convert the goods.¹⁰ Thus larceny was

¹ *State v. Coombs*, 55 Me. 477, 1867. *Jacobs*, 12 Cox C. C. 151. *Cf. R. v. See R. v. Wright*, *supra*, § 887, as to Gumble, 12 Cox C. C. 248; and see effect of returning in purging offence. note to *supra*, § 956, as to distinctions.

² *Infra*, § 1055.

⁷ *R. v. Sullens*, 1 Mood. C. C. 129;

³ *Supra*, § 961; *R. v. Barnes*, T. & *R. v. Bird*, 12 Cox C. C. 254. *Cf. 25 M. 387*; 2 Den. C. C. 59; *R. v. Davenport*, Arch. Peel's Acts, 5; *Lewer v. Alb. L. J. 383. Supra*, §§ 862, 962.
⁸ *Justices v. People*, 90 N. Y. 12, 1882; *People v. Abbott*, 53 Cal. 284. See *People*, 17 Ill. 339, 1856; *Wilson v. Hildebrand v. People*, 56 N. Y. 394, 1874, where a customer laid down a note on the counter which the clerk seized. This was held larceny. *Supra*, § 956; and see *R. v. McKale*, L. R. 1 C. C. 125; 11 Cox C. C. 32; *State v. Anderson*, 25 Minn. 66, 1878.

it, is not larceny of the property. ⁹ *Supra*, §§ 916, 957. *Infra*, § 975.
People v. Cruger, 102 N. Y. 810, 1886. ¹⁰ *Supra*, § 956; *R. v. Campbell*, 1

⁴ *R. v. Metcalf*, 1 Mood. C. C. 433.

⁵ *Supra*, § 962 b; *R. v. Essex*, 7 Cox C. C. 235; *R. v. Gillings*, 1 F. & C. C. 384. F. 36; *R. v. Hornby*, 1 C. & K. 305;

⁶ *R. v. Thomas*, 9 C. & P. 741; *R. State v. Brown*, 25 Iowa, 561, 1868; *v. Reynolds*, 2 Cox C. C. 170; *R. v. Com. v. Cruikshank*, 138 Pa. 194, 1890.

held to be consummated in a case where some wheat, not the property of the prosecutors, but which had been consigned to them, was placed in one of their storehouses in the care of a servant, E., who was to deliver the wheat only to the orders of the prosecutors or their managing clerk, C., when the defendant, who was in the employ of the prosecutors, obtained the key of the storehouse from E., and was allowed to remove a quantity of the wheat, upon the fraudulent representation to E. that he had been sent by C., and was to take the wheat to the Brighton railway station;¹ and it has been held larceny for a person to take *animo furandi* from a post-office clerk a larger sum than he is entitled to, knowing the money not to be his.² But it is otherwise when absolute property is transferred by an authorized agent or bailee. This being the case, as the cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine orders, and to judge of their genuineness, it is not larceny but false pretence to obtain money on a forged cheque from such cashier.³

fraudulently obtained from servant or bailee as precludes prosecution for larceny.

¹ R. v. Robins, 29 Eng. Law & Eq. 544; 6 Cox C. C. 420; Dears. C. C. 418. See *supra*, § 888.

² R. v. Middleton, 12 Cox C. C. 260, cited at large *supra*, § 916; and see R. v. Oliver, cited 4 Taunt. 274; Cf. comments in London Law Times, Sept. 21, 1878, p. 347.

In Com. v. Barry, 125 Mass. 390, 1878, the evidence was that, in pursuance of a preconcerted plan with B., A. entered the baggage-room of a railroad station, where B. had a valise checked, and presenting a check corresponding with the one on the valise, obtained permission from the baggage-master to place a package in the valise. While the attention of the baggage-master was called away by B., A. changed the checks on the valise and a trunk, which was standing underneath the valise, and immediately passed out of the room. By means of this substitution of checks, the trunk was carried to a station other than that intended

by its owner. B. went on the same train with it, and on arrival at the station received it, took it with him, and appropriated its contents. It was held that A. was guilty of larceny of the trunk and its contents.

³ R. v. Prince, L. R. 1 C. C. 150; 11 Cox C. C. 198, See *supra*, § 916, for other cases.

Where a letter addressed to J. M., St. Martin's Lane, Birmingham, inclosing a bill of exchange, drawn in favor of J. M., was delivered to the defendant, whose name was J. M., and who resided near St. Martin's Lane, Birmingham, but, in truth, the letter was intended for a person of the name of J. M., who resided in New Hall Street; and the prisoner who, from the contents of the letter, must have known that it was not intended for him, applied the bill of exchange to his own use; the judges held that it was no larceny, because at the time when the letter was delivered to him, the de-

§ 967. When the possession by a bailee is rightfully obtained, the mere fact of the subsequent existence of the *animus furandi* does not make the offence larceny,¹ unless by some new and distinct act of taking, as by severing some part of the goods from the rest, and thereby breaking bulk, with intent to convert them to his own use, the offender determines the privity of the bailment, and so the special property thereby conferred upon him.² Whether the separation by a carrier of one package from

Bailee liable when bulk or package is fraudulently broken, though possession was obtained *bona fide*.

defendant had not the *animus furandi*. R. v. Mucklow, 1 Mood. C. C. 160; R. v. Godfrey, 8 C. & P. 563; R. v. Davies, 36 Eng. Law & Eq. 607; Dears. C. C. 640. *Supra*, § 806. If, on the other hand, the original taking of the letter had been fraudulent, and with knowledge that it was not meant for the defendant, the case is larceny. R. v. Gillings, 1 F. & F. 36.

¹ R. v. Thistle, 1 Den. C. C. 502. (cited *supra*, § 963); R. v. Banks, R. & R. 441; People v. Anderson, 14 Johns. 294, 1816; Wilson v. People, 39 N. Y. 459, 1868.

² 1 Hawk. c. 33, s. 1; 2 East P. C. 554; 1 Hale, 504; 2 Russ. on Cr. (6th Am. ed.) 56.

Mr. Collyer, in his collection of statutes, remarks: "This latter position has been disputed, and much stress has been laid upon the unreasonableness of making a man guilty of a felony for stealing part of that of which, if he had taken it all, he would be only guilty of a misdemeanor; but a man is equally guilty of a felony in taking the whole as in taking a part, when he has done an act to determine the privity of contract. The cause of the distinction is to be found in the necessity of an accurate distinction between a breach of trust and an act of felony; and the principle is, that felony cannot be committed by a person having a legal possession of goods; as, for instance, under a contract. See R. v.

Charlewood, 1 Leach, 409. The contract must be put an end to before felony can be committed; for during its existence the person having possession under it has, *prima facie*, a legal possession; therefore, although by selling the goods without breaking he, in fact, destroys the privity of the contract, still that act is executed in respect of goods which are at the time in his legal possession, the termination of the contract and the act of conversion being contemporaneous; there is not, therefore, a caption and asportation of the goods of another, which is essential to the offence of larceny. And upon this principle R. v. Madox, R. & R. 92, was decided. The prisoner was master and owner of a ship, and stole some of the goods delivered to him to carry. It was held not larceny, because he did not take them out of their packages. But if the package of goods be first broken, the contract is determined by that act; the legal possession of the carrier is at an end; and, although the actual possession is still in him, the property reverts in the owner, and any subsequent act of conversion is strictly an act committed upon the goods of another, and the larceny is complete. It may be observed that, in the latter case, the offence is the same, whether it be committed upon the whole or upon part." Burn's Justice (29th ed.), tit LARCENY.

a mass of packages, without breaking the wrapper or boxing of the package so separated, is such a breaking bulk, has been contested. The affirmative is maintained in Massachusetts and New York.¹ The negative appears to be the prevalent view in England.²

§ 968. A bailment may be also determined by a fraudulent severance by the bailee, so as to make him guilty of larceny.

Thus, in an English case that came up before all the judges, the prisoner was sent out by a tailor to sell clothes in a particular county; the price of each article was fixed, and the clothes were intrusted to the prisoner on the arrangement that he was to sell them at the price fixed, he receiving 3s. in the pound on the amount received for them, and

And so where bailment is determined by fraudulent severance.

Where a miller having received barrilla to grind, fraudulently abstracted part of it, returning a mixture of barrilla and plaster-of-Paris, it was considered larceny. *Com. v. James*, 1 Pick. 375, 1823. See 1 Hawk. 33, s. 56; *State v. Fairclough*, 29 Conn. 47, 1860.

Where a carrier, while his contract is in the course of completion, opens the pack and takes out part of the goods, he commits a larceny; but if he run away with the whole it is a breach of trust, and no larceny. But if, after arriving at the place where he should deliver his charge, he steal a part or the whole, it is a larceny. 1 Hale, 504; Staundf. 25.

Merely to take one article away which is not bound up in bulk with others is not, according to the English rule, breaking bulk. *R. v. Glass*, 1 Den. C. C. 215; 2 C. & K. 395. This has been applied to the case of a letter-carrier taking a bank bill out of an envelope. *R. v. Glass*, *ut supra*; though it is otherwise if one bank note is taken out of a bundle. *Ibid.* So it is not larceny for a carrier to take one truss of hay from a load, not bound together, of several trusses. *R. v. Pratley*, 5 C. & P. 533; nor for a drover to take one sheep from a flock. *R. v. Reilly*, *Jebb*, 51.

Where the prosecutor sent forty

bags of wheat to the prisoner, a warehouseman, for safe custody, until they should be sold by the prosecutor, and the prisoner's servant, by direction of the prisoner, emptied four of the bags, and mixed their contents with other inferior wheat, and part of the mixture was disposed of by the prisoner, and the remainder was placed in the prosecutor's bags, which had thus been emptied, and there was no severing of any part of the wheat in any other bag, and the intent was to embezzle that part only which was so severed; it was held that the prisoner was guilty of larceny in taking the wheat out of the bag. *R. v. Brazier*, *R. & R.* 337; and see *R. v. Madox*, *Ibid.* 92.

Under the special statutes, to sustain a charge of larceny by a bailee, it is necessary to prove some act of conversion inconsistent with the purpose of the bailment. *R. v. Jackson*, 9 Cox C. C. 505. See *infra*, § 1009.

¹ *Com. v. Brown*, 4 Mass. 580, 1808; *Nichols v. People*, 17 N. Y. 114, 1858, overruling *People v. Nichols*, 3 Parker C. R. 579, 1857.

² *R. v. Cornish*, 6 Cox C. C. 432; *Dears*. 425; *R. v. Madox*, *R. & R.* 92; cited more fully *infra*; *R. v. Howell*, 7 C. & P. 325; *R. v. Pratley*, 5 C. & P. 533.

being bound to bring back the remainder of the clothes which were unsold. The prisoner received from the prosecutor a parcel of clothes on these terms, but, instead of selling them, he fraudulently pawned a portion of them for his own benefit, and afterward fraudulently misappropriated the residue to his own use. It was held that the original bailment of the goods to the prosecutor was determined by the unlawful act of pawning part of them, and that the subsequent fraudulent misappropriation of the remainder amounted to larceny.¹

§ 969. It need scarcely be added that where a bailment has expired by its own limitations, and the property reverts to the master's possession, it is larceny for the ex-bailee to steal any article it may have included.² In illustration of this rule may be noticed an English case, where certain coals were delivered to the prisoner, who had been sent for them by his master, and deposited in the master's cart, their price being entered to the master's account. On the road home the prisoner disposed of a portion of the coals. It was held that this was larceny of the coals and not embezzlement, the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, and the possession from that time being in the master.³ And determination of a bailment can be inferred from the dealings of the parties.⁴

§ 970. It is proper to say that by English statutes (20 & 21 Vict. and 24 & 25 Vict.) the common law, in this respect, has been changed, and stealing by bailees is made larceny, irrespective of the limitations imposed by the common law. Similar statutes have been adopted in several of the United States.⁵ These will hereafter be discussed.⁶

VIII. BY ASSIGNEE OR VENDEE.

§ 971. A party obtaining goods from another by sale is not liable, as we shall have frequently occasion to see, to a prosecution for

¹ R. v. Poyser, 2 Den. C. C. 233; T. C. & K. 518. *Supra*, §§ 956, 962 a. & M. 559; 5 Cox C. C. 241. As to embezzlement in such cases, see

² R. v. Charlewood, 1 Leach, 409; 2 *infra*, § 1027.

East P. C. 689. See R. v. Stear, 1 Den.

⁴ R. v. Stear, *ut supra*.

C. C. 349; R. v. Cornish, 33 Eng. Law

⁵ As to New York statute, see note & Eq. 527; Dears. 425; 6 Cox C. C. to *supra*, § 888.

432. See *supra*, § 892.

⁶ See *infra*, §§ 1049 *et seq.*; and see

³ R. v. Reed, Dears. C. C. 257; 18

R. v. Aden, 12 Cox C. C. 512.

Jur. 67. See, also, R. v. Hayward, 1

larceny, no matter how fraudulent may have been the pretences by which the sale was obtained.¹ This rule, however, does not apply when the goods were obtained by force or threats of force.²

Sale obtained by force does not transfer property.

¹ *Supra*, §§ 914, 915, 965; *R. v. Wilson*, 8 C. & P. 111; *Lewer v. Com.*, 15 S. & R. 93, 1826. *Cf. Fleming v. State*, 136 Ind. 149, 1893. See notice of New York statute, *supra*, § 888, *note*.

² *R. v. Lovell*, L. R. 8 Q. B. D. 185; 44 L. T. 319. *Supra*, § 915.

The defendant acted as auctioneer at a mock auction, and knocked down some cloth for 26s. to B, who had not bid for it, as the defendant knew, and B. refused to take the cloth or pay for it; upon which the defendant refused to allow her to leave the room unless she paid. Ultimately she paid the 26s. to the defendant and took the cloth. She paid the 26s. because she was afraid. The defendant was indicted for, and convicted of, feloniously stealing these 26s.; and it was held by the English judges in banc that the conviction was right, because, if the force used to B. made the taking a robbery, larceny was included in that crime; if the force was not sufficient to constitute a robbery, the taking of the money nevertheless amounted to larceny, as B. paid the money to the defendant against her will, and because she was afraid. *R. v. McGrath*, L. R. 1 C. C. 205; 18 W. R. 119; 37 L. J. M. C. 7. It was held, also, that under the circumstances it was not necessary that the jury should be asked whether B. paid the money against her will, as from the evidence it was clear that there could have been no doubt in the minds of the jury that the money was so paid. See *Zink v. People*, *ut supra*. *Infra*, § 973.

In *R. v. Lovell*, *ut supra*, the proof was that B. engaged the prisoner to grind scissors, and paid him when they were ground. B. then handed

him six knives to grind. He ground them and demanded 5s. 3d. for them, the ordinary charge being 1s. 6d. B. refused to pay 5s. 6d. The prisoner then threatened B., and said he would make her pay, and ultimately, in consequence of her fears, she gave the prisoner 5s. 6d. The prisoner was indicted for larceny of the 5s. 6d., and the chairman on the trial directed the jury that, if the money was obtained by frightening the owner, the prisoner was guilty of larceny. The jury having convicted the prisoner, the conviction was sustained by the court for crown cases reserved (1881).

In another case the prisoners, pretending that one of them was a sea captain, and a Frenchman unable to speak English, offered to the prosecutrix a dress for sale at 25s., saying that if she would give that price for it, she should have another dress, which was produced, worth 12s. into the bargain. The prosecutrix agreed to this, and took a sovereign and a shilling from her pocket. Whilst she was holding the money, one of the prisoners opened her hand and took it out, though not forcibly. He then declined to take the other 4s., but laid down the dress first produced, and refused to let the prosecutrix have the other. The dress proved to be of little value. It was held that the prisoners were properly convicted of larceny. *R. v. Morgan*, 29 Eng. Law & Eq. 543; *Dears. C. C.* 395; 6 Cox C. C. 408.

On the same reasoning the following was held to constitute larceny: The defendant went into a shop and asked to buy a chattel, and was referred by the clerk to the shopkeeper,

§ 972. The sale, to bar larceny, must be complete.¹ Thus where the defendant, having bargained for goods, for which, by the custom of trade, the price should have been paid before they were taken away, took them without the consent of the owner, and at the time he bargained for them did not intend to pay for them, but meant to get them into his own possession and dispose of them for his own benefit, this was ruled to be larceny.² And where the defendant put goods into a cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them, his intention being from the beginning to get the goods by fraud, larceny was in like manner held to be proved.³

§ 973. A transfer obtained by a fraudulent trick does not shield the taker.⁴ The defendant, in the presence of the prosecutor, picked up a purse in the street, containing a receipt of £147 for a "rich brilliant diamond ring," and also the ring itself; it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money as a security that he would return the ring as soon as his pro-

Transfer by "ring-dropping" or trick not such a sale. who refused to let him have it except upon his father's order. Afterward, without having obtained such order, and in the absence of the shopkeeper, he asked to see the chattel. When it was shown him by the clerk, he took it from the counter, told the clerk that he had made it all right with the shopkeeper, and carried it away. *Com. v. Wilde*, 5 Gray, 83, 1855. This can be sustained on the ground that there was no assent to the transfer.

¹ *Supra*, §§ 915, 959; *R. v. Cohen*, 2 Den. C. C. 249; *State v. Anderson*, 25 Minn. 66, 1878.

² *R. v. Gilbert*, 1 Mood. C.C. 185. See *Com. v. Wilde*, as above explained.

³ *R. v. Pratt*, 1 Mood. C. C. 250.

⁴ *Supra*, § 964; *Miller v. Com.*, 78 Ky. 15, 1879; *People v. Tweed*, 1 N.Y. Cr. R. 97, 1881; *Grunson v. State*, 89 Ind. 533, 1883. See *U.S. v. Murphy*, 1 MacA. & Mc.K. 375, 1880; *Hall v. State*, 6 Baxt. 522, 1873.

In *R. v. Hollis*, 49 L. T. (N. S.) 572; L. R. 12 Q. B. D. 25; 15 Cox C. C. 345, a conviction of larceny was sustained on the following facts: The prisoner and another person went to an inn. The prisoner asked the barmaid for whiskey. He put down half a sovereign, and received 9s. 6d. in silver in change. He then asked for the half-sovereign back, saying he thought he had change. She gave it back. His companion then asked for a cigar. She served him with it. The prisoner then put down 10s. in silver and a half-sovereign, asking the barmaid to give him a sovereign for it, which she did. His companion kept on engaging the barmaid's attention. The prisoner never returned the 9s. 6d. which the barmaid gave him in the first instance. The barmaid never intended to part with her master's money except for full consideration.

portion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10s. only and the watch and the money were never returned; it was left to the jury to say whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury being of that opinion convicted the defendant.¹ In another case, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion that this practice of ring-dropping amounted to larceny; and they distinguished it from the case of a loan; for here although the possession was parted with, the property in the goods was not.²

§ 974. The transfer to pass such title as bars larceny must be the consent of two minds to one thing.³ Hence where a defendant offered to give the prosecutor gold for bank notes, and upon the prosecutor's laying down some bank notes for the purpose of having them changed, the defendant took them up and went away with them, promising to return immediately with the gold, but in fact never returned, and was indicted for stealing them: Wood, B., left to the jury to say whether the defendant had the *animus furandi* at the time he took the notes; and said that, if they were of that opinion, the case clearly amounted to larceny.⁴ To adopt the language of the same judge, "A parting with the property in goods could only be effected by contract, which required the assent of two minds; but in this case there was not the assent of the mind either of the prosecutor or of the prisoner, the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner

Transfer
must be
consent
of two
minds
to one
thing.

¹ R. v. Patch, 1 Leach, 273. See De- R. v. Solomons, 62 L. T. (N. S.) frese v. State, 3 Heisk. 53, 1871. But 672.

where the prosecutor gave the prisoner money for purses into which the latter had by a trick appeared to drop money, it was held that, having parted with his property in the money in exchange for the purses and their contents, he could not charge the prisoner with larceny, but that the latter was guilty of false pretence.

² R. v. Watson, 2 Leach, 730; s. c. 2 East P. C. 680. *Supra*, § 964.

³ Whart. on Cont. § 4. *Supra*, § 915; Shipplly v. People, 86 N. Y. 375, 1881; Peck v. State, 9 Tex. App. 70, 1880.

⁴ R. v. Oliver, cited 4 Taunt. 274; 2 Russ. 122, s. c.; 2 Leach, 1072; R. & R. 215. *Supra*, § 971.

never meaning to barter, but to steal.”¹ And where money is passed conditionally to another, who before the condition is per-

¹ See *R. v. Rodway*, 9 C. & P. 784. See *supra*, § 964.

Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodgings, out of which the defendant choose six pairs, which were laid on the back of a chair; and the defendant then sent the prosecutor back to his shop for some articles, and while he was absent absconded with the stockings; the judges held that this amounted to larceny, as the defendant clearly obtained possession of the goods *animo furandi*, and as the prosecutor did not assent to the sale. *R. v. Sharpless*, 1 Leach, 108; 2 East P. C. 675.

In another case, one of the defendants persuaded the prosecutor, by a preconcerted plan, to deposit his money with another of the defendants as a deposit upon a pretended bet, and the stakeholder afterward, upon pretence that one of his confederates had won the wager, handed the money over to him; it was left to the jury to say whether, at the time the money was taken, there was not a plan that it should be kept, under the false color of winning the bet, and the jury found that there was. The offence was held to be larceny; because, at the time the defendants obtained the money from the prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party won the wager. *R. v. Robinson*, R. & R. 413. See, also, *R. v. Horner*, 1 Leach, 325; Cald. 295. *Aliter*, if money was absolutely parted with. *R. v. Nicholson*, 2 Leach, 698. So where S., induced by the subterfuges of three fellow-passengers in a railway car, made a wager with one of them and deposited his stake with P., another of them. The opposite stake

turned out to be only waste paper; but P., after detection, refused to give up S.'s money. This was held larceny in P. and his associates. *Stinson v. People*, 43 Ill. 397, 1867. See *R. v. Robson*, R. & R. 413.

Where the prisoner went into a shop and asked for change for half-a-crown, and the shopman gave him two shillings and sixpence; the prisoner held out the half-crown, and the shopman just took hold of it by the edge, but never actually got it into custody, and the prisoner ran away with the change and the half-crown: upon an indictment for stealing the two shillings and sixpence, Parke, J., held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown. *R. v. Williams*, 6 C. & P. 390. And see *R. v. Twist*, 12 Cox C. C. 509; *R. v. Johnson*, 2 Den. 310.

Another illustration is found in a crown case reserved decided in Feb. 1873. The prosecutor agreed to sell a load of onions to the defendants for cash. The defendants pretended to agree to this, and said, “You shall have your money directly the onions are unloaded.” The onions were unloaded, and the prosecutor asked for his money, which the defendants would not pay, but, on receiving a bill from the prosecutor, put a cross on it, declared that they had a receipt, and hurried off with the onions. The jury found that the defendants never intended to pay. It was ruled to be clear that there was not such an agreement between the prosecutor and the defendants to the same exact thing as made out a sale. “If, in this case,” said Kelly, C. B., “it had been intended by the prosecutor to give credit for the price of the onions, even for a single hour, it would not have been

formed steals it, the case, as we will presently see, is one of larceny.¹

§ 975. Hence a transfer of property, so as to bar larceny, does not exist when there is a condition which still reserves a property in the vendor.² Thus, as we have just seen, if a sale be for cash, the taking of the goods without paying cash is larceny.³

Condi-
tional
transfer
does not
bar lar-
ceny.

§ 976. Where a replevin is fraudulently sued out, and by that means another man's horse is obtained and carried away, it is held that larceny may be maintained;⁴ and so where one, having no cause of action, sues out a writ for a fictitious demand, and thus gets possession of the property of another, which he converts to his own use, and with intent to defraud

No defence
that goods
were ob-
tained by

larceny, but it is clear that no credit was given or ever intended to be given. *If the seller delivers first before the money is paid, and the buyer fraudulently runs off with the article, or if, on the other hand, the buyer pays first, and the seller fraudulently runs off with the money, without delivering the thing sold, it is equally larceny.*" R. v. Slowly, 12 Cox C. C. 269; 27 L. T. (N. S.) 803. See R. v. McGrath, 11 Cox C. C. 347; L. R. 1 C. C. 205.

¹ R. v. McKale, L. R. 1 C. C. 125; 11 Cox C. C. 32. *Supra*, § 972.

"In two recent cases the prisoner was charged with stealing nineteen shillings. In both the prosecutor gave the prisoner a sovereign, under the expectation that nineteen shillings change were to be given. In the first case the chairman of Quarter Sessions amended the indictment to one for stealing a sovereign, and directed the jury that if they believed that the prisoner at the moment of obtaining the sovereign intended by a trick feloniously to deprive the prosecutor of the sovereign, they were to find a verdict of guilty, and it was held that the direction was right. R. v. Gumble, 42 L. J. M. C. 7; L. R. 2 C. C. 1. In the second case the indictment was not

amended, and therefore the prisoner could not be convicted, as she had never taken nineteen shillings at all, but the majority of the judges thought that she might have been convicted on an indictment for stealing one sovereign if the issue had been properly left to the jury. R. v. Bird, 12 Cox C. C. 257; C. C. R. 42 L. J. M. C. 44." Roscoe C. P. p. 633. See distinctions taken in this respect, *supra*, §§ 956, 965.

² *Supra*, §§ 888, 972, 974. In R. v. Goode, 2 C. & P. 422, *n.*, it was held larceny in A. to fraudulently get from B. a note to deposit in bank, because B. did not intend to part with his property until the condition was fulfilled. See *People v. Call*, 1 Denio, 120, 1845; *People v. Hildebrand*, 56 N. Y. 394, 1874; *Dignowitty v. State*, 17 Tex. 521, 1856; and cases cited *supra*, §§ 956, 957.

³ R. v. Cohen, 2 Den. C. C. 249; R. v. Campbell, 1 Mood. C. C. 179; R. v. Gilbert, *Ibid.* 185; R. v. Slowly, 12 Cox C. C. 269. See R. v. Box, 9 C. & P. 126; cited *supra*, § 885.

⁴ 1 Hale, 507; 1 Hawk. c. 83, s. 12; 3 Inst. 108; R. v. Farre, Kel. 43; R. v. Summers, 3 Salk. 194.

legal process, where such process is fraudulent. the owner.¹ But it may be questioned whether such cases are not more properly extortionate abuse of process as an offence at common law. And where money is paid voluntarily to one who falsely represents himself as an officer with a warrant to arrest, the latter is not indictable for larceny.²

IX. INDICTMENT.

§ 977. The indictment in larceny is considered in other works, to which reference is made, as follows :

Indictment must be formally correct. Name and addition of defendant, Whart. Cr. Pl. & Pr. 96. Name and addition of owner, etc., Whart. Cr. Pl. & Pr. § 109 ; Whart. Cr. Ev. § 94.

Description of written instrument in, Whart. Cr. Pl. & Pr. § 167.

Proof of same, Whart. Cr. Ev. § 114.

Description of articles stolen, Whart. Cr. Pl. & Pr. § 206.

Evidence of same, Whart. Cr. Ev. § 121.

Averment of value, Whart. Cr. Pl. & Pr. § 213.

Proof of, Whart. Cr. Ev. § 126.

Description of money or coin, Whart. Cr. Pl. & Pr. § 218.

Proof of same, Whart. Cr. Ev. § 122.

Joinder of articles in, Whart. Cr. Pl. & Pr. §§ 243 *et seq.*

Joinder of counts in, with receiving stolen goods, Whart. Cr. Pl. & Pr. §§ 285 *et seq.*

Technical averments in, Whart. Cr. Pl. & Pr. § 266.³

The indictment must allege that the defendant " feloniously did steal, take, and carry away " the goods in question.⁴

In some jurisdictions it is necessary to aver that the taking was without the owner's assent,⁵ and that the intent was to deprive the owner of his property.⁶

§ 978. As is elsewhere seen, counts for larceny can be joined

¹ Com. v. Low, Thach. C.C. 477, 1887. that were not larceny at common law,

² Perkins v. State, 63 Ind. 317, 1878. the indictment should show in which

³ For Forms, see Whart. Prec. tit. one of the ways the accused is charged. " LARCENY." State v. Henn, 39 Minn. 464, 1888.

⁴ Whart. Cr. Pl. & Pr. § 266 ; Com. v. Pratt, 132 Mass. 246, 1882. See Yates v. Tex. App. 338, 1882.

⁵ Supra, § 915 ; Bowling v. State, 13 State, 67 Ga. 770, 1881 ; Sovine v. State, 85 Ind, 576, 1882. Where the code de- 1883.

finer some ways of committing larceny

with those for embezzlement, and receiving stolen goods.¹ In Ohio this is settled by statute.² Property may be stated in different ways in different counts.³ Various counts may be joined.

How far articles belonging to different owners may be grouped is elsewhere considered.⁴

Where a joint ownership is averred, it must be proved as laid.⁵

§ 979. Ownership must be distinctively averred, either in a specific person, or a person unknown to the grand jury.⁶ "Of the goods and chattels" of the owner is a sufficient averment of ownership.⁷ When required by statute, the taking must be averred either directly or inferentially to be without the owner's consent.⁸ But this is not necessary at common law.⁹ Ownership must be stated.

It is not sufficient, at common law, to aver ownership in a partnership without giving the names of the partners.¹⁰

The goods may be averred to be of a person unknown,¹¹ and this sufficiently negatives ownership in the defendant.¹²

As we have seen, the ownership may be averred to be in either special or general owner.¹³

¹ Whart. Cr. Pl. & Pr. §§ 291 *et seq.* See *State v. Lawrence*, 81 N. C. 522, 1879; *Brown v. People*, 39 Mich. 37, 1878. As to counts of larceny and burglary, see *State v. Hackett*, 47 Minn. 425, 1891; *State v. Richardson*, 45 La. An. 692, 1893; *State v. McClung*, 35 W. Va. 280, 1891; *State v. Moore*, 117 Mo. 395, 1893.

That there cannot be a conviction for receiving on a count for larceny, see *infra*, § 986.

² Code of Crim. Prac. O. L. vol. 66, 301.

³ *Supra*, § 932 *b*.

An indictment alleging that the defendant "did unlawfully obtain from the said C. C. a check for the sum of £8 14s. 6d. of the moneys of the said W. W.," is a sufficient allegation of the ownership of the check. *R. v. Godfrey*, Dears. & B. C. C. 426; 27 L. J. M. C. 151. See Whart. Cr. Pl. & Pr. §§ 191, 218.

⁴ *Supra*, §§ 931, 948; Whart. Cr. Pl. & Pr. §§ 252, 470.

⁵ *State v. Ellison*, 58 N. H. 325, 1878.

⁶ *Supra*, § 932; *Garner v. State*, 36 Tex. 693, 1872; *Maddox v. State*, 14 Tex. App. 447, 1883. See *Gadson v. State*, 36 Tex. 350, 1872; *Case v. State*, 12 Tex. App. 228, 1882; *Stone v. State*, *Ibid.* 193, 1882; *State v. Hanks*, 39 La. An. 234, 1887; Whart. Cr. Pl. & Pr. § 218.

⁷ *State v. Bartlett*, 55 Me. 200, 1866; *Fisher v. State*, 40 N. J. L. 169, 1878; Whart. Cr. Pl. & Pr. § 191.

⁸ *Com. v. Smith*, 116 Mass. 40, 1874. See *Johnson v. State*, 39 Tex. 393, 1873; *Williams v. State*, 23 Tex. App. 619, 1887.

⁹ *Wedge v. State*, 7 Lea, 687, 1881; *People v. Davis*, 97 Cal. 194, 1893; *Com. v. Butler*, 144 Pa. 568, 1891.

¹⁰ *Supra*, §§ 932, 935.

¹¹ *Supra*, § 949.

¹² *Thompson v. State*, 9 Tex. App. 301, 1880.

¹³ *Supra*, §§ 932, 936.

X. VERDICT.

§ 980. The subject of verdict, when there are lumping valuations, is elsewhere fully discussed.¹ It has been also seen that a verdict may go to a part of the articles alleged to be stolen, when each has a specific valuation.² Whether a valuation of the goods in the verdict is requisite is also elsewhere noticed.³

XI. RESTORING ARTICLES STOLEN.

§ 981. The statute 21 Hen. VIII., which is part of the common law brought with them by the American colonists, declares that the person robbed, etc., "shall be restored to his money," and directs judges on conviction to award from time to time "writs of restitution for the said money, goods, and chattels." The statutes 7 & 8 Geo. IV. and 24 & 25 Vict. add provisions which will hereafter be partially noticed. Statutes on the same topic have been enacted in several of the United States.⁴ The statute 21 Hen. VIII. extended only to felonious and not to fraudulent takings; and hence has been held not to include embezzlements.⁵ If there be any gross neglect in prosecution, the prosecutor is stopped from asserting his right.⁶

§ 981 a. The statute 21 Hen. VIII. limits the restoration to "the money, goods, or chattels," robbed or stolen, and under this statute it is part of the sentence of a convicted thief that he "restore the property stolen, if not already restored." Two points of difficulty here arise. (1) The first is whether the goods can be followed into the hands of innocent assignees. The statute of 21 Hen. VIII. warranting this interpretation, the statutes of 7 & 8 Geo. IV. and 24 & 25 Vict. were passed to protect *bonâ fide* purchasers. Unless, however, a clear case of *bonâ fides* is made out, the court will order a writ to

¹ *Supra*, § 951; Whart. Cr. Pl. & Pr. §§ 736 et seq.

² Whart. Cr. Pl. & Pr. §§ 252, 470, 736 et seq.

³ Whart. Cr. Pl. & Pr. § 753. And see *Com. v. Butler*, 144 Pa. 568, 1891; *Cole v. State*, (Miss.) 4 So. Rep. 577, 1888; *Brooks v. State*, 28 Nebr. 389, 1889; *Gibson v. State*, (Miss.) 7 So. Rep. 211, 1890; *Ellison v. State*, 25 Tex. App. 328, 1888.

⁴ See, as to Massachusetts, *Com. v. Boudrie*, 4 Gray, 418, 1855. As to New Hampshire, *Locke v. State*, 32 N. H. 106, 1855. As to Virginia, *Com. v. Hensey*, 2 Va. Cas. 145, 1819.

⁵ *R. v. De Veaux*, 2 Leach, 665; 2 East P. C. 789, 839. It is otherwise with the 24 & 25 Vict. See *Parker v. Patrick*, 5 T. R. 175.

⁶ 1 Hale P. C. 540; 2 Hawk. c. 23, s. 56.

issue to restore the goods wherever they may be found.¹ And the general principle is that property in a stolen chattel reverts to the owner on conviction of the thief, and he may follow the chattel wherever it may be, unless it be in the hands of *bonâ fide* innocent purchasers.² (2) Can the owner, by this process, obtain the *price* of the goods in case the goods have been sold by the thief? Certainly not under 21 Hen. VIII., which gives title to the stolen goods *in specie*, wherever they may be, and which, until limited by 7 & 8 Geo. IV., authorized the writ to follow the goods even in the hands of *bonâ fide* purchasers. Hence, if the goods cannot be found in the thief's possession, the court cannot assess upon the thief their price. So, indeed, has it been decided in Massachusetts.³ And in England it has been ruled that the court has no power, either by statute or common law, to direct the disposal of chattels in the possession of a convicted felon, unless such chattels specifically belong to the prosecutor.⁴

Goods stolen from a servant may be thus recovered by the master, if the goods be laid in the indictment as the master's property.⁵

§ 981 b. Attempts at stealing have been already distinctively discussed.⁶

XIII. LARCENY FROM HOUSE.

§ 981 c. By statute in several States larceny in a house is made distinctively indictable. The gist of the offence, in such case, is the fact of the larceny being committed in a house; and this includes curtilage.⁷ But larceny from an alley or court adjacent to a warehouse is not larceny in a house;⁸ nor is larceny from a fence or piazza-railing;⁹ nor is larceny of clothes hanging on the outside wall of a house;¹⁰ though it is otherwise when the things stolen are taken from a hook under

Larceny from the house a statutory offence.

¹ See *R. v. Macklin*, 5 Cox C. C. v. State, 2 Pickle, 511, 1888; *People v. Stanton*, 7 C. & v. Moran, 123 N. Y. 254, 1890. P. 481.

⁷ *R. v. Norris*, R. & R. 69; *Stanley*

² *Scattergood v. Sylvester*, 15 Q. B. v. State, 58 Ga. 430, 1877. See *Com. v. Smith*, 111 Mass. 429, 1873. *Ullman v.*

³ *Com. v. Boudrie*, 4 Gray, 418, 1855. *State*, 1 Tex. App. 220, 1876; *People v.*

⁴ *R. v. Pierce*, Bell C. C. 235; 8 Cox *Horrigan*, 68 Mich. 491, 1888; *State v. C. C. 344*. See *El., Bl. & El.* 509. But *Leedy*, 95 Mo. 76, 1888.

see *Golightly v. Reynolds*, Lofft. 88. ⁸ *Middleton v. State*, 53 Ga. 248, 1874.

⁵ 1 Hale P. C. 542.

⁶ *Supra*, §§ 176, 178, 186. And see *Jackson v. State*, 91 Ala. 55, 1890; *Hayes v. State*, 15 Lea, 64, 1885; *Clark*

⁹ *Henry v. State*, 39 Ala. 679, 1866.

¹⁰ *Martinez v. State*, 41 Tex. 126, 1874.

the eaves of the house.¹ Stealing a purse from a fellow-lodger's trunk when in the house in which both lodge is larceny in a house;² but, so far as concerns the particular purpose, the entry must be adverse.³ Hence the offence, so far as it involves a trespass in entering into a house, is not made out when the defendant is a married woman and the house her husband's.⁴ As is the case with other forms of larceny, there must be a prior intent to steal, though it is not necessary that this intent should have been formed at the time of entrance into the house.⁵

¹ *Burge v. State*, 62 Ga. 170, 1878. *supra*, § 793. As to out-houses, see

² *Com. v. Smith*, 111 Mass. 429, 1873. *supra*, 797. As to a storehouse, see

³ See *State v. Chambers*, 6 Ala. 855, *Jefferson v. State*, (Ala.) 14 So. Rep. 1844, 627, 1894.

⁴ See *Com. v. Hartnett*, 3 Gray, 450, 1855. ⁵ *Ward v. Com.*, 14 Bush, 233, 1878; *Berry v. State*, 10 Ga. 511, 1851.

As to what is a "warehouse," see

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

Temporary Deprivation of Owner of his Property not Larceny.

To constitute larceny the intent must be to deprive the owner permanently of his property, and on this ground the following instruction was held erroneous :

"In defining to you the crime of larceny he [*i. e.*, counsel for the defence] says it is essential that the taking of it must be felonious. That is true: the taking with the intent to deprive the owner of it; but he adds the conclusion that you must find that the taker intended to deprive him of it permanently. I do not think that is the law. I think in this case, for example, if the defendant took this bicycle, we will say for the purpose of riding twenty-five miles, for the purpose of enabling him to get away, and then left it for another to get it, and intended to do nothing else except to help himself away for a certain distance, it would be larceny, just as much as though he intended to take it all the while. A man may take a horse, for instance, not with the intent to convert it wholly and permanently to his own use, but to ride it to a certain distance, for a certain purpose he may have, and then leave it. He converts it to that extent to his own use and purpose feloniously." *People v. Brown*, (Cal.) 38 Pac. Rep. 518, 1894.

So, the refusal of the court to give the following instruction was held erroneous: "If you are satisfied from the evidence that the defendant at the time of taking the mare described in the indictment, took her with the intention of restoring her to the man from whom he had hired her, you should acquit him. If, from all the evidence in the cause, you have a reasonable doubt as to whether the defendant, at the time of the taking the mare, had in his mind

the intent to steal her, or the intent to take and restore her to her original owner, and thus endeavor to cure whatever wrong he had committed with respect to said mare, you should give the defendant the benefit of that doubt and acquit him." *Gooch v. State*, (Ark.) 28 S. W. Rep. 510, 1894.

Possession of Owner must be Superseded by Wrongdoer.

The possession of the owner must be superseded by that of the wrongdoer, and for this reason the following instructions were held erroneous:

"If the jury find from the evidence that the defendant, with a felonious intent, grabbed for the money, but did not get it, but only knocked it from the owner's hand with a felonious intent, this would be a sufficient carrying away of the money, although defendant never got possession at any time of said money." *Thompson v. State*, 94 Ala. 535, 1891.

Killing Live Stock with Intent to Take it Afterward not Larceny.

"If a man shoots the hog of another with the intent to steal it and kills the hog and takes possession of it, he is guilty of larceny; or if he gets near enough to the hog to exercise dominion and control over it, after the killing, with the intent to steal it, he is guilty of larceny thereof." Here the latter clause alone was held erroneous. *Molton v. State*, (Ala.) 16 So. Rep. 795, 1895.

CHAPTER XIV.

RECEIVING STOLEN GOODS.

I. OFFENCE GENERALLY.

Receiving is a substantive offence, § 982.

Fact of stealing may be proved by testimony of thief, but not by his confessions, § 982 *a*.

Guilty knowledge must be proved, § 983.

Such knowledge may be inferred, § 984.

Inference may be derived from possession, § 985.

If larceny be proved, defendant cannot be convicted of receiving, § 986.

Claim of title is a defence, § 987.

Honest intent is a defence, but need not be *lucri causa*, if intent be fraudulent, § 988.

If charge be joint, joint act of reception must be proved, § 989.

Receiving must be substantively proved, § 990.

Reception must be from thief, § 990 *a*.

Goods must have been of some value, § 990 *b*.

Receiving goods with intent to receive reward is within rule, § 991.

Wife cannot be convicted of receiving goods stolen by husband; but husband is responsible for connivance at his wife's guilty reception, § 992.

Reception against will of thief is not within rule, § 993.

Conflict as to whether indictment lies in one State for receiving goods stolen in another, § 994.

Place of reception to be inferentially proved, § 995.

Reception after statutory larcenies indictable, § 996.

II. INDICTMENT.

Name of thief need not be given, § 997.

Not necessary to aver conviction of thief, § 998.

Scienter and unlawfulness necessary, § 999.

Time and place need not be stated, § 1000.

"Taking" or "stealing" must be averred, § 1001.

Goods must be accurately described, § 1002.

Value must be averred, § 1003.

Counts may vary with ownership, § 1004.

Counts for larceny and receiving may be joined, § 1005.

Simultaneous reception of goods of different owners not one offence, § 1006.

POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)

I. OFFENCE GENERALLY.

Receiving is a substantive offence.

§ 982. RECEIVING stolen goods knowing them to be stolen, and with intent to prevent the owner from recovering their full enjoyment, is now a substantive offence,

if not by common law, at least by statute.¹ The offence at common law is a misdemeanor;² though by the statute of 3 W. & M. ch. 9, it was made accessoryship after the fact to larceny and hence became felony. By the 1 Anne stat. 2, ch. 9, it was provided that where the principal was not convicted of the larceny (which then was a prerequisite to a conviction of an accessory), the receiver could be convicted of the misdemeanor of receiving. Where, however, the offence is combined with harboring and sheltering the thief, then it is accessoryship after the fact to larceny.³ At common law this would operate as a merger; but merger is now prevented by the statutes making guilty reception of stolen goods an independent offence.⁴

§ 982 a. The first point to be shown, in an indictment for receiving stolen goods, is that the goods were stolen,⁵ and to prove this fact the thief is a competent witness.⁶ His testimony, however, like that of all other accomplices,⁷ is to be scrupulously weighed, and upon it, if uncorroborated, a conviction should not be permitted to rest.⁸ And bare possession of the stolen property is not sufficient corroboration.⁹ Unless confederacy be proved *aliunde*,

Facts of stealing may be proved by testimony of thief, not by his confessions.

¹ *Infra*, §§ 997 et seq.; *Com. v. Barry*, 52 Ind. 379, 1876; *State v. Antoine*, 42 116 Mass. 1, 1874; *Com. v. Sullivan*, La. An. 945, 1890; *People v. Seaton*, 136 Ibid. 170, 1883; *State v. Weston*, 15 N. Y. Sup. 270, 1891; *People v. 9 Conn. 527, 1833; Shriedley v. State*, Montague, 71 Mich. 318, 1888. That goods taken by robbery or burglary are stolen, see *R. v. Wardroper*, Bell Ky. 254, 1885. Receiving stolen goods and receiving embezzled goods are different offences. *Com. v. Leonard*, 140 Mass. 473, 1886.

² 2 East P. C. 142; 1 Hale P. C. 619; 1 Chitty C. L. 950; *State v. Hodges*, 55 Md. 127, 1880.

³ *R. v. Smith*, L. R. 1 C. C. 270. *Infra*, § 986.

⁴ See *People v. Reynolds*, 2 Mich. 422, 1852; *People v. Maxwell*, 24 Cal. 14, 1864; *Nourse v. State*, 2 Tex. App. 304, 1877; *State v. Coppenburg*, 2 Strob. (S. C.) 273, 1847.

⁵ *R. v. Kenney*, 13 Cox C. C. 397; 2 Q. B. D. 307; *Com. v. White*, 123 Mass. 430, 1877; *Hey v. Com.*, 32 Gratt. 946, 1879; *O'Connell v. State*, 55 Ga. 296, 1875. See *Owen v. State*, 52 Ind. 379, 1876; *State v. Antoine*, 42 116 Mass. 1, 1874; *Com. v. Sullivan*, La. An. 945, 1890; *People v. Seaton*, 136 Ibid. 170, 1883; *State v. Weston*, 15 N. Y. Sup. 270, 1891; *People v. 9 Conn. 527, 1833; Shriedley v. State*, Montague, 71 Mich. 318, 1888. That goods taken by robbery or burglary are stolen, see *R. v. Wardroper*, Bell C. C. 249; 8 Cox C. C. 284; *Shriedley v. State*, 23 Ohio St. 130, 1872.

⁶ *R. v. Haslam*, 2 Leach, 467; *Com. v. Savory*, 10 Cush. 535, 1852; *Com. v. Mullin*, 150 Mass. 394, 1890; *Com. v. Poots*, 43 Leg. Int. 226, 1886. An accomplice is also a good witness.

Cooper v. State, 29 Tex. App. 8, 1890; *Sands v. State*, 30 Tex. App. 578, 1891. Likewise one to whom the goods were sold. *McFadden v. State*, 28 Tex. App. 241, 1889.

⁷ Whart. Crim. Ev. § 439; *Sands v. State*, 30 Tex. App. 578, 1891.

⁸ *R. v. Robinson*, 4 F. & F. 43; Whart. Crim. Ev. § 441.

⁹ *R. v. Pratt*, 4 F. & F. 315. See *Com. v. Savory*, 10 Cush. 535, 1852; *Durant v. People*, 13 Mich. 351, 1865;

and unless the confession be made during the continuance of the confederacy, the confession of the thief himself, being the principal, is not admissible against the accessaries.¹ But it is receivable when the admission of guilt is made by the thief in the receiver's presence, even though the thief was at the time in custody.²

§ 983. Guilty knowledge, involving guilty intent,³ on the part of the defendant, is essential to the constitution of the offence.⁴ This may be shown either by the evidence of the principal felon, supported by corroborating facts,⁵ or inductively by proving that the defendant bought them very much under their value,⁶ or denied their being in his possession, or the like. To show a guilty knowledge, other instances of receiving may be proved;⁷ even though they be the subjects of other indict-

State v. Weston, 9 Conn. 527, 1833; Whart. Crim. Ev. § 442; Cooper v. State, 29 Tex. App. 8, 1890; White v. State, 28 Tex. App. 71, 1889.

¹ R. v. Turner, 1 Mood. C. C. 347; Whart. Crim. Ev. § 698.

² R. v. Robinson, 4 F. & F. 43; Whart. Crim. Ev. § 679.

³ Under the Iowa statute, the intent is not essential and guilty knowledge alone is sufficient to convict. State v. Smith, 87 Iowa, 723, 1893.

⁴ See R. v. Densley 6 C. & P. 399; Copperman v. People, 56 N. Y. 591, 1874; May v. People, 60 Ill. 119, 1871; Andrews v. People, Ibid. 254, 1871; State v. Caveness, 78 N. C. 484, 1878; Huggins v. State, 41 Ala. 393, 1868; Wilson v. State, 12 Tex. App. 481, 1882; Wright v. State, 5 Yerg. 154, 1833; Arcia v. State, 26 Tex. App. 193, 1888; State v. Houston, 29 S. C. 108, 1888.

⁵ R. v. White, 1 F. & F. 665; Com. v. Savory, 10 Cush. 535, 1852; Goldstein v. People, 82 N. Y. 231, 1880; Friedberg v. People, 102 Ill. 160, 1882; People v. McKenna, 12 N. Y. Sup. 493, 1890.

⁶ 1 Hale, 619; R. v. Carter, 12 Q. B. D. 522; 15 Cox C. C. 448; Huggins v. People, 135 Ill. 243, 1890.

In Andrews v. People, 60 Ill. 354,

1871, it was held that where a second-hand retailer of clothing was indicted for receiving stolen goods, and, as tending to prove guilty knowledge, evidence was introduced that he had only paid for the clothing about one-third of its value, it is error to refuse to permit the defendant to prove that, according to usage, dealers in second-hand clothing do not generally pay full prices for clothing, but purchase it at a reduction, and, from the character of the business, they are compelled to sell new clothing for the price of second-hand goods, and hence they must purchase out of season and at reduced prices. It was said by the court that such evidence would tend to rebut the inference of guilty knowledge drawn from the fact that accused had purchased the goods at very low rates.

⁷ R. v. Dunn, 1 Mood. C. C. 146; R. v. Oddy, 2 Den. C. C. 264; R. v. Nicholls, 1 F. & F. 51; People v. Rando, 3 Parker C. R. 335, 1857; Shriedley v. State, 23 Ohio St. 130, 1872; Yarrow v. State, 41 Ala. 405, 1868; Devoto v. Com., 3 Metc. (Ky.) 417, 1861. See, on the point generally, Whart. Crim. Ev. § 44; and, as indicating limits to this, see Com. v. Hills, 10 Cush. 530, 1852; State v.

ments antecedent to the receiving in question.¹ But where there is a marked difference in time and character in the receptions, one cannot be received to prove the other.²

§ 984. Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eye-witnesses.³ He is required to use the circumspection usual with persons taking goods by private purchase; and this is eminently the case with dealers buying at greatly depreciated rates.⁴ That which a man in the defendant's position ought to have suspected, he must be regarded as having suspected, as far as was necessary to put him on his guard and on his inquiries.⁵ But it has been said that, to justify a conviction in the case of *goods found*, it is not sufficient to show that the prisoner had a general knowledge of the circumstances under which the goods were taken, unless the jury is also satisfied that he knew that the circumstances were such as constituted a larceny.⁶ The proof in any case is to be inferential; and among the inferences prominent are inadequacy of price, irresponsibility of vendor or depositor, and secrecy of transaction.⁷

Such knowledge may be inferred.

Ward, 49 Conn. 429, 1881; Huggins v. People, 135 Ill. 243, 1890. The fact that a junk dealer failed to keep the books required by law may be shown. Com. v. Leonard, 140 Mass. 473, 1886. Or that the accused gave conflicting accounts of his whereabouts on the night in question. People v. Connor, 22 N. Y. Sup. 669, 1893; State v. Crawford, 39 S. C. 343, 1893; but see R. v. Carter, L. R. 12 Q. B. D. 522, 1884.

¹ R. v. Davis, 6 C. & P. 177; 2 Russ. on Cr. 251. But subsequent dealings with the thief cannot be shown, as they throw no light on the state of mind of the accused at the date of the alleged taking. People v. Willard, 92 Cal. 482, 1891.

² R. v. Oddy, *ut supra*; Coleman v. People, 55 N. Y. 81, 1873; s. c. 58 Ibid. 555, 1874.

In England, by statute, prior independent receivings may be put in evidence to prove guilty knowledge; but

the goods so received, so it has been held, must have been in the defendant's possession at the time of the larceny on trial. R. v. Drage, 14 Cox C. C. 85; R. v. Carter, L. R. 12 Q. B. D. 522; 50 L. T. (N. S.) 432; 15 Cox C. C. 448.

³ A belief that the goods had been stolen will be sufficient. Com. v. Leonard, 140 Mass. 473, 1886.

⁴ R. v. White, 1 F. & F. 665; R. v. Wood, Ibid. 497—Bramwell. See State v. Scovel, 1 Rep. Const. Ct. (1 Mill) 274, 1817; R. v. Mallory, L. R. 13 Q. B. D. 33, 1884.

⁵ Com. v. Finn, 108 Mass. 466, 1871; State v. Houston, 29 S. C. 108, 1888; Frank v. State, 67 Miss. 125, 1889.

⁶ R. v. Adams, 1 F. & F. 86. See Rice v. State, 3 Heisk. 215, 1871; and see People v. Seaton, 15 N. Y. Sup. 270, 1891.

⁷ Adams v. State, 52 Ala. 379, 1875; Collins v. State, 33 Ibid. 434, 1859.

§ 985. When goods, shown to have been stolen, are retained by a party in his hands, under suspicious circumstances, the burden may rest on him to explain how he came into their possession.¹ But mere possession of stolen goods will not sustain a conviction.²

Inference
may be de-
rived from
possession.

§ 986. As an elementary principle, if larceny by the defendant be proved, though the offender appear only to be a principal in the second degree, the charge of receiving falls, because the offences are substantially distinct, and because there can be no guilty reception unless there be a prior stealing by another.³ But this reasoning fails, when on an indictment for receiving, proof transpires to show that the defendant was also an accessory before the fact. The offences are so distinct that one cannot be said to merge in the other, nor is conviction of the one in any way incompatible with conviction of the other. Hence, in defiance of such testimony the defendant, if there be sufficient evidence of guilty receiving, may be convicted of such receiving.⁴

If larceny
be proved
defendant
cannot be
convicted
of receiv-
ing.

§ 987. Evidence that the thief had at one time been lawfully employed to sell such articles to the defendant will warrant an acquittal, in the absence of any evidence that the defendant knew that the authority had been withdrawn.⁵

Claim of
title a de-
fence.

And the declarations made by the alleged vendor of the defendant at the time of the act are admissible for the defence;⁶ and so

¹ R. v. Langmead, L. & C. 427; 37 Ibid. 58, 1865; State v. Moultrie, 33 State v. Brewster, 7 Vt. 118, 1835; La. An. 1146, 1881. See R. v. Smith, State v. Weston, 9 Conn. 527, 1833; 33 Eng. Law & Eq. 531; Dears. C. C. People v. Connor, 22 N. Y. Sup. 669, 496; 6 Cox C. C. 554; R. v. Dyer, 2 1893. East P. C. 767; R. v. Atwell, Ibid.

² R. v. Woodward, L. & C. 122; 9 Cox C. C. 95; Durant v. People, 13 Mich. 351, 1865; Jones v. State, 14 Ind. 346, 1860; State v. Emerson, 48 Iowa, 172, 1878. As to presumption to be derived from possession of stolen goods, see Whart. Crim. Ev. § 758. ³ R. v. Coggins, 13 Cox C. C. 517; State v. Ives, 13 Ired. 338, 1852; Teideman v. State, 4 Strob. 309, 1833; State v. Honig, 78 Mo. 249, 1883; State v. Smith, 761. This applies where the defendant was principal in the second degree in the larceny. R. v. Coggins, *ut supra*; R. v. Gruncell, *ut supra*. See *supra*, § 982.

⁴ State v. Coppenburg, 2 Strob. (S. C.) 273, 1847. ⁵ R. v. Wood, 1 F. & F. 497, and see *supra*, §§ 884-85; but see Cassels v. State, 4 Yerg. 149, 1833; Wright v. State, 5 Ibid. 154, 1833.

⁶ People v. Dowling, 84 N. Y. 478, 1881; Whart. Crim. Ev. §§ 263, 691, 761. As to statements made at the

of the defendant's declarations at the time when the goods were found on him.¹

§ 988. If the intent be honest (*e. g.*, to receive goods for owner or to entrap and detect the thief), the offence is not constituted.² But, on the other hand, it is not necessary that the offence should be *lucri causa*. It is enough if the object be to shelter or accommodate the thief,³ or in any way to defraud the owner.⁴ And, as is elsewhere seen, an intent to get by the receiving a reward is *a fortiori* sufficient to satisfy the statutes.⁵

Honest intent a defence, but need not be *lucri causa* if intent be fraudulent.

When the statute requires an intent it must be laid.⁶

§ 989. If two defendants be indicted jointly for receiving, a joint act of receiving must be proved in order to convict both.⁷ Proof that the goods were found in their joint possession may give an inference which will support this conclusion.⁸

If charge be joint, joint act of reception must be proved.

But, although a joint act of receiving must, under a joint indictment, be proved to sustain a joint conviction, yet even without this the indictment, it seems, is good under the English statute, against the one who first received.⁹ Nor is it necessary that all the alleged joint receivers should have had actual possession. The possession may be constructive.¹⁰ A master and servant may be

time of the commission of an offence generally, see *State v. Daley*, 53 Vt. 442, 1881; *Lander v. People*, 104 Ill. 248, 1882.

¹ *Ibid.* See Whart. Crim. Ev. §§ 263, 691, 761, for cases. That the defendant's explanation may be negatived inferentially, see *R. v. Ritson*, 50 L. T. (N. S.) 727; 15 Cox C. C. 478. Evidence may also be offered to show how the goods were procured. *Williams v. State*, 29 Tex. App. 167, 1890.

² *Supra*, §§ 883 *et seq.*; *Aldrich v. People*, 101 Ill. 16, 1881; *White v. State*, 28 Tex. App. 71, 1889.

³ *R. v. Richardson*, 6 C. & P. 335; *R. v. Davis*, *Ibid.* 177; *Com. v. Bean*, 117 Mass. 141, 1875; *State v. Hodges*, 55 Md. 127, 1880; *State v. Rushing*, 69 N. C. 29, 1873; *State v. Scovel*, 1 Const. R. (S. C.) 1 Mill 274, 1817; *Arcia v. State*, 26 Tex. App. 193, 1888.

⁴ *People v. Johnson*, 1 Parker C. R. 504; *Rice v. State*, 3 Heisk. 215, 1871; *State v. St. Clair*, 17 Iowa, 149, 1864.

⁵ *Supra*, § 119; *infra*, §§ 991, 1416.

⁶ *Pelts v. State*, (Ind.) 3 Blackf. 28, 1832.

⁷ *R. v. Messingham*, 1 Mood. C. C. 257.

⁸ *State v. Brewster*, 7 Vt. 118, 1835; *State v. Weston*, 9 Conn. 527, 1833; See *R. v. Langmead*, L. & C. 427.

⁹ *R. v. Dovey*, 4 Cox C. C. 428; 15 Jur. 230; *R. v. Messingham*, 1 Mood. C. C. 257; Whart. Cr. Pl. & Pr. §§ 314, 755, 940. The necessity of an election is removed by Stat. 14-15 Vict., under which there can be a conviction of defendants severally.

¹⁰ *R. v. Rogers*, 37 L. J. M. C. 83.

convicted of joint reception on evidence of a receiving by the servant under the master's orders, but in the master's absence.¹

§ 990. Reception must be substantively proved.² Manual possession or touch is unnecessary in order to sustain conviction; it is sufficient if there is a control by the receiver over the goods.³ A person is said to receive goods improperly obtained as soon as he obtains control over them from the person from whom he receives them;⁴ and the mere aiding in the secreting or disposal of the goods constitutes the offence.⁵ When the goods were unlawfully received by a servant or wife of the party charged, it is necessary, in order to make him a receiver, that he should have done some act in the way of joining in the reception.⁶ The reception of the produce of the goods, however, is not the reception of the goods.⁷

§ 990 a. The reception must be from the thief or the thief's⁸

¹ R. v. Parr, 2 M. & Rob. 346.

1872; People v. Stakem, 40 Cal. 599,

² R. v. Wiley, 2 Den. C. C. 37; 1 Eng. Law & Eq. 567; Jones v. State, 14 Ind. 346, 1860; Faunce v. People, 51 Ill. 811, 1869. It is not essential that all the goods should have been received at the same time. State v. Crawford 39 S. C. 343, 1893. But it must be a reception anterior to the indictment, and proof of a guilty receiving subsequent to the presentment of the indictment will not warrant a conviction. Arcia v. State, 28 Tex. App. 198, 1889. The fact that the prisoner admits selling a watch bearing the same number as the one stolen is sufficient to warrant a finding of possession in the defendant. Gunther v. People, 139 Ill. 526, 1891.

1871; see State v. St. Clair, 17 Iowa, 149, 1864; Faunce v. State, 51 Ind. 311, 1869.

⁶ Ibid. A's wife, in A's absence, receives stolen potatoes, knowing them to be stolen. The jury find that A. "afterward adopted his wife's receipt." This finding is not sufficient to sustain a verdict of guilty, as it is consistent with A's having passively consented to what his wife had done without taking any active part in the matter. R. v. Dring, D. & B. 329.

A's wife, in A's absence, receives stolen goods, and pays the thief 6d. on account. The thief then tells A., who strikes a bargain with the thief, and pays him the balance. A. has received stolen goods, knowing them to be stolen. R. v. Woodward, L. & C. 122. These cases are cited from Steph. Dig. Crim. Law, art. 353. *Infra*, § 992.

³ R. v. Miller, 6 Cox C. C. 353; R. v. Smith, 33 Eng. Law & Eq. 531; Dears. 496; 6 Cox C. C. 554; State v. Turner, 19 Iowa. 144, 1865; State v. Scovel, 1 Rep. Const. Ct. (1 Mill) 274, 1817; Huggins v. State, 41 Ala. 393, 1868. See R. v. Hill, 2 C. & K. 978; 1 Den. C. C. 453; F. & M. 150. *Supra*, § 924.

⁷ U. S. v. Montgomery, 3 Sawy. 547, 1875.

⁴ Steph. Dig. Crim. Law, art. 353; citing R. v. Wiley, 2 Den. 37.

⁸ R. v. Dolan, *supra*; R. v. Wiley, 2 Den. C. C. 37; R. v. Wade, 1 C. & K. 739; Com. v. White, 123 Mass. 430, 1877; Foster v. State, 106 Ind. 272, 1885.

⁵ Shriedley v. State, 23 Ohio St. 120,

agent. If the owner resume possession of the goods before they reach the receiver, there can be no conviction of the receiver.¹ A receiver from a receiver, also, provided there be no conspiracy,² is not, at common law, a receiver from the thief.³

Reception must be from thief.

§ 990 *b*. To constitute the offence the goods must be of some value, though this may be inferentially shown.⁴

Goods must be of some value.

§ 991. A party who receives stolen goods, knowing them to be stolen, for the purpose of returning them to the owner on payment of a reward, is guilty of receiving under the statute.⁵

Receiving goods with intent to receive reward is within rule

§ 992. A wife cannot be convicted of feloniously receiving goods stolen by her husband.⁶ Nor can she, in

Wife cannot be convicted of

¹ *R. v. Dolan*, 29 Eng. Law & Eq. 31; 10 Cox C. C. 241; *U. S. v. DeBare*, 533; *Dears.* 436; 6 Cox C. C. 449; *S. 6 Biss.* 358, 1875; *State v. Ives*, 13 P., *R. v. Hancock*, 38 L. J. (N. S.) 338, 1852. See *Com. v. Finn*, 787; 14 Cox C. C. 111; qualifying *R. v. Lyons*, C. & M. 217. *Cf. R. v. Schmidt*, L. R. 1 C. C. 15. See *London Law Times*, Nov. 1878, p. 39.

A prisoner was convicted of feloniously receiving stolen goods under the following circumstances: The goods were stolen and sent by the thief in a parcel by railway addressed to the prisoner. A policeman belonging to the railway company, from information he had received, examined the parcel at the railway station at its place of destination, and stopped it. It was called for by one of the thieves on the day of its arrival, and refused to him. A porter of the company, the next day, by the direction of the policeman, took it to a house which the thief who had called for it designated, and it was there received by the prisoner. It was held that the conviction was wrong, as the goods had ceased to be stolen goods, within the statute, at the time of the receipt by the prisoner. *R. v. Schmidt*, 10 Cox C. C. 172; L. R. 1 C. C. 15.

² *Com. v. White*, 123 Mass. 430, 1877; *Foster v. State*, 106 Ind. 272, 1885.

³ See *R. v. Reardon*, L. R. 1 C. C.

31; 10 Cox C. C. 241; *U. S. v. DeBare*, 533; *Dears.* 436; 6 Cox C. C. 449; *S. 6 Biss.* 358, 1875; *State v. Ives*, 13 P., *R. v. Hancock*, 38 L. J. (N. S.) 338, 1852. See *Com. v. Finn*, 787; 14 Cox C. C. 111; qualifying *R. v. Lyons*, C. & M. 217. *Cf. R. v. Schmidt*, L. R. 1 C. C. 15. See *London Law Times*, Nov. 1878, p. 39.

⁴ *Supra*, § 882. *State v. Fenn*, 41 Conn. 590, 1874; *Com. v. Smith*, 1 Mass. 245, 1804; *People v. Wiley*, 3 Hill, 194, 1842; *State v. Kreiger*, 68 Mo. 98, 1878; *State v. Smart*, 4 Rich. S. C. 256, 1851. As to averment of value, see *infra*, § 1003; *Sands v. State*, 30 Tex. App. 578, 1891. The goods may be valued collectively, and the value may be inferred by the jury from inspection, or from a description by witnesses. *State v. Gerrish*, 78 Me. 20, 1885. It is said that the degree of the crime depends upon the amount received and not on the amount stolen. *Chenault v. Com.*, 90 Ky. 160, 1890.

⁵ *People v. Wiley*, 3 Hill, (N. Y.) 194, 1842; *State v. Pardee*, 37 Ohio St. 63, 1881. *Supra*, § 119; *infra*, § 1416. *Arcia v. State*, 28 Tex. App. 198, 1889.

⁶ *R. v. Brooks*, *Dears.* C. C. 184; 6 Cox C. C. 148; *R. v. Kenny*, L. R. 2 Q. B. D. 307; 36 L. J. (N. S.) 36; s. c. 13 Cox C. C. 398. See *R. v. Wardroper*, Bell C. C. 249; 8 Cox C. C. 284. *Supra*, § 83.

receiving
goods
stolen by
husband;
but hus-
band is
responsible
for conniv-
ing at his
wife's
guilty
reception.

England, be convicted jointly with her husband of receiving.¹

A husband is responsible for his wife's guilty reception, he knowing and afterward adopting the same.²

But it is otherwise when the reception is without his knowledge and apart from him.³ This, of course, does not in any way impinge on the principle that a husband may be convicted of feloniously receiving property which his wife has *stolen* voluntarily and without any constraint on his part, if he received it knowing that she had stolen it.⁴

Reception
against
willofthief
is not
withinrule

§ 993. When a second thief takes goods from a first thief without the latter's will, this is larceny.⁵ But if the reception is with the first thief's assent, this is receiving stolen goods.⁶

Conflict as
to whether
indictment
lies in one
State for
receiving
goods
stolen in
another.

§ 994. A person receiving in the State of A. goods stolen in the State of B. is indictable in the State of A. for receiving such goods, if bringing the goods in such State is there held to be larceny.⁷

In England, the practice is different. Thus, where a person had stolen goods in Guernsey and brought them to England, where he was taken and committed for trial, it was held that, Guernsey not being a part of the United Kingdom, he could not be convicted of larceny for having them in his possession in England, nor of receiving in England the goods so stolen in Guernsey.⁸

Place of
reception
to be infer-
entially
proved.

§ 995. The place of reception, like the place of stealing, is to be inferred from all the circumstances in the case.⁹

¹ R. v. Mathews, 1 Den. C. C. 596; 1 Eng. Law & Eq. 549. (State v. Habib, (R. I.) 30 Atl. Rep. 462,

² R. v. Woodward, L. & C. C. C. 1894; People v. Hubbard, 86 Mich. 122; 9 Cox C. C. 95. *Supra*, § 990. 440, 1891) or in "A." County (Wright

³ R. v. Dring, Dears. & B. C. C. 329; 7 Cox C. C. 382. *Supra*, § 83. v. Dressel, 140 Mass. 147, 1885). But under the Kentucky statute an indictment lies only in county where goods were received. Allison v. Com., 83 Ky. 108, 1888.

⁴ R. v. McAthey, L. & C. 250; 9 Cox C. C. 251. *Supra*, § 83. 254, 1885; State v. Habib, (R. I.) 30 Atl. Rep. 462, 1894. See *supra*,

⁵ See *supra*, § 945.

⁶ R. v. Wade, 1 C. & K. 739.

⁷ Com. v. Andrews, 2 Mass. 14, 1806; Com. v. White, 123 Ibid. 480, 1877. And one receiving in "A." County goods stolen in "B." county

⁸ R. v. Debruiel, 11 Cox C. C. 207—Byles. See *supra*, § 291.

⁹ Wills v. People, 3 Parker C. R. 473, 1857. Whart. Crim. Ev. § 108.

§ 996. When a taking is by statute made larceny, receiving goods so taken is indictable under the statutes against receiving. By the same reasoning it is indictable to receive goods embezzled when such embezzlement is indictable, and even where this is not so by statute, it would be so at common law.¹

Reception
after statu-
tory lar-
cenies in-
dictable.

II. INDICTMENT.²

§ 997. The indictment need not set forth the name of any person from whom the goods were received,³ nor, according to the preponderance of authority, that they were received from some person or persons unknown.⁴ When, however, the principal felon is named, a variance is fatal.⁵ It is not fatal to the averment of "unknown" that the grand jury have found an indictment against a named person for stealing the same goods.⁶

Name of
thief need
not be
given.

§ 998. It is not essential, in any case, to aver that the principal felon or thief has been convicted.⁷

Not neces-
sary to aver
conviction
of thief.

§ 999. It is fatal to omit the *scienter*, which in some

¹ R. v. Frampton, Dears. & B. 585. is necessary to aver the name of the thief; State v. Beatty, Phil. L. (N. C.) 52, 1866; State v. Ives, 13 Ired. 338, 1852; and hence it is safer to give this, or state the thief to be unknown. Compare R. v. Jervis, 6 C. & P. 156; Swaggerty v. State, 9 Yerg. 338, 1836. But it is said that where the thief is stated as unknown a reasonable effort must be shown on the trial to ascertain his name and whereabouts. Foster v. State, 106 Ind. 272, 1885.

² See, for indictments, Whart. Prec. 450 *et seq.*

³ R. v. Wheeler, 7 C. & P. 170; R. v. Pulham, 9 Ibid. 280; R. v. Thomas, 2 East P. C. 781; Com. v. State, 11 Gray, 60, 1858; State v. Hazard, 2 R. I. 474, 1853; People v. Caswell, 21 Wend. 86, 1839; Schriedley v. State, 28 Ohio St. 130, 1872; State v. Coppenburg, 2 Strob. (S. C.) 273, 1847; State v. Murphy, 6 Ala. 845, 1844; State v. Smith, 37 Mo. 58, 1865; State v. Moultrie, 34 La. An. 489, 1882; Huggins v. People, 135 Ill. 243, 1890; People v. Ribolsi, 89 Cal. 492, 1891; Allison v. Com., 83 Ky. 254, 1885; but see State v. Honig, 78 Mo. 249, 1883.

⁴ In some jurisdictions, however, it

⁵ R. v. Woolford, 1 M. & Rob. 384; U. S. v. De Bare, 6 Biss. 358, 1875; Com. v. King, 9 Cush. 284, 1852; though see State v. Coppenburg, 2 Strob. (S. C.) 273, 1847; Huggins v. People, 135 Ill. 243, 1890.

⁶ Com. v. Hill, 11 Cush. 137, 1853. As to this point, see Whart. Crim. Ev. § 97.

⁷ Com. v. King, 9 Cush. 284, 1852; R. v. Woolford, 1 M. & Rob. 384.

Scienter
and unlaw-
fulness
necessary.

shape must be averred.¹ The reception, also, must be averred or implied to be unlawful.²

Time and
place need
not be
stated.

§ 1000. *The time and place* when and where the goods were stolen need not be stated in the indictment.³

An indictment, which avers that the defendant received on a specified day goods "before then" stolen, may be sustained by proof of his receiving after the theft goods stolen on a later day.⁴

§ 1001. When it is charged that the goods were "feloniously stolen," it is not necessary on an indictment against the receiver by himself, to add the words "taken and carried away."⁵ But merely "carry" without being followed by "away," is defective when receiver and thief are charged together.⁶

§ 1002. The indictment should describe the goods with accuracy, and a variance in this particular will be fatal.⁷ If, however, as in larceny, the crime be established in respect to only a single article, though the indictment describe several, the defendant may be convicted.⁸ But articles belonging to several persons cannot be at common law joined.⁹

¹ Whart. Crim. Ev. § 164; R. v. Ivaan, 136 Mass. 170, 1883; State v. Larkin, 26 Eng. Law & Eq. 572; Holford, 2 Blackf. 103, 1827; State v. Dears. 365; 6 Cox C. C. 377. As to averring *scienter*, see Huggins v. State, 41 Ala. 393, 1868; and see Com. v. Crawford, 39 S. C. 343, 1893.

Cohen, 120 Mass. 198, 1875; Pelts v. State, 3 Blackf. 28, 1832. *Supra*, § 164; 1869.

State v. Crawford, 39 S. C. 343, 1893. The reception must be averred to have been felonious or fraudulent. People v. Johnson, 1 Parker C. R. 564, 1854.

In Iowa the words "feloniously and burglariously" are sufficient. State v. Lane, 68 Iowa, 384, 1886.

In Tennessee an indictment for receiving stolen goods must charge the defendant with receiving them with intent to deprive the true owner thereof. Hurrell v. State, 5 Humph. 68, 1844.

² State v. Hodges, 55 Md. 127, 1880.

³ 2 East P. C. 780; 1 Leach, 109, 477; Starke C. P. 169; Com. v. Sul-

⁴ Com. v. Campbell, 103 Mass. 436, 1869.

⁵ Com. v. Lakeman, 5 Gray, 82, 1855.

⁶ Com. v. Adams, 7 Gray, 43, 1856.

⁷ People v. Wiley, 3 Hill, (N. Y.) 194, 1842. But the name of the owner is not necessary; Huggins v. People, 135 Ill. 243, 1890. As to how goods

are to be set out, see Whart. Cr. Pl. & Pr. § 206; Whart. Crim. Ev. § 121; and as to the designation of written instruments, Whart. Cr. Pl. & Pr. § 167; Whart. Crim. Ev. § 114.

⁸ People v. Wiley, *ut supra*; Whart. Cr. Pl. & Pr. §§ 250, 470, 736.

⁹ Kilrow v. Com., 89 Pa. 480, 1879. Whart. Cr. Pl. & Pr. §§ 90, 252, 470.

It is not necessary to allege that the goods were received upon any consideration passing between the thief and the receiver.¹

1003. The rule of value laid down as to larceny applies equally to receiving stolen goods.² It may here be specially observed that no judgment can be pronounced in either offence, except for specific articles, as charged in the indictment.³

Value
must be
averred.

§ 1004. Separate counts may be introduced averring separate owners. It has been held that there may be as many counts, under the statute, for receiving as there are counts for stealing, and that the prosecutor ought not to be put to elect.⁴ Ownership, when known, must in some way be averred.⁵

Counts
may vary
with own-
ership.

§ 1005. Larceny and receiving stolen goods may be joined;⁶ and a count for receiving may be tacked to one for stealing, so as to be dependent on the latter for its sense, and yet to stand independently in case of an acquittal on the stealing. This is the uniform practice in Pennsylvania. In England, this practice was sustained on an indictment in which the first count charged the prisoner with larceny, on which the jury found a verdict of not guilty; in a subsequent count, the prisoner was charged with having received the article, "so as aforesaid feloniously stolen," on which the jury found a verdict of guilty. It was held that there was no repugnancy; for that, although the word "aforesaid" in a subsequent count virtually incorporates in that count all the previous averments as to time and place, the words "so as aforesaid feloniously stolen" did not necessarily mean

Counts for
larceny
and for
receiving
may be
joined.

¹ *Hopkins v. People*, 12 Wend. 76, on such plea. *O'Connell v. Com.*, 7 Metc. 460, 1844.

² See *supra*, § 952; and see, also, *State v. Watson*, 3 R. I. 114, 1855. As to value being necessary, see *supra*, § 990 *b*.

⁴ *R. v. Beeton*, 2 C. & K. 960; s. c. 1 Den. C. C. 414. See *Com. v. Cohen*, 120 Mass. 198, 1876. *Whart. Cr. Pl. & Pr.* § 293.

³ Where an indictment charges a defendant with receiving various articles of stolen property, knowing them to be stolen, and specifically describes each article, and avers the value thereof, and he pleads that he is "guilty of receiving fifty dollars' worth of said property, in manner and form as set forth in the indictment," no valid judgment can be rendered against him

⁵ *State v. McAloon*, 40 Me. 133, 1855; *Whart. Crim. Ev.* § 97. *Supra*, § 932.

⁶ *Whart. Cr. Pl. & Pr.* § 291. *Supra*, § 978. Likewise, burglary and receiving, but a conviction can be had on one only, and the jury should be so instructed; *Com. v. Mullen*, 150 Mass. 394, 1890. See *Johnson v. State*, 61 Ga. 212, 1878.

that the article had been stolen by the person named in the first count, but only that it had before then been feloniously stolen by *some person*.¹

A thief and a receiver of stolen goods may be jointly indicted.²

§ 1006. A conviction and sentence for having received the goods of A. B., knowing them to be stolen, is no bar to a further indictment for having received the goods of C. D., at the same time and place, knowing them to have been stolen, though the acts of receiving were one and the same.³ Whether the prosecution can waive this, and include such double receiving in one count, is elsewhere discussed.⁴

¹ *R. v. Craddock*, 2 Den. C. C. 31; if the indictment properly charges the T. & M. 361; 1 Eng. Law & Eq. 563.

² *Com. v. Adams*, 7 Gray, 43, 1856. But an acquittal of the thief necessitates an acquittal of the person charged with receiving the stolen goods. *State v. Antoine*, 42 La. An. 945, 1890.

In Massachusetts, when a defendant is convicted on an indictment which charges him with receiving and aiding in the concealment of stolen goods, he is convicted of only one offence, and

defendant with aiding in the concealment of the goods, he may be legally sentenced, although the charge of receiving the goods is insufficiently made. *Stevens v. Com.*, 6 Metc. 241, 1843.

³ *Com. v. Andrews*, 2 Mass. 409, 1807. See *supra*, § 948; Whart. Cr. Pl. & Pr. § 471.

⁴ *Supra*, § 948.

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

Since the general statute, C. 115, § 5, providing that courts shall not charge juries with respect to matters of fact, but may state the testimony and the law, it is erroneous in a criminal case to instruct the jury that evidence of character can only be considered by the jury where the other evidence is doubtful, and that it is not of the slightest consequence where the evidence is strong and the guilt of the defendant is impressed on the minds of the jury. *Com. v. Leonard*, 140 Mass. 473, 1886; *supra*, § 982.

The court authorized the jury to convict defendant for receiving stolen property, knowing it to be stolen, on proof that the property was stolen and that defendant received or concealed it, knowing it to be stolen. Held erroneous, as failing to state that there must be a guilty knowledge or fraudulent intent connected with the act. *Arcia v. State*, 26 Tex. App. 193, 1888.

The defendant claimed that the goods were taken in payment of services rendered by defendant to the thief, and that she did not know they were worth more than the services. Held that a charge that whether defendant knew the value was a question for the jury, but that their value was evidently

much greater than defendant's services, is in conflict with the constitutional provision prohibiting a charge on the facts. *State v. Houston*, 29 S. C. 108, 1888. *Supra*, § 984.

In the same case, where a wife was indicted with her husband for receiving stolen goods, a charge that if the wife was drawn into the crime by the husband, but was the more active of the two, she is equally guilty is erroneous, as her guilt would depend not upon the fact of activity, but whether the activity was voluntary or caused by the coercion of her husband. *State v. Houston, supra*.

CHAPTER XV.

EMBEZZLEMENT.

I. AGAINST SERVANTS AND OTHERS
APPROPRIATING GOODS NOT YET
COME TO THEIR MASTER.

Statutes not designed to overlap the common law. Larceny at common law cannot be embezzlement under statute, § 1009.

Statutes make it embezzlement for servant or clerk to appropriate master's goods before he receives them, § 1010.

Employment need not be permanent, § 1011.

Mere volunteer not within the statute, § 1012.

Servant employed to change note or sell produce is within statute, § 1013.

Compensation is requisite to constitute service, § 1014.

Members of societies or partners not servants within statute, § 1015.

Goods may be followed through successive reinvestments, § 1016.

The "servant" need not be the servant of the prosecutor, § 1017.

Servant includes employes of all kinds, § 1018.

But not those invested with fiduciary discretion, § 1019.

Middleman is not a servant, § 1020.

"Clerk" is a person employed to keep accounts and collect money thereon, § 1021.

"Agent" is wider in meaning than clerk, § 1022.

"Virtue of employment" as test in old statutes, § 1023.

Not necessary that thing embezzled should have been received in direct conformity with employer's directions, § 1024.

Prosecutor's title not material as against third person, § 1025.

No defence that money received was under restricted limit, § 1026.

If case is larceny at common law, it is not embezzlement, *e. g.*, where goods are taken after reaching master, § 1027.

Embezzlement covers only cases which common law larceny does not include, § 1028.

Diverging views in New York, § 1029.

Fraud is to be inferred from facts, § 1030.

No defence that money was received from another servant, § 1031.

Goods must have been received on account of master, § 1032.

Goods must not belong to the defendant, § 1033.

Middleman may be prosecutor, § 1034.

Corporation may be prosecutor, but not illegal corporation, § 1035.

No defence that a worthless security was given in place of that embezzled, § 1036.

Conversion of produce enough, § 1037.

No defence that principals have no title to money, § 1038.

No defence that a trap was laid for the defendant, § 1039.

Defendant may be tried in any place of embezzlement, § 1040.

Embezzlements created by federal statutes must be tried in federal courts, § 1041.

Simultaneous embezzlements may be joined, § 1042.

Fiduciary relations must be averred, § 1043.

Goods embezzled and ownership must be accurately stated, § 1044.

When a felony, term "feloniously" must be used, § 1045.

Servant of joint masters may be averred to be servant of either, § 1046.

Embezzlement may be joined with larceny, § 1047.

Bill of particulars may be required, § 1048.

II. AGAINST TRUSTEES, AGENTS, BAILEES, AND OTHERS APPROPRIATING GOODS RECEIVED BONA FIDE.

Statute covers cases of trustees or agents fraudulently appropriating goods received *bonâ fide* for principal, § 1049.

If case is larceny at common law, prosecution fails, § 1050.

"Officer" may be a *nomen generalissimum*, § 1051.

"Trustee" is one holding property for another, § 1052.

Fraud to be inferred from circumstances, § 1053.

"Agents," § 1053 *a*.

Copartners and members of common society not "agents," § 1054.

"Bailee" to be used in restricted sense, § 1055.

Person not capable of contracting may be bailee, § 1056.

Goods need not have been received from prosecutor, § 1057.

Conversion must be inconsistent with bailment, § 1058.

Some act of conversion must be in jurisdiction, § 1059.

Indictment must conform to statute, § 1060.

Special conditions of particular statutes must be satisfied, § 1061.

At common law, indictment for larceny is not enough, § 1062.

Evidence inferential, § 1062 *a*.

III. PUBLIC OFFICERS.

Embezzlement by, a statutory offence, § 1063.

IV. RECEIVING EMBEZZLED GOODS.

Indictable at common law, § 1064.

POINTS FOR DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES. (See end of chapter.)

I. AGAINST SERVANTS AND OTHERS APPROPRIATING GOODS NOT YET COME TO THEIR MASTER.

§ 1009. EMBEZZLEMENT is an intentional and fraudulent appropriation of the goods of another by a person intrusted with the property of the same.¹ In the common law definition of larceny, we must remember, there are two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps is caused by

Statutes not designed to overlap the common law. Larceny at

¹ See *U. S. v. Conant*, U. S. Dist. Lowell, J.; *State v. Wolff*, 34 La. An. Ct. Bost. 1879, 9 Cent. L. J. 129, per 1153, 1882; 13 Cent. L. J. 462.

common
law cannot
be embez-
zlement by
statute.

the position that to maintain larceny it is necessary that the stolen goods should have been at some time in the prosecutor's possession.¹ The second results from the

¹ See *supra*, § 943; *People v. Johnson*, 91 Cal. 265, 1891; *Cartwright v. Green*, 8 Ves. 405; and criticism of Sir J. F. Stephen, in note xvii. to his *Digest of Criminal Law*. This criticism closes as follows:

"The point upon which the most subtle questions as to possession arise is the distinction between theft and embezzlement—a perfectly useless distinction, no doubt, and one which the legislature has, on two separate occasions, vainly tried to abolish. So long, however, as it is allowed to exist, it is necessary to understand it.

"I have already explained how a man may retain the possession of a thing of which he gives his servant the custody. He retains a power over the thing which is not the less real or effective because he has to exercise it through the will of another person, who has undertaken to be the instrument of his will. Suppose, however, that instead of the master's having given his horse to his groom, or his plate to his butler, a horse-dealer has delivered the horse to the groom, or a silversmith has delivered plate to the butler for his master; I should have thought that there was no real difference between these cases; that, inasmuch as the servant in each case was acting for the master, in the discharge of a duty toward him, and under an agreement to execute his orders, the master would come into possession of the horse or the plate as soon as his servant received it from the dealer or the silversmith, just as he remains in possession of the horse or the plate when he gives the custody of it to his groom or his butler. I should also have thought that the servant who appropriated his master's property to

his own use, after receiving it from another on his master's account, was, for all purposes, in precisely the same position as the servant who did the same thing after receiving it from his master. The courts, however, decided otherwise. They have held on many occasions that, though the master's possession continues when he gives the custody of a thing to his servant, it does not begin when the servant receives anything on account of his master; on the contrary, the servant has the possession, as distinguished from the custody, until he does some act which vests the possession in his master, though it may leave the custody in himself. If, during that interval, he appropriates the thing, he commits embezzlement. If afterward, theft. The most pointed illustration of this singular doctrine which can be given occurs in the case of *R. v. Reid*, Dears. 257. B. sent A., his servant, with a cart to fetch coals. A. put the coals into the cart, and, on the way home, sold some of them and kept the money. A. was convicted of larceny, and the question was whether he ought to have been convicted of embezzlement. It was held that the conviction was right, because, though A. had the custody of the cart all along, yet the possession of it and its contents was in B., and though A. had the possession of the coals whilst he was carrying them to the cart, that possession was reduced to a mere custody when they were deposited in the cart, so that A.'s offence was larceny, and not embezzlement, which it would have been if he had misappropriated the coals before they were put into the cart." See, also, *infra*, § 1050.

assumption that when possession of goods is acquired *bonâ fide* by a bailee, no subsequent fraudulent conversion (unless there be breaking of bulk or some other rupture of the conditions of bailment) can be larceny while the bailment lasts.¹ To cure these defects were passed the embezzlement statutes of England and of most of the United States.² These statutes were intended simply to make penal two phases of theft not previously penal. If a servant (and this is the first of the two) steal his master's goods *before they have come into his master's possession*, this is to be indictable as embezzlement. And the second is, that it shall be also embezzlement for a trustee or bailee to fraudulently convert to his own use his master's goods he may have *bonâ fide* received. Now, as neither of these cases is larceny at common law, the statutes of embezzlement in no way overlap the old domain of larceny. They were passed solely and exclusively to provide for cases which larceny at common law did not include. Hence, nothing that is larceny at common law is indictable under the English embezzlement statutes, and those of a similar type; and nothing that is indictable under these statutes is larceny at common law.³ And by applying this test we will find that the embezzlement statutes fall into two distinct and widely different classes: first, those meeting the case of servants and clerks appropriating their master's property before it reaches his possession; and secondly, those meeting the case of trustees and bailees appropriating goods of which they obtained possession *bonâ fide*.⁴ It should at the same time be kept in mind that it is within the power of the legislature, as has been recently

¹ *Supra*, § 971.

² See *State v. Lanier*, 89 N. C. 517, 1883; *State v. Shiver*, 20 S. C. 392, 1883; *State v. Wolff*, 34 La. An. 1153, 1882.

³ *Infra*, §§ 1027, 1028. 3 Chit. Crim. Law, 921; *R. v. Hedge*, R. & R. 160; *Kibs v. People*, 81 Ill. 599, 1876; *State v. Fain*, 106 N. C. 760, 1890.

⁴ The statutes, it is true, do not always retain the distinctive features of the English statutes; and in many cases the two classes of embezzlement are merged in one. Thus, in Indiana, (*State v. Wingo*, 89 Ind. 204, 1883); in South Carolina, (*State v. Shiver*, 20 S. C. 392, 1883); and in Alabama, (*Planters' Ins. Co. v. Tunstall*, 72 Ala.

142, 1882); larcenies by servants having bare charge have been made embezzlements. The Kentucky statute provides that "if any carrier, porter, or other person to whom money or other property or thing which may be the subject of larceny may be delivered to be carried for hire, or any other person who may be intrusted with such property, embezzle, or fraudulently convert to his own use, or secrete with intent to do so, any such property, either in mass or otherwise, before delivery at the place, or to the person to whom the same were to be delivered, he shall be confined in the penitentiary not less than one nor more than five years." This statute

done in England, to provide, that under an indictment for larceny, or for larceny in one count and embezzlement in another, there may be a conviction of either offence.¹

§ 1010. In those of the embezzlement statutes which were passed to meet the case of servants, or persons having a bare charge, appropriating their master's goods before such goods have reached him, the term "servant," "clerk," and "agent," are used to designate those on whom this species of embezzlement may be charged. "Servant," in the English statute, is the first term used, and is that which is invested with the most general signification. Some of the decisions made in this connection will now be noticed.

§ 1011. To bring a servant under the operation of the statute the employment need not be permanent.² Thus, where the prosecutor, having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was held to be a servant within the meaning of the act.³ And a drover who was employed to drive two cows to a purchaser and receive the purchase-money, and embezzled the money, was ruled to be a servant within the meaning of the act.⁴ A single transaction may be enough to constitute service.⁵ The test is subordination to a master.⁶

has been held to embrace the case of servants receiving their master's property, and embezzling the same before it reaches him. *Johnson v. Com.*, 5 Bush, 430, 1869. In New York all the common law distinctions were swept away by § 528 of Penal Code of 1882, which made larceny, embezzlement, and obtaining goods by false pretence a single offence under the name of larceny with a common definition. For prior New York law, see *infra*, § 1029. As to California, see *Ex parte Hedley*, 31 Cal. 108, 1866; *People v. Salorse*, 62 Ibid. 139, 1882.

While in England embezzlement is thus made larceny, in North Carolina, while punishable as larceny, it does not become larceny. *State v. Lanier*, 89 N. C. 517, 1883.

¹ *R. v. Spencer*, R. & R. 299. See *R. v. Smith*, Ibid. 516; *R. v. Carr*, Ibid. 198; *R. v. Hoggins*, Ibid. 145; *R. v. Tongue*, Bell C. C. 289.

² *R. v. Hughes*, 1 Mood. C. C. 370; *State v. Costin*, 89 N. C. 511, 1883.

³ *R. v. Negus*, L. R. 2 C. C. 34; *Campbell v. State*, 35 Ohio St. 70, 1878.

⁴ *Gravatt v. State*, 25 Ohio St. 162, 1874. A mail carrier who takes money from a letter contained in a mail bag

⁵ *R. v. Cooper*, L. R. 2 C. C. 123. See *State v. Wingo*, 89 Ind. 204, 1883.

§ 1012. It has, however, been determined, that where the treasurer of a charitable institution, in his individual capacity, permitted the defendant (the schoolmaster of the charity-school, appointed by a committee of which the treasurer was a member, and whose sole duty was confined to the instruction of children) in one single instance to receive a voluntary contribution, for which he was to have no remuneration, the defendant was not a clerk or servant, or person employed for the purpose, or in the capacity of a clerk or servant.¹ We may therefore conclude that a mere volunteer, permitted specially to collect a particular sum, is neither "clerk" nor "servant."²

But mere
volunteer
not within
the statute.

§ 1013. It has been already seen that if a servant, who, having bare charge, is employed to change a note or to sell goods, steal the note or the goods, this is larceny, as his possession is the possession of his master.³ If, however, he obtain change for the note or sell the goods, and then secrete or abscond with the produce, this is not larceny, but embezzlement, as the owner never was in possession.⁴ But a person employed specially, merely to get a cheque cashed, "for which he was to receive sixpence," is not a servant under the statute.⁵ And the same view has been taken as to a broker undertaking, on a particular occasion, to purchase a certain bill.⁶

Servant
employed
to change
note or sell
produce
is within
the statute.

§ 1014. It is essential to constitute a servant that his services should be for some consideration. Yet this consideration need not be money; for if it consist in clothes, food, or home, it is, on general principles, sufficient to sustain an action against the servant for neglect, and hence a prosecution for embezzlement. Even a right given to the servant to

Compensa-
tion is
requisite to
constitute
service.

is not a servant of the sender to the extent of making him liable for embezzling it. There is no such relation of master and servant between them as makes this possible. *Brewer v. State*, 83 Ala. 113, 1888; *State v. Costin*, 89 N. C. 511, 1883.

¹ *R. v. Nettleton*, 1 Mood. C. C. 259. ² *R. v. Mayle*, 11 Cox C. C. 150; *R. v. Tyree*, L. R. 1 C. C. 177; 11 Cox C. C. 241. See *R. v. Freeman*, 5 C. & P. 534. Nor agent under statutes of Ky.; see *Shelburn v. Com.* 85 Ky. 173, 1887. See *Com. v. Lynch*, (Pa.) 3 Lan. Law Rev. 412, 1886. See *Miller v. State*, 16 Nebr. 179, 1884, for retention

of money by agent according to terms of employment. But see *Ex parte Ricard*, 11 Nev. 287, 1876. ³ *Supra*, §§ 956 *et seq.* ⁴ *R. v. Sullens*, 1 Mood. C. C. 129; *R. v. Winnall*, 5 Cox C. C. 326; *R. v. Hartley*, R. & R. 139; *R. v. Keena*, 11 Cox C. C. 123; L. R. 1 C. C. 113; *R. v. Gale*, 13 Cox C. C. 340; *State v. Foster*, 37 Iowa, 404, 1873; *Johnson v. Com.*, 5 Bush, 430, 1869. But see *Crofton v. State*, 79 Ga. 584, 1887.

⁵ *R. v. Freeman*, 5 C. & P. 534. See *R. v. Mayle*, 11 Cox C. C. 150.

⁶ *Com. v. Davis*, 7 Law Rep. 94, 1844, per Allen, J.

receive the gratuities and fees of an office is enough ;¹ and *a fortiori* is this the case with commissions on a proportion of the profits,² when such are fixed by rule.³ There must, however, be *wages* or compensation in some shape, or else the prosecution fails.⁴

§ 1015. A prosecution cannot be maintained against members of societies or against partners for embezzlements of this class : because (1) the possession of the particular member or partner is the possession of the whole society or firm ;⁵ and (2) such members or partners cannot be *servants* under the act to the firms or societies to which they belong.⁶ For the same reason a city officer, having a distinct status, is not the *servant* of the municipal corporation ;⁷ though it is otherwise when the officer is subordinate to the corporation ;⁸ in which case the relation of master and servant may exist though the appointing power be elsewhere.⁹ It is also otherwise in cases where the government of a society is vested in trustees, to whom the defendant, as treasurer, is distinctively subject.¹⁰

§ 1016. In larceny, where it is necessary that the thing stolen should, *in specie*, have been at the time of stealing in possession of the prosecutor, it is fatal to the prosecution if it appear that the money charged as stolen was not that which had been in the prosecutor's posses-

¹ See *R. v. Adey*, 1 Den. C. C. 571 ; *Bren, L. & C.* 346 ; 9 Cox C. C. 398 ; *R. v. White*, 8 C. & P. 742. *R. v. Diprose*, 11 Ibid. 185 ; *R. v.*

² *R. v. McDonald*, L. & C. 85 ; 9 Taffs, 4 Ibid. 169. See *Com. v. Berry*, Cox C. C. 10 ; *Com. v. Smith*, 129 99 Mass. 428, 1868 ; and see *infra*, Mass. 104, 1880 ; *Campbell v. State*, § 1054. But under the Ohio statute 35 Ohio St. 70, 1878. the cashier of an unincorporated

³ *R. v. Hartley*, R. & R. 139 ; *R. v. Thomas*, 6 Cox C. C. 403. banking establishment may be indicted for larceny, although he be a

⁴ *R. v. Tyree*, L. R. 1 C. C. 177 ; 11 Cox C. C. 241. See *R. v. Stainer*, L. R. 1 C. C. 231. stockholder. *State v. Kusnick*, 45 Ohio St. 535, 1888.

⁵ See *supra*, § 935 ; *infra*, § 1054 ; *Gary v. N. W. Masonic Aid Assn.*, (Iowa) 53 N. W. Rep. 1086, 1893. Nor will a statute declaring partners to be trustees of each other alter the rule, although another statute provides for embezzlement by trustees. *State v. Reddick*, 2 S. Dak. 124, 1891.

⁶ *R. v. Marsh*, 3 F. & F. 523 ; *R. v. Williams v. Stott*, 3 Tyrw. 689. *R. v. Carpenter*, L. R. 1 C. C. 29 ; though see *Coats v. People*, 22 N. Y. 245, 1860. *Infra*, § 1035.

⁷ *R. v. Callahan*, 8 C. & P. 154. See *R. v. Jenson*, 1 Mood. C. C. 434.

⁸ *R. v. Proud*, L. & C. 97 ; 9 Cox C. C. 22 ; *R. v. Hall*, 1 Mood. C. C. 474 ; *R. v. Carr*, R. & R. 198.

⁹ *R. v. Marsh*, 3 F. & F. 523 ; *R. v.*

sion, but was its produce.¹ But it is not so in the present form of embezzlement, since the very essence of this offence is that the thing stolen should *not* have been in the prosecutor's possession. Hence a prosecution for embezzlement may follow money embezzled through a dozen reinvestments, so long as it is in the embezzler's hands.² The money which has flowed into the defendant's hands by virtue of his employment may have become mixed with other moneys of the defendant, or may have been turned into other shapes or forms of security. But, notwithstanding this, the embezzler and his assignees with notice, may be prosecuted for embezzling the funds received.³

§ 1017. An officer, it should be remembered, may be a servant, and may embezzle money as such, and yet not bear the relation of an immediate servant to the prosecutors in an indictment. Thus, the treasurer of a society may be a servant of the society, and as such may be guilty of embezzling the funds of the society; but if he be elected by the society, and governed by rules prescribed by the society, he is to be described as their servant, and not as the servant of the board of directors or trustees.⁴ Nor does it make any difference that the appointment was in the trustees. The appointment may be in a principal officer, and the mastership in a subordinate, or *vice versa*.⁵ In this respect, as will be hereafter seen, the New York statute varies from the English.⁶

The "servant" need not be the servant of the prosecutors.

§ 1018. The term "servant," in the statutes, has been held to include:

Employés in general, in respect to the particular master by whom they are paid and to whom they are accountable;⁷ female

¹ See *supra*, § 962.

⁴ *R. v. Tyree*, L. R. 1 C. C. 177; 11

² See *R. v. Bailey*, 12 Cox C. C. 49; *Cox C. C.* 241. In this case, however, *R. v. Taylor*, 3 B. & P. 596; 2 Leach, 974; *R. v. Hall*, 3 Stark. 67; *R. v. Gale*, L. R. 2 Q. B. D. (C. C. R.) 141, cited *infra*, § 1033. But see *Leonard v. State*, 7 Tex. App. 417, 1879; *Webb v. State*, 8 Ibid. 310, 1880. As to the right to follow produce, see *infra*, § 1037.

viz., that the treasurer was a volunteer, with no salary. As to gratuitous servants, see *infra*, § 1019; *supra*, § 1014. See *Com. v. Clifford*, (Ky.) 27 S. W. Rep. 811, 1894.

⁵ See *R. v. Salisbury*, 5 C. & P. 155; *R. v. Thorpe*, Dears. & B. 562; 8 Cox C. C. 29.

³ But see, apparently *contra*, *Com. v. Libbey*, 11 Metc. 64, 1846; *Com. v. Stearns*, 2 Metc. 343, 1841; discussed *infra*, §§ 1018, 1033, 1037. As to conversion of produce, see more fully *infra*, § 1037.

⁶ *Infra*, §§ 1029, 1033. As to middlemen, see *infra*, § 1034.

⁷ Per Bayley, J., in *Williams v. Stott*, 1 Cr. & M. 675; *R. v. Dixon*, 11 Cox C. C. 178; *R. v. Thomas*, 6 Ibid.

house servants or domestics;¹ apprentices;² day laborers employed "Servant" to take vegetables to market for sale and to bring back includes the price;³ cashiers and collectors of business concerns, employes of all kinds although admitted to a share of the profits, if they are not liable for losses, nor entitled to any control of the business;⁴ commercial travellers;⁵ managers of insurance companies;⁶ stage drivers;⁷ treasurers of railway corporations;⁸ treasurers of townships and other bodies corporate;⁹ solicitors appointed to collect debts for a salary;¹⁰ and tax collectors.¹¹ The fact that the transac-

408; *R. v. Foulkes*, 13 *Ibid.* 63. See *infra*, § 1024; *People v. Treadwell*, 69 *Cal.* 226, 1886.

¹ *R. v. Smith*, R. & R. 267; *R. v. Williams*, 7 C. & P. 338.

² *R. v. Mellish*, R. & R. 80.

³ *R. v. Winnall*, 5 Cox C. C. 326.

⁴ *R. v. McDonald*, L. & C. 85; 9 Cox C. C. 10; *R. v. Turner*, 11 *Ibid.* 552.

⁵ *R. v. Tite*, L. & C. 29; 8 Cox C. C. 458; *R. v. Carr*, R. & R. 198. *Infra*, § 1025.

⁶ *R. v. Gale*, L. R. 2 Q. B. D. (C. C. R.) 141.

⁷ *People v. Sherman*, 10 *Wend.* 298, 1833.

⁸ *Com. v. Tuckerman*, 10 *Gray*, 173, 1857.

⁹ *R. v. Squire*, R. & R. 348; 2 *Stark.* 349; *R. v. Welch*, 2 C. & K. 296; 1 *Den. C. C.* 199; 2 Cox C. C. 85; *R. v. Guelder*, Bell C. C. 284; 8 Cox C. C. 372; *R. v. Carpenter*, L. R. 1 C. C. 29. See *R. v. Tyers*, R. & R. 402; *R. v. Beacall*, 1 *Mood. C. C.* 16.

¹⁰ *R. v. Gibson*, 8 Cox C. C. 436.

¹¹ *R. v. Adey*, 1 *Den. C. C.* 571; though see *R. v. Truman*, 2 Cox C. C. 306.

Sir J. F. Stephen (art. 309) thus states the law:

"A man may be a clerk or servant although he was appointed or elected to the employment in respect of which he is a clerk or servant by some other person than the master whose orders he is bound to obey;

"Although he is paid for his services by a commission or share in the profits of a business;

"Although he is the clerk or servant of more masters than one" (see *R. v. Leech*, 3 *Stark.* 70; *R. v. Batty*, 2 *Mood.* 257; *R. v. Carr*, R. & R. 198. *Infra*, § 1046).

"Although he acts as clerk or servant only occasionally, or only on the particular occasion on which his offence is committed.

"But an agent or other person who undertakes to transact business for another without undertaking to obey his orders is not necessarily a servant—

"Because he receives a salary, or

"Because he has undertaken not to accept employment of a similar kind from any one else, or

"Because he is under a duty (statutory or otherwise) to account for money or other property received by him.

"It seems that in order that a clerk or servant may be within the meaning of this article, it is necessary that the objects of his service should not be criminal, but a man may be such a clerk or servant although the objects of his service are in part illegal, as being contrary to public policy."

These points he illustrates as follows:

"A. was engaged by B. to solicit orders. He was to be paid by commission. He was at liberty to apply

tion was out of the ordinary run of the servant's business does not take the case out of the statute.¹

for orders whenever he thought most convenient, but was not to employ himself for any other person than B. A. was not B.'s servant. *R. v. Negus*, L. R. 2 C. C. 34. (Aff. in *R. v. Goas*, London Law Times, Feb. 18, 1882.)

"The treasurer of a friendly society, under 18 & 19 Vict. c. 63, is not the servant of the trustees of the society, though by section 22 he is bound before seven days, after being required by the trustees (in whom the money is vested by section 18), to account to the trustees. *R. v. Tyree*, L. R. 1 C. C. 177. A treasurer would appear, as a rule, to be rather a banker than a servant, but every case depends on its special circumstances. In *R. v. Murphy*, 4 Cox C. C. 101, the prisoner was both clerk and treasurer. See the explanation of this case given in *R. v. Tyree*. In *R. v. Welch*, (1 Den. 199) the circumstances were very similar to those of *R. v. Tyree*, and Coleridge, J., appears to have been satisfied that the prisoner was a servant, and did not reserve the point. It is singular that this case is not referred to in *R. v. Tyree*.

"A parish clerk is not a servant, because he is not under the orders of any particular person. *R. v. Burton*, 1 M. C. C. R. 237, explained in *Williams v. Scott*, 3 Tyrw. 688; 1 Cr. & M. 675.

"The chamberlain of the commons of a corporation, chosen and sworn in at a court, but whose duty it is to superintend the commons, and to receive certain duties, which he kept till the end of the year, when his accounts were audited and the balance

paid over to his successor, is not a servant, because he holds a distinct office, and is not bound to pay at any time. *Williams v. Stott*, 3 Tyrw. 688; 1 Cr. & M. 675.

"The servant of a trade union may be convicted of the embezzlement of its funds, although some of its rules are void, as being in restraint of trade. *R. v. Stainer*, L. R. 1 C. C. 230. In the argument on this case both sides assumed that, if the society was criminal, the conviction could not be sustained. Cockburn, C. J., said: 'It is unnecessary to consider how far the criminal purpose of a society might affect its title to property.' As stolen property may be stolen from the thief who stole it (1 Hale P. C. 507), the question might deserve consideration if it ever arose. *R. v. Hunt*, in the next illustration, is in point, yet it is only a *nisi prius* decision.

"The servant of a society, the members of which took an unlawful oath under 37 Geo. III. c. 123, and 52 Geo. III. c. 104, cannot be convicted of embezzlement for misappropriating the funds of the society. *R. v. Hunt*, 8 C. & P. 642, by Mirehouse (Com. Serj.), after consulting Bosanquet and Coleridge, JJ."

In Massachusetts it has been held, as we will hereafter see (§ 1033), that when an auctioneer has power to mingle his principal's goods with his own he is not a "servant," under the statute, of the person whose property he sells; *Com. v. Stearns*, 2 Metc. 343, 1841; and that a collector of bills with this right is not the servant or agent of his employer; *Com. v. Libbey*, 11 Metc. 64, 1846; see *State v. Kent*,

¹ *State v. Costin*, 89 N. C. 511, 1883.

§ 1019. But fiduciary discretion to be exercised by the agent according to his judgment, unshackled by fixed rules, is inconsistent with the character of a servant; and where such discretion exists the party cannot be a servant under the statute. Thus the relation of servant and master is held not to exist where A., being insolvent, assigns his estate to assignees for the benefit of creditors, and is appointed by them as agent to collect the debts due the estate;¹ nor where the bailiff of a county court in England receives funds for the high bailiff;² nor where a person employed to get orders for goods and to receive payment for them is at liberty to get the orders and receive the money when and where he thinks proper, being paid by a commission on the goods sold;³ nor where there is nothing but an illusory salary, and where the whole business is left very much to the agent's discretion;⁴ nor where the prosecutors decline to appoint B. as an "agent," but say, "For all business you do for us we shall be happy to pay you a commission;"⁵ nor where the defendant, without any agreement as to remuneration, is simply to collect debts as he pleases;⁶ nor where a broker is employed

22 Minn. 41, 1875. But although this may be correct under the Massachusetts statute, where a series of terms are used antithetically, it cannot hold where the terms "servant" and "agent" are used in a general sense.

¹ R. v. Barnes, 8 Cox C. C. 129.

² R. v. Glover, L. & C. 466; 9 Cox C. C. 500.

³ R. v. Bowers, L. R. 1 C. C. 41. *Infra*, § 1021. See, to same effect, R. v. Negus, 42 L. J. M. C. 62; L. R. 2 C. C. 34. "Where the prosecutor said: 'I paid the prisoner commission but no salary; he was not obliged to be at my office at any particular time excepting on Fridays and Saturdays, to account for what money he had received for me; I did not give the prisoner directions to go to any particular place for orders; he went where he pleased,' it was held that he was not a clerk or servant. R. v. Marshall, 11 Cox C. C. 490, C. C. R. But where the prisoner was bound by the terms

of his agreement, 'diligently to employ himself in going from town to town and soliciting orders,' he was ruled by Lush, J., to be a clerk or servant. That learned judge, in remarkably clear language, thus states the law: 'If a person says to another carrying on an independent trade, "If you get any orders for me I will pay you a commission"—and that person receives money and applies it to his own use, he is not a "clerk or servant;" but if a man says, "I employ you and will pay you, not by salary, but by commission"—then the person employed is a servant.' R. v. Turner, 11 Cox C. C. 551." Roscoe's Crim. Ev. p. 447.

⁴ R. v. Walker, Dears. & B. 600; 8 Cox C. C. 1. See R. v. Mayle, 11 Ibid. 150.

⁵ R. v. May, L. & C. 13; 8 Cox C. C. 421.

⁶ R. v. Hoare, 1 F. & F. 647.

specially to purchase a particular draft ;¹ nor where the business of the defendant is to receive stock from the prosecutor to be worked up into shoes in the defendant's shop ;² nor where a constable is employed with discretionary powers to collect or sue.³ In fine, unless there is a settled arrangement that the servant in the particular matter acts for pay in obedience to a particular line prescribed by the employer, he is not a "servant" under the statutes.⁴

§ 1020. A person employed as middleman or go-between between a manufacturer and operatives, to have work done by the latter on the former's material, is not a servant of the operatives under the statute.⁵

A middleman is not a servant.

§ 1021. A "clerk,"⁶ in the sense in which the term is used in this line of statutes, is a person employed by a superior to keep accounts and to receive payments thereon. Money received by a clerk on bills given him to collect is money received in the course of his employment.⁷ The term *clerk*, as used in the statutes, has been held to include persons acting as commercial travellers, even though their compensation is by commission ;⁸ and though representing several distinct houses ;⁹ but if there be unlimited discretion given, neither the term "clerk" nor "servant" applies ;¹⁰ and the money or goods embezzled must be received in the course of employment.¹¹

A "clerk" is a person employed to keep accounts and collect money thereon.

§ 1022. As used in the Massachusetts statute, the term "agents" is much wider in its signification than "servants" or "clerks." The latter are restricted to the performance of specific acts in a specific way ; the former may or may not be restricted, and may, in fact, be clothed with full powers to represent their principal with the same discretion as

"Agent" is wider in meaning than clerk.

¹ See *Com. v. Davis*, 7 Law Rep. 94, 1855 ; *Lowenthal v. State*, 32 Ibid. 1844.

² *Com. v. Young*, 9 Gray, 5, 1857. 1877.

³ *People v. Allen*, 5 Denio, 76, 1847. ⁵ *R. v. Turner*, 11 Cox C. C. 552.

⁴ *Williams v. Stott*, 1 Cr. & M. 675. ⁹ *R. v. Carr*, R. & R. 198 ; *R. v.*

⁵ *R. v. Gibbs*, Dears. C. C. 448 ; 6 Tite, L. & C. 29 ; 8 Cox C. C. 458. See Cox C. C. 455. See *Com. v. Young*, 9 Gray, 5, 1857. ¹⁰ *R. v. Mayle*, 11 Cox C. C. 150.

⁶ A "clerk" has been called a term *nomen generalissimum*. *People v. Johnson*, 71 Cal. 384, 1886. See *R. v. Bowers* L. R. 1 C. C. 41 ; *R. v. Negus*, L. R. 2 C. C. 34 ; 12 Cox C. C. 493 ; *R. v. Hall*, 13 Ibid. 49. *Supra*, § 1019.

⁷ *Com. v. King*, 9 Cush. 284, 1852. See *People v. Hennessey*, 15 Wend. 147, 1836 ; *Case v. State*, 26 Ala. 17, Cox C. C. 469 ; L. R. 2 C. C. 28. ¹¹ *Infra*, § 1032 ; *R. v. Cullum*, 12

he might exercise himself.¹ In New Hampshire a single act may constitute an agency.² But under the English statute, there must be an employment in a line of agency to constitute an agent.³

Bailees, trustees, and officers are terms to be hereafter discussed.⁴ In these cases, also, the offence is supplementary to common law larceny.⁵

§ 1023. It was necessary to the constitution of the offence, under the English statute as originally framed, that the defendant should have received the money, by virtue of his employment,⁶ for the embezzlement of money by a servant not authorized to receive it was not within the statute;⁷ although the party paying it to him supposes that he is so authorized.⁸ Under the more recent statute, in which "virtue of employment" is left out, the goods must be received in the name and on account of the master.⁹

¹ See *Com. v. Young*, 9 Gray, 5, 1857; and see *Com. v. Libbey*, 11 Metc. 64, 1846. As to "agents," see further, *infra*, § 1053 a.

² *State v. Barter*, 58 N. H. 604, 1879.

³ *R. v. Cosser*, 13 Cox C. C. 187.

⁴ *Infra*, §§ 1051, 1055-6.

⁵ See *infra*, § 1049.

⁶ See *R. v. Prince*, M. & M. 21; *R. v. Batty*, 2 Mood. C. C. 257; *People v. Sherman*, 10 Wend. 298, 1833; *People v. Hennessey*, 15 Ibid. 147, 1836; *Ex parte Hedley*, 31 Cal. 108, 1866.

⁷ *R. v. Thorley*, 1 Mood. C. C. 343; *R. v. Arman*, Dears C. C. 575; 7 Cox C. C. 45; *R. v. Mellish*, R. & R. 80; *R. v. May*, L. & C. 13; 8 Cox C. C. 421; *R. v. Harris*, 6 Ibid. 363; *Dears*, C. C. 344. As to Iowa, see *supra*, § 1012.

⁸ *R. v. Hawtin*, 7 C. & P. 281.

⁹ *R. v. Cullum*, 12 Cox C. C. 469; *L. R.* 2 C. C. 28. As construing the phrase "by virtue of employment," see *infra*, § 1024; *R. v. Beechy*, R. & R. 319; *R. v. Smith*, Ibid. 516; *R. v. Barker*, 1 D. & R. N. P. 19; *R. v. Mellish*, R. & R. 80; *R. v. Nettleton*, 1 Mood. C. C. 259; *R. v. May*, L. & C. 13; 8 Cox C. C. 421; *People v. Dal-*

ton, 15 Wend. 581, 1836; *Com. v. Hays*, 14 Gray, 62, 1859—a case which is on another branch of the law, but is by analogy applicable to this.

In *Griffin v. State*, 4 Tex. App. 390, 1878, we have the following from Winkler, J.:

"There are two separate classes of cases defined in the Penal Code in which the crime of embezzlement may be committed. The first is that class found in c. 3, title 6, of the Penal Code, P. Dig. art. 1854 (art. 235 of the Code) *et seq.*, under the head, 'Embezzlement or Misapplication of Public Money.' To this class belonged the case of *State v. Brooks*, 42 Tex. 62, 1875, where it was held that a deputy sheriff is an officer within the meaning of the law punishing embezzlement of public money, which see for an indictment held sufficient. The other class is found in c. 10, of title 20, P. Dig. art. 2421 (art. 771 of the Code), under the head of 'Embezzlement of Property by Private Persons,' which was amended by act of the fifteenth legislature. Gen. Laws of 1877, p. 9. It is to the latter class that the pres-

§ 1024. It is not, however, necessary that the thing embezzled should have been received by the defendant in conformity with the employer's express directions. While the reason of the thing requires that the money embezzled should have been received by the defendant within the orbit of his employment, yet where he succeeds in getting money on the basis of such employment from third parties, and when there is a legal duty resting on him to pay over such money to his employers, then the embezzlement of such money is within the statute.¹ It is otherwise, however, when the thing embezzled was taken out of the orbit of employment, and without authority.²

Not necessary that the thing embezzled should have been received in direct conformity with employer's directions.

§ 1025. It has been held that the servant cannot, as is elsewhere seen,³ defend himself on the ground that his employer is not entitled in law to receive the money embezzled. For if, as between the master and servant, the servant holds the money for the master, the question whether the master could have claimed the money from a third party is irrelevant.⁴ Nor is it any defence that the money was intrusted to the defendant for an illegal purpose.⁵ But the money or goods must belong, in some sense, to the master.⁶

Not material as to prosecutor's title against third parties.

ent case belongs. *State v. Johnson*, 21 Tex. 775, 1858, furnishes an interpretation of the statute under consideration, and indicates not only that a trust relation must exist as to the fund embezzled, but that that relation must exist between the owner of the subject embezzled and the party accused. *Wise v. State*, 41 Tex. 139, 1874.

"We consider *Riley v. State*, 32 Tex. 763, 1870, as overruled, so far as it holds that an indictment for embezzlement will support a conviction on proof of theft."

¹ *R. v. Beechey*, R. & R. 319; *R. v. Orman*, 36 Eng. Law & Eq. 611; *Dears. C. C.* 575, 7 Cox C. C. 45— which case goes to overrule *R. v. Harris*, 25 Eng. Law & Eq. 579; *Dears. C. C.* 344; 6 Cox C. C. 363; *infra*, § 1032; so far as the latter holds that money received by a servant for his master outside of the servant's prescribed line of duty cannot be the

subject of embezzlement. See *R. v. Cullum*, L. R. 2 C. C. 28; 12 Cox C. C. 469; *R. v. Christian*, *Ibid.*; L. R. 2 C. C. 94.

In *Ex parte Hedly*, 31 Cal. 108, 1866, it was held that when the money was obtained by an agent in a way not authorized by the principal, it comes within the statute. See, also, *Ex parte Ricard*, 11 Nev. 287, 1876; *supra*, § 1012, *infra*, § 1053.

² *R. v. Mellish*, R. & R. 80; *R. v. Hawtin*, 7 C. & P. 281; *R. v. May*, L. & C. 13; 8 Cox C. C. 421. *Supra*, § 1012.

³ *Infra*, § 1038.

⁴ *R. v. Orman*, *supra*; *R. v. Beacall*, 1 C. & P. 464; *Campbell v. State*, 35 Ohio St. 70, 1878. A consignee is such an owner of goods as to support an indictment for embezzlement. *Watterman v. State*, 116 Ind. 51, 1888.

⁵ *Com. v. Cooper*, 130 Mass. 285, 1881. *Infra*, § 1038.

⁶ *Infra*, § 1032.

§ 1026. As to under payments there has been some vacillation in the English rulings. Can the reception by a servant of a sum below that authorized by the master be said to be in obedience to the

master's instructions? Taking up this question in this narrow shape, Parke, J., held that money received by a servant less than that which he was authorized by his employer to take, is not within the statute.¹ But this case is now no longer followed; and though the money received by the servant is below the restricted limit, he is now held properly accountable for it, and liable to prosecution for its embezzlement.²

No defence that money received was under restricted limit.

§ 1027. If the case is larceny at common law, from the fact that the money was taken from the prosecutor's possession,

the prosecution for embezzlement fails. It is scarcely necessary, in support of this position, to repeat the statement,³ that the embezzlement statutes were passed, not to touch any cases within the common law range of larceny, but to cover new cases outside of that range. Hence that which is larceny at common law, from the fact that the goods were taken from the owner's possession, is not embezzlement.⁴ We must therefore at this point recur to the doctrine of constructive possession heretofore discussed.⁵ Goods which have reached their destination are constructively in the owner's possession, though he may not yet have touched them; and hence, after such termination of transit, the servant who converts them is guilty, not of embezzlement, but of larceny.⁶

If case is larceny at common law, it is not embezzlement, e. g., when goods are stolen after reaching master.

Following out this general principle, the Supreme Court of

¹ R. v. Beechey, R. & R. 319.

1871; Fulton v. State, 8 Eng. (Ark.)

² R. v. Aston, 2 Cox C. C. 234—
Patteson, J.

168, 1852. See U. S. v. Clew, 4 Wash.
C. C. 700, 1827. *Supra*, § 956; *infra*,

³ See *supra*, § 1009. See People v.
Johnson, 91 Cal. 265, 1891.

§§ 1049, 1055.

⁵ *Supra*, §§ 944, 961, 1009.

⁴ R. v. Hayward, 1 C. & K. 518—
Tindall, C. J.; R. v. Goode, C. & M.
582; R. v. Wilson, 9 C. & P. 27; R. v.
Heath, 2 Mood. C. C. 33; Temp. & M.
342; R. v. Hawkins, 4 Cox C. C. 224;
R. v. Watts, 2 Den. C. C. 14; R. v.
Jennings, Dears. & B. 447; 7 Cox C.
C. 397; Com. v. King, 9 Cush. 284,
1852; Com. v. Berry, 99 Mass. 428,
1868; Com. v. Doherty, 127 Ibid. 26,
1879; State v. Fann, 65 N. C. 317,

⁶ R. v. Reed, Dears. C. C. 257; R.
v. Watts, 2 Den. C. C. 14. But where
a servant put the proceeds of a sale
of goods into the money drawer of a
cash register without registering the
sale, with intent immediately to ex-
tract it again, which he subsequently
did, it has been held to be embezzle-
ment, and not larceny. Com. v. Ryan,
155 Mass. 523, 1892.

Massachusetts has correctly ruled, where the servant of a co-partnership fraudulently converted money, which one of the firm had directed him to carry to another, that the goods were constructively in the possession of the employers, and that consequently the offence was not embezzlement, but larceny.¹ The same conclusion was reached by the same court where a swindler absconded with money given him by the prosecutor to count;² and where a clerk, who, though sometimes permitted to sell goods, had no general powers of sale, appropriated such goods.³ To the same effect (*i. e.*, that larceny at common law by a servant is not within the embezzlement statutes) is the reasoning of Judge Grier and Judge Kane, in an embezzlement case tried in the United States Circuit Court in Philadelphia.⁴

§ 1028. No inconvenience can arise from the maintenance of this distinction, since it is allowable as well as prudent to join a count for larceny to that for embezzlement.⁵ But great inconvenience would follow from the acceptance of the principle that the embezzlement statutes absorb all cases of larceny by servants. For, if this be the case, the old common law indictments for larceny would no longer hold when the servants are defendants, for the reason that the embezzlement statutes would have to be followed, and in indictments for embezzlement it is necessary that the special fiduciary circumstances constituting the offence should be set out. All that would be requisite, therefore, on an indictment for larceny, to obtain an acquittal, would be to prove that the defendant was a servant or clerk. By the same reasoning, whenever it should appear in a trial for larceny that false pretences were used, it would be necessary, although the case was clearly larceny at common law, to direct an acquittal, because the false pretences were not specially averred. Far better is it to treat the embezzlement and false pretence statutes as in no way invading the province of larceny at common law, but as simply covering cases which larceny at common law does not reach.⁶ Yet while such is the case in principle, it is in full accord-

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¹ *Com. v. Berry*, 99 Mass. 428, 1868. See *State v. Coombs*, 55 Me. 477, 1868;

² *Com. v. O'Malley*, 97 Mass. 584, *Fulton v. State*, 8 Eng. 168, 1852; and 1867. cases cited *supra*, §§ 885, 907, 1009.

³ *Com. v. Davis*, 104 Mass. 548, *Infra*, § 1050. 1870.

⁵ See *infra*, § 1047.

⁴ *U. S. v. Hutchinson*, reported in *Whart. Prec.* 461, 1848. *Supra*, § 960. 1845. ⁶ See *State v. Sias*, 17 N. H. 558,

ance with the modern policy of simplification of pleading that it should be provided by statute that if the case should turn out to be one of larceny there should be no acquittal if the evidence show the case to be embezzlement, and the indictment, or bill of particulars, give adequate notice of the offence.¹

§ 1029. Is divergence from the rule above expressed in a decision in New York,² which, as based on a statute since repealed, it is not necessary now to criticise. It is sufficient here to say that in the legislation in New York the law of embezzlement has been uniformly treated as not supplementary to but as more or less amendatory of the law of larceny. The same may be said of the legislation in Alabama.³ In New York, as has been already noticed, all distinctions have, at least on paper, been swept away by the statutory amalgamation in 1882, of larceny, embezzlement, and obtaining goods on false pretences, in one common offence. This, however, cannot prevent their distinctive features being presented, if not in indictments at least in bills of particulars, and their peculiar characters being this way exhibited to courts of error.⁴ The objects gained by giving the three a common title is simplicity in pleading, and the avoidance of acquittals on account of variance between indictment and evidence as to averments distinguishing larceny from embezzlement and false pretences. But the same difficulties may arise in variances between bill of particulars and evidence.

§ 1030. Since embezzlement necessarily involves secrecy and stealth, if the defendant, in rendering his account, instead of denying the appropriation of property, admit the appropriation, alleging a right in himself, no matter how unfounded, his offence in taking and keeping is no embezzlement.⁵ So, if a person, whose duty it is to receive money for his employer,

¹ R. v. Cooper, L. R. 2 C. C. 123. by a trustee is included—a phase of crime which, in other jurisdictions, is covered by a distinct statute. See *infra*, §§ 1049, 1052.

² Cowen, J., in *People v. Dalton*, 15 Wend. 581, 1836. See, also, *People v. Hennessey*, Ibid. 147, 1836, and criticism of these cases by Hoar, J., in *Com. v. Berry*, 99 Mass. 430, 1868. See *supra*, §§ 956 *et seq.*

³ *Lowenthal v. State*, 32 Ala. 589, 1858. The Alabama statute leaves out the phrase “without the consent of his master or employer.” Hence, under the Alabama statute any embezzlement

⁴ See *supra*, §§ 888, 1009. See *People v. Hearne*, 20 N. Y. Sup. 806, 1892.

⁵ R. v. Norman, C. & M. 501; R. v. Creed, 1 C. & K. 63. See R. v. Lister, D. & B. 118. *Infra*, § 1062 *a*. So as to claim of title generally, *supra*, § 884.

receive money and render a true account of all the money he has received, he is not guilty of embezzlement, but of larceny, if he abscond and does not pay over the money; but if he had received the money and rendered an account in which it was omitted, the necessary proof of concealed appropriation is supplied.¹ The fraudulent appropriation is to be inferred from facts,² among

¹ *R. v. Creed*, 1 C. & K. 63; *R. v. Jackson*, *Ibid.* 384; *R. v. Wortley*, T. & M. 636; 2 Den. C. C. 339; 5 Cox C. C. 382; *R. v. Winnall*, 5 *Ibid.* 326; *Com. v. Tuckerman*, 10 Gray, 173, 1857; *Com. v. Berry*, 99 Mass. 428, 1868; *State v. Cameron*, 3 Heisk. 78, 1871. Nor is the refusal of an employer to pay back money deposited by a servant as security for his faithful service embezzlement. The deposit created a debt only. *Mulford v. People*, 139 Ill. 586, 1891.

According to Sir J. F. Stephen (Dig. Crim. Law, art. 312):

"The inference that a prisoner has embezzled property, by fraudulently converting it to his own use, may be drawn from the fact that he has not paid the money or delivered the property in due course to the owner; or

"From the fact that he has not accounted for the money or other property which he has received; or

"From the fact that he has falsely accounted for it; or

"From the fact that he has absconded; or

"From the fact that upon the examination of his accounts there appeared a general deficiency unaccounted for. *R. v. Grove*, 1 Mood. C. C. 447; 2 Russ. on Cr. 459, 460. The authority of this case, decided by eight judges to seven, has been doubted. See *R. v. Moah*, Dears. 626, 639; see, too, *R. v. Lambert*, 2 Cox C. C. 309; *R. v. Jones*, 8 C. & P. 287; *R. v. Chapman*, 1 C. & K. 119; *R. v. King*, 12 Cox C. C. 73.

"But none of these facts constitutes

in itself the offence of embezzlement; nor is the fact that the alleged offender rendered a correct account of the money or other property intrusted to him inconsistent with his having embezzled it. *R. v. Hodgson*, 3 C. & P. 422; *R. v. Winnall*, 5 Cox C. C. 326. Mr. Greaves's note on this case disapproves of the summing up of Erle, J., on what appears to me to be a misconception of its purport. Mr. Greaves's view, that the fraudulent conversion constitutes the offence and that everything else is only evidence of it, is obviously correct; but I think that Erle, J., did not mean to say anything inconsistent with this." But the weight of authority is that mere non-accounting for balance, without proof of appropriating some particular sum, cannot sustain a conviction of embezzlement. *R. v. Jones*, 8 C. & P. 288; *R. v. Wolsteinholme*, 11 Cox C. C. 310. *Infra*, § 1044. But wilful false accounting is now in England a substantive offence. See 38 & 39 Vict. c. 24, s. 2; *R. v. Guelder*, Bell C. C. 284; *R. v. Lister*, D. & B. 118. Compare *infra*, § 1062 *a*.

² *R. v. Murdock*, 2 Den. C. C. 298; *R. v. Wortley*, *Ibid.* 334; *R. v. Betts*, 8 Cox C. C. 140; *Com. v. Shepard*, 1 Allen, 575, 1861; *Com. v. Tuckerman*, 10 Gray, 173, 1857; *Calkins v. State*, 18 Ohio St. 366, 1868; *State v. King*, 81 Iowa, 587, 1891. *Infra*, § 1062 *a*; *State v. Foley*, 81 Iowa, 36, 1890; *Lang v. State*, 97 Ala. 41, 1893; *Carr v. State*, (Ala.) 16 So. Rep. 155, 1894.

which is the denial of the reception or the suppression of the fact of such reception.¹ And it is usual to require in addition to proof of reception, some proof of attempted concealment, flight, or other facts inferring fraud;² among which facts the falsification of accounts is to be noticed as peculiarly significant.³ The question is, "Did the defendant appropriate furtively money coming to his master, but not as yet received by the latter?" And to prove this satisfactorily, not only the reception by the defendant must be shown, but the illicit use.⁴ For here two difficulties stand in the prosecutor's way, if the indictment be simply for embezzlement. The first is, that if the defendant took money actually paid into his employer's hands, the offence is larceny, not embezzlement. The second is, that if the allegation be that the defendant fraudulently appropriated the money before it reached his employer's hands, the fraud must be shown. And to show this, flight, insolvency, concealment, or evasions, form strong elements of proof.⁵ As notes of conceal-

¹ *R. v. Murdock*, 2 Den. C. C. 298; confession of misappropriation, however, is by itself inadequate. *R. v. Wortley*, Ibid. 333; *R. v. Jackson*, 1 C. & K. 384; *R. v. White*, 8 C. & P. 742; *People v. Treadwell*, 69 Cal. 226, 1886; *Territory v. Meyer*, (Ariz.) 24 Pac. Rep. 183, 1890.

The financial condition of the prisoner prior to and during the time of the alleged embezzlement is competent evidence. *U. S. v. Camp*, 2 Idaho, 215, 1886.

And evidence of the embezzlement of other things may be shown as bearing on the question of intent. *Terry v. State*, 1 Wash. 277, 1890; *People v. Neyce*, 86 Cal. 393, 1890.

But the jury should be instructed to confine such evidence strictly to the question of intent. *State v. Lewis*, 19 Oreg. 478, 1890.

A conviction was sustained where the defendant, a clerk, upon being called upon to produce the money with which he had charged himself on his books, was unable to produce it, and threw himself at his employer's feet, imploring mercy. *R. v. Grove*, 7 C. & P. 635; 1 Mood. C. C. 447; criticised above. *Infra*, § 1062 a. A

² See *R. v. Jones*, 8 C. & P. 288; *R. v. Williams*, 7 Ibid. 338; *Com. v. Berry*, *ut sup.*

³ *R. v. Taylor*, R. & R. 63; 3 B. & P. 596; *R. v. Hall*, R. & R. 463. *Hollingsworth v. State*, 111 Ind. 289, 1887; *State v. Cowan*, 74 Iowa, 53, 1888.

And on indictment of a station agent a suppression of the way bills may be shown, but his explanation of the reason of this, where the accused is an honest man, should be given great weight. *State v. Baldwin*, 70 Iowa, 180, 1886. Conflicting statements as to what was done with the note alleged to have been embezzled may be shown. *State v. Fain*, 106 N. C. 760, 1890.

⁴ See *Johnson v. Com.*, 5 Bush, 430, 1869.

⁵ See *R. v. Jackson*, 1 C. & K. 384; *R. v. Murdock*, and other cases cited in prior notes to this section; *Johnson v. Com.*, 5 Bush, 530, 1869; *State v. Leonard*, 6 Cold. (Tenn.) 307, 1869; *Ex parte Hedley*, 31 Cal. 108, 1866.

ment and evasion, false entries are to be regarded as conspicuous.¹ Pledging to a third person, also, is evidence of embezzling.² And where there is this proof of evasion or misappropriation it is not necessary to prove demand by employer and refusal by servant.³

§ 1031. Nor does it matter that the money was received, not directly from a customer, but from another servant. The defendant is responsible, under the statute, notwithstanding there may have been intermediate links between himself and the customer, provided the master was not one of these links.⁴ If, however, the goods have reached their destination, and are virtually in the master's possession, the case, as we have seen, is one of larceny.⁵

No defence that money was received from another servant.

§ 1032. If the goods were not received on account of the master, to whom they belong, the prosecution fails.⁶

Goods must have been received on account of master.

Infra, § 1062 *a*. On cross-examination of the prisoner it was held proper to ask whether he had not expended large sums of money in stock gambling and otherwise, and how he obtained the money, provided it be confined to a time subsequent to the alleged embezzlement. *Com. v. Shaw*, 145 Mass. 349, 1887.

¹ *R. v. Hall*, R. & R. 463; *R. v. Welch*, 1 Den. C. C. 199.

² *Com. v. Butterick*, 100 Mass. 1, 1868; *infra*, §§ 1040-1044.

³ *Ibid.*; *State v. Hunnicut*, 34 Ark. 562, 1879, where it was held that failure to pay without good reason was sufficient. *Whart. Crim. Ev.* § 632. The fact that the treasurer's books show a large shortage, or show a large balance which is unaccounted for, may be shown. *State v. King*, 81 Iowa, 587, 1891; *State v. Czizek*, 38 Minn. 192, 1888; *State v. Cowan*, 74 Iowa, 53, 1888; *Hollingsworth v. State*, 111 Ind. 289, 1887; *Hemmingway v. State*, 68 Miss. 371, 1890; *Lang v. State*, 97 Ala. 41, 1893; and if this results from negligence or mismanagement, an actual intent to de-

fraud need not be shown; *State v. Czizek*, 38 Minn. 192, 1888.

But mere non-payment is not sufficient proof; *R. v. Smith*, R. & R. 267.

⁴ *R. v. Masters*, 1 Den. C. C. 332; 2 C. & K. 930.

⁵ *Supra*, § 1027.

⁶ *R. v. Glover*, L. & C. 466; *R. v. Harris*, Dears. C. C. 344; 6 Cox C. C. 363; *R. v. Cullum*, L. R. 2 C. C. 28; *R. v. Beaumont*, Dears. C. C. 270; 6 Cox C. C. 269. But see *supra*, § 1024.

In *R. v. Beaumont*, Dears. C. C. 270, it appeared that one W. had engaged with a railway company to find horses and carmen to deliver the company's coals, and that he or his carmen should deliver to the company's manager all the money received from the customers. The delivery notes were entered by W. in his book, and the receipted invoices given to the customers. The prisoner was one of W.'s carmen, whose duty it was to pay over directly to the manager the money which he received from the customers. No account of money so received and paid was kept between

§ 1033. Under the English statute, the goods for which embezzlement lies must be the goods of the servant's master; and hence, where the prosecutor specially employs another person's servant for a single job, the indictment does not lie.¹ It is otherwise in New York, where it is enough if the goods taken belong to "any other person" than the taker, and hence need not be the goods of the servant's master.² But, as is elsewhere noticed, the goods must not belong to the defendant, either in whole or in part.³ And they must have been received on account of the prosecutor.⁴

§ 1034. A middleman, or agent between the chief employer and the servant, may be a prosecutor. Thus, a person undertaking to deliver goods for a railway company, and pay over the proceeds to the company, and who in such

W. and the company. It was held by a majority of the Court of Criminal Appeal, that the prisoner was the servant of the company and not of W., and that the money was received by him on their account and not on the account of W., and that consequently an indictment against the prisoner, as the servant of W., for embezzling money received in that capacity, could not be supported. A somewhat similar case was that of *R. v. Thorpe*, D. & B. C. C. 562. Roscoe's Crim. Ev. p. 450. See *Quarman v. Burnett*, 6 M. & W. 499; *McCrary v. State*, 81 Ga. 334, 1888.

¹ *R. v. Freeman*, 5 C. & P. 534.

² See *People v. Dalton*, 15 Wend. 581, 1836. See *Com. v. Stearns*, 2 Metc. 343, 1841; Whart. Prec. 462. *Supra*, § 1017.

³ See § 1015; *State v. Kent*, 22 Minn. 41, 1875; *Parli v. Reed*, 30 Kans. 534, 1883.

⁴ In *R. v. Gale*, L. R. 2 Q. B. D. (C. C. R.) 141, the defendant was clerk and servant of an insurance company, and head manager in their chief office at L. In the ordinary course of business he received several cheques payable to his order from the managers of

branch offices, which it was his duty to indorse and hand over to the company's cashier. Instead of doing so, he indorsed the cheques and obtained money for them from friends of his own, who paid the cheques into their own banks. He then took the amount so received to the cashier, and handed it over to him, saying he wished it to go against his salary, which was overdrawn to a like amount; and he got back from the cashier I. O. U.'s which he had previously given for the amount of the overdraft. The prisoner having been convicted of embezzling the proceeds of the cheques, it was ruled that the proceeds of the cheques, though received not from the bankers but from third persons, were received on account of the company, and that the prisoner was rightly convicted.

In Massachusetts it has been argued that if the defendant had a right to throw cash received by him in common stock with his own, then he cannot be convicted of embezzling it. It is not the "property" of another. *Supra*, § 932. *Com. v. Stearns*, 2 Metc. 343, 1841; *Com. v. Libbey*, 11 Ibid. 64, 1846. This view, however, is in conflict with the English rule. *Supra*, § 1016. It

capacity employs draymen to do the hauling, may prosecute the latter for embezzling money received by them for the company and in the company's name.¹

§ 1035. There is no question that under the statutes generally a corporation is regarded as a person, and as such may be prosecutor in a trial for embezzlement.² In New York, however, under a statute making it penal for an officer of "an incorporated company" to embezzle, it was held that the term "incorporated company" did not include public bodies, whether politic or corporate.³ And this is certainly the case as to illegal societies.⁴ But where a society is legal, though some of its rules are void as being in restraint of trade, the servant of the society may be convicted of embezzlement;⁵ and so where the action of the corporation in holding the property is *ultra vires*.⁶

Corporation may be a prosecutor, but not illegal corporation.

§ 1036. It is no defence that the defendant fraudulently deposited a worthless security in place of money embezzled. Hence, where a banker's clerk fraudulently taking money from the till put in its place the cheque of a customer, such cheque being really valueless and fraudulently obtained by the clerk, this was held embezzlement.⁷

No defence that worthless security was given.

§ 1037. It is no defence that the defendant, a clerk, through the false manipulation of his accounts, paid over certain particular notes received by him to his master, if he appropriated the sum such notes represented.⁸ And the fraudulent conversion by an innkeeper of trunks obtained by him on checks given to him by a guest is embezzlement under the statute.⁹ So the appropriation of the produce of the principal's bonds is an embezzlement of the principal's property.¹⁰

Conversion of produce enough.

is clear that when the money is received as a special deposit for the owner, it is capable of being embezzled. *Com. v. Foster*, 107 Mass. 221, 1871. Roscoe's Crim. Ev. p. 445. *Infra*, § 1038.

¹ *R. v. Thorpe*, Dears. & B. 562; 8 Cox C. C. 29. See *supra*, § 1017; *Waterman v. State*, 116 Ind. 51, 1888. ² *Leonard v. State*, 7 Tex. App. 417, 1879. *Supra*, §§ 932, 1025.

³ *R. v. Hammon*, R. & R. 221; 2 Leach, 1083.

⁴ *R. v. Hall*, 3 Stark. 67; *Bowman v. Brown*, 52 Iowa, 437, 1879. See *supra*, § 1016. But see *Leonard v. State*, 7 Tex. App. 417, 1879.

⁵ See *supra*, § 1015.

⁶ *Coats v. People*, 22 N. Y. 245, 1860. ⁷ *People v. Husband*, 36 Mich. 306, 1877.

⁸ *R. v. Hunt*, 8 C. & P. 642.

⁹ *Bork v. People*, 91 N. Y. 5, 1883;

¹⁰ *R. v. Stainer*, L. R. 1 C. C. 230; *State v. Fain*, 106 N. C. 760, 1890.

§ 1038. It is no defence that the principals have no right, as against third parties, to the money which the servant embezzles, or that their title was wrongful.¹ If he fraudulently take it on their account and then embezzle it, the offence is complete.² Nor is it any defence that the money embezzled was the proceeds of the sale of liquor kept in violation of law.³

§ 1039. It has been shown⁴ that the mere marking of money in the master's usual place of custody, with the intention of catching a servant suspected of stealing, does not estop the master from proceeding criminally against the prisoner. This doctrine has been carried out in prosecutions for embezzlement. Thus, where the prosecutor gave some marked money to a customer to expend in the prosecutor's shop, for the purpose of detecting a suspected servant, and the servant was convicted of embezzling the marked money, it was held that the conviction was right.⁵

§ 1040. The remarks heretofore made as to continuous takings⁶ apply with peculiar force to embezzlements, which (until detected) may spread over an extended duration of time and occupy several jurisdictions. The defendant may be tried in any county where any part of the embezzlement was committed, or where, upon being called upon to account, he disowned having received the money.⁷

¹ *Supra*, § 1025. See *Com. v. Cooper*, Cox C. C. 234; *Com. v. Ryan*, 155 Mass. 285, 1881.

² *R. v. Beacall*, 1 C. & P. 310; *R. v. Wellings*, Ibid. 454; *R. v. Orman*, Dears. C. C. 575; 7 Cox C. C. 45; *R. v. Stainer*, L. R. 1 C. C. 230; *Leonard v. State*, 7 Tex. App. 417, 1879. *Supra*, §§ 1025, 1035. See *State v. Turney*, 81 Ind. 559, 1882. That the prosecutor's title was wrongful does not bar prosecution for larceny, see *supra*, §§ 882 a, 945.

³ *Com. v. Smith*, 129 Mass. 104, 1880. *Supra*, §§ 882 a, 1025.

⁴ *Supra*, §§ 149, 917; *infra*, § 1190.

⁵ *R. v. Gill*, Dears. C. C. 289; 6 Cox C. C. 295; *R. v. Hedge*, 2 Leach, 1033; *R. & R.* 160; *R. v. Whittingham*, 2 Leach, 912; *R. v. Aston*, 2

Cox C. C. 234; *Com. v. Ryan*, 155 Mass. 523, 1892.

⁶ See *supra*, §§ 288, 928.

⁷ See *supra*, § 288; *R. v. Murdock*, 2 Den. C. C. 298; 8 Eng. Law & Eq. 577; *R. v. Hobson*, R. & R. 56; *R. v. Taylor*, 2 B. & P. 596; *Larkins v. People*, 61 Barb. 226, 1871; *Campbell v. State*, 35 Ohio St. 70, 1878; but see *Com. v. Butterick*, 100 Mass. 1, 1868. The mere reception in a county does not give jurisdiction. *People v. Murphy*, 51 Cal. 376, 1876. Otherwise if there is no proof of carrying the money elsewhere. *State v. New*, 22 Minn. 76, 1875. That statutes giving jurisdiction are constitutional, see *Mack v. People*, 82 N. Y. 235, 1880. On trial it has been held

§ 1041. When an embezzlement is an offence against two sovereigns, each has jurisdiction, and each may prosecute for the offence against himself.¹ It has, however, been held, that a federal statute establishing embezzlement as an offence by officers of national banks absorbs the jurisdiction.² And in pursuance of this principle it has been ruled in Massachusetts that even an accessory to an embezzlement from a national bank, by one of its officers, cannot be punished in Massachusetts, though such offence is not provided for by the federal statutes. The reasoning of the court is, that jurisdiction over a *principal* is a condition precedent to jurisdiction over an *accessary*.³

Embezzlements created by federal statutes must be tried in federal courts.

§ 1042. Several articles embezzled simultaneously may be included in the same indictment, if these articles have not different owners.⁴ It is proper, however, to say, that in Massachusetts, in prosecutions for embezzlement, it is held that there may be separate indictments for articles simultaneously embezzled.⁵ And in any view the offence must be distinctively individuated.⁶

Simultaneous embezzlements may be joined.

§ 1043. The distinguishing features (*e. g.*, the defendant's fiduciary character) which divide embezzlement from larceny⁷ must

fatal for indictment to omit to show where the crime was committed. *Thornell v. People*, 11 Colo. 305, 1888.

¹ See *supra*, §§ 265-6.

² *Com. v. Fuller*, 8 Metc. 313, 1844; *Com. v. Tenney*, 97 Mass. 50, 1867; *Com. v. Felton*, 101 Ibid. 204, 1869; *State v. Tuller*, 34 Conn. 280, 1867; and see discussion, *supra*, § 266. *Cf.* *U. S. v. Taintor*, *infra*, § 1851; *Brewer v. State*, 83 Ala. 113, 1887; *People v. Fonda*, (Mich.) 8 Crim. Law Mag. 281, 1886.

³ *Com. v. Felton*, 101 Mass. 204, 1869. See *supra*, §§ 265-6.

⁴ *Supra*, § 948.

⁵ "It is an ancient and well-established rule," said Foster, J., in the Supreme Court of Massachusetts, in 1868, "that the taking of divers articles at one time may be treated as constituting a distinct larceny of each article stolen." *Com. v. Butterick*,

100 Mass. 9, 1868. But this position though right in principle, is not generally sustained. See *supra*, §§ 931, 948. *Whart. Cr. Pl. & Pr.* §§ 252, 470.

⁶ *State v. Messenger*, 58 N. H. 348, 1878; *Goodhue v. People*, 94 Ill. 37, 1879; *McCann v. U. S.*, 2 Wyo. Ter. 267, 1880.

⁷ *Com. v. Simpson*, 9 Metc. 138, 1845; *Com. v. Smart*, 6 Gray, 15, 1856; *Com. v. Wyman*, 8 Metc. 247, 1844; *Com. v. Merrifield*, 4 Metc. 468, 1842; *Com. v. Doherty*, 127 Mass. 20, 1879; *Coats v. People*, 4 Parker C. R. 662, 1860; s. c. 22 N. Y. 245, 1860; *People v. Allen*, 5 Denio, 76, 1847; *Bartow v. People*, 78 N. Y. 377, 1879; *People v. Tryon*, 4 Mich. 665, 1857; *State v. Butler*, 26 Minn. 90, 1879; *Lowenthal v. State*, 32 Ala. 589, 1858; *State v. Porter*, 26 Mo. 201, 1858; *Fulton v. State*, 8 Eng. (Ark.) 168, 1852; *People v. Cohen*, 8 Cal. 42, 1857.

be especially detailed ; though when agency is averred the instructions need not be given.¹ When refusal to pay over is the charge, a demand should be averred.²

Fiduciary relations must be averred.

The name of the person from whom the money was received need not be stated.³

It is not necessary, however, to aver that the defendant was a "professed agent," under a statute designating "agents."⁴

§ 1044. Unless the pleader is relieved from this exactness by special statute, the goods and ownership must be set out and proved with the same completeness as in larceny.⁵ But it is not necessary to set forth the exact sum taken,⁶ if a sum covered by the indictment is proved to be embezzled,⁷ though "it is not sufficient to prove at the

Goods embezzled and ownership must be accurately stated.

Under Pennsylvania statute, see *Com. v. Leisenring*, 11 Phila. 392, 1875. Under Louisiana statute, see *State v. Palmer*, 32 La. An. 565, 1880; and see *State v. Goss*, 69 Me. 22, 1878; *McCann v. U. S.*, 2 Wyo. Ter. 267, 1880. Under Michigan statute, see *People v. Bringard*, 39 Mich. 22, 1878.

An indictment in the words of the statute will be sufficient. *Huffman v. State*, 89 Ala. 33, 1889; *Ritter v. State*, 111 Ind. 324, 1887; *State v. Fricker*, (La.) 12 So. Rep. 755, 1893.

And words equivalent to those used in the statute have been held sufficient, although they are not identical. *State v. Eames*, 39 La. An. 986, 1887; *State v. Washington*, 41 La. An. 778, 1889; *State v. Combs*, 47 Kans. 136, 1891.

But where the statute provides for the punishment of embezzling city treasurers, the word "feloniously" must be included, although not contained in the statute. *Stropes v. State*, 120 Ind. 562, 1889. As to Iowa statute, see *State v. Jamison*, 74 Iowa, 602, 1888.

The fiduciary relations must be averred. *State v. Roubles*, 43 La. An. 200, 1891; *State v. Griffith*, 45 Kans. 142, 1891.

And a full statement of the facts constituting the crime will be sufficient without the identical words. *People v. Neyce*, 86 Cal. 393, 1890.

¹ *State v. Meyers*, 68 Mo. 266, 1878.

² *State v. Munch*, 22 Minn. 67, 1875; *State v. Bancroft*, 22 Kans. 170, 1879.

³ *State v. Lanier*, 89 N. C. 517, 1883.

⁴ *Com. v. Newcomer*, 49 Pa. 478, 1865.

⁵ *R. v. McGregor*, 3 B. & P. 106; *R. v. Furneaux*, R. & R. 335; *Com. v. Stebbins*, 8 Gray, 492, 1857; *Com. v. O'Connell*, 12 Allen, 451, 1866; *Com. v. Butterick*, 100 Mass. 1, 1868; *Bullock v. State*, 10 Ga. 47, 1851; *State v. Mims*, 26 Minn. 191, 1879; *Ricord v. State*, 15 Nev. 167, 1880; *People v. Cohen*, 8 Cal. 42, 1857; *People v. Cox*, 40 Cal. 275, 1870; *Reside v. State*, 10 Tex. App. 675, 1881; *State v. Thompson*, 42 Ark. 517, 1884; *State v. Lyon*, (N. J.) 17 Rep. 598, 1883;

⁶ *R. v. Carson*, R. & R. 303; *R. v. Grove*, 1 Mood. 447; *State v. Ring*, 29 Minn. 78, 1882.

⁷ *Supra*, § 979; Whart. Crim. Ev. § 121.

trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen."¹

Proof of embezzling a cheque will not sustain an indictment for stealing money.²

State v. Denton, 74 Md. 517, 1891; & P. 288; State v. Fain, 106 N. C. 760, 1890; State v. Lanier, 89 N. C. 517, 1883. But see Taylor v. State, 29 Tex. App. 466, 1891; Woodward v. State, (Ind.) 7 Crim. Law Mag. 244, 1885; State v. Roubles, 43 La. An. 200, 1891; State v. Fricker, (La.) 12 So. Rep. 755, 1893; State v. Ward, 48 Ark. 36, 1886; State v. Arnold, (Mo.) 2 S. W. Rep. 269, 1886; Brown v. State, 23 Tex. App. 214, 1887; Crump v. State, 23 Tex. App. 615, 1887; Malcolmson v. State, 25 Tex. App. 267, 1888; Wallis v. State, 54 Ark. 611, 1891. In Com. v. Gately, 126 Mass. 52, 1878, the question of variance was held to be for the jury. In State v. Thompson, 82 La. An. 796, 1880, a precise description of money was held unnecessary. An indictment for "1320 pairs of shoes, each pair of the value of one dollar, the property of" was held sufficient in Com. v. Shaw, 145 Mass. 349, 1887. That the ownership must be averred if known, see 1 Whart. Prec. 470, and cases cited above. But where in one count ownership is laid in one person, and in another in another, substantial proof of either will be sufficient. Butler v. State, 91 Ala. 87, 1890. State v. Lyon, 45 N. J. (16 Vroom) 272, 1883. See Washington v. State, 72 Ala. 272, 1882. But on the indictment of a county treasurer it is not necessary to state which of the different funds in his hands he embezzled. Hollingsworth v. State, 111 Ind. 289, 1887; People v. Hearne, 20 N. Y. Sup. 806, 1892; People v. Treadwell, 69 Cal. 226, 1886.

¹ Alderson, B., in R. v. Jones, 8 C. 11 Cox C. C. 123.

W. Rep. 269, 1886; Taylor v. State, 29 Tex. App. 466, 1891; State v. Noland, 111 Mo. 473, 1892. *Supra*, § 1030, and see R. v. Tyers, R. & R. 402; R. v. Chapman, 1 C. & K. 119, to the effect that the prosecution must show a definite sum received by the defendant from the employer.

Under the New York statute it is not necessary to aver value unless restitution be claimed. People v. Bork, 96 N. Y. 188, 1884. Under the Illinois statute making the taking of any railroad ticket or pass embezzlement, the value of the ticket or pass taken need not be averred. McDaniels v. People, 118 Ill. 301, 1886. And in an indictment alleging the embezzlement of money in current coin of the United States a value need not be averred, for the court judicially knows it is worth its face value. Gady v. State, 83 Ala. 51, 1887.

Where the prisoner had to account weekly in gross sums, and he was alleged in the indictment to have embezzled three such sums, it was held that such aggregate sums might be shown to be made up of smaller sums which he had embezzled, and with the embezzlement of which he might have been charged. R. v. Balls, L. R. 1 C. C. 328; Roscoe's Crim. Ev. p. 458. Under the Wisconsin statutes a city controller was held liable for embezzling unissued city bonds upon which the city was not liable. State v. White, 66 Wis. 343, 1886.

² R. v. Keena, L. R. 1 C. C. 113;

It is not necessary, in cases of servants and clerks, to aver from whom the money was received.¹

§ 1045. "*Feloniously*," when the offence is a felony, must be used,² though it is sufficient if the term qualify the concluding averment of "steal and take."³ But the statutory characteristics of the offence must be given.⁴ The "felonious intent" must be proved.⁵

When
"feloni-
ously,"
must be
used.

§ 1046. The servant of joint owners or partners may be rightly described as the servant of either,⁶ or in a joint employment, as the servant of all the employers.⁷

Servant of
joint mas-
ters may
be averred
to be ser-
vant of
either.

Embezzle-
ment may
be joined
with lar-
ceny.

§ 1047. Counts for larceny may be joined with counts for embezzlement, framed under various statutes;⁸ nor, unless the evidence shows cases relating to entirely distinct transactions, should the prosecution be called upon to elect until its case is closed.⁹ Different phases of the offence cannot be run together, but must be described in separate counts.¹⁰ In England it seems that the court may, in its discretion, compel an election at an earlier period.¹¹

¹ R. v. Beacall, 1 C. & P. 310; State v. Lanier, 89 N. C. 517, 1883.

² Whart. Cr. Pl. & Pr. § 260. And the word "feloniously" has been held necessary where the indictment followed the words of the statute in which it was not contained. Stropes v. State, 120 Ind. 562, 1889. An indictment charging an executor with failure to account for certain funds, merely, without other inculpatory words, will not be sufficient. People v. Gale, 77 Cal. 120, 1888. See State v. Hill, 91 N. C. 561, 1884.

³ R. v. Crighton, R. & R. 62.

⁴ Com. v. Pratt, 132 Mass. 246, 1882; State v. Manley, 107 Mo. 364, 1891; State v. Adams, 108 Mo. 208, 1891.

⁵ Beaty v. State, 82 Ind. 228, 1882.

⁶ R. v. Leach, 3 Stark. 70; R. v. White, 8 C. & P. 742.

⁷ R. v. Bailey, 7 Cox C. C. 179; L. & C. 177. Dears. & B. 600.

⁸ R. v. Johnson, 3 M. & S. 539; R. v. Murray, 5 C. & P. 145, n.; State v. Porter, 26 Mo. 201, 1858; Mayo v. State, 30 Ala. 32, 1857. See State v. Weydeman, 3 Wash. 399, 1891, as to embezzlement under the code of Washington, punishable as larceny, with no distinctions of grand or petit larceny because of amount of value. See State v. Fournier, 12 Mont. 235, 1892; State v. Gilmore, 110 Mo. 1, 1892; Whart. Cr. Pl. & Pr. §§ 285-293-4.

⁹ See Whart. Cr. Pl. & Pr. § 293.

¹⁰ Where A. and B. are jointly indicted for larceny, and in another count A. is indicted alone, it is not a misjoinder; but the latter count will be stricken out as surplusage. State v. Harris, 106 N. C. 682, 1890. And see cases cited *supra*, § 1042.

¹¹ R. v. Holman, 9 Cox C. C. 201

§ 1048. A bill of particulars may be required in all cases in which the indictment is general in its terms, and the bill should at least state from what persons the money alleged to have been embezzled was received.¹

Bill of particulars should be required.

II. AGAINST TRUSTEES, AGENTS, BAILEES, AND OTHERS, APPROPRIATING GOODS RECEIVED BONA FIDE.

§ 1049. It has already been stated² that the object of the embezzlement statutes is to provide punishment for fraudulent appropriations, which the common law definition of larceny does not reach. The first of these offences, which has just been discussed, is that of a servant or other agent appropriating his master's goods before these goods have reached the master, and, consequently, before the master has acquired such possession in them as will enable him to maintain larceny at common law. The second offence, to which a second class of embezzlement statutes is directed, is that of a trustee or bailee appropriating goods which he received *bonâ fide*. When a trustee or bailee obtains possession of goods fraudulently and afterward fraudulently converts such goods to his own use, this is larceny at common law,³ and, consequently, is not within the scope of the statutes we are about to scrutinize. The object of these statutes is to cover that which is not larceny at common law, viz., the case of a trustee or bailee receiving *bonâ fide* goods from or in behalf of his principal, and then fraudulently appropriating such goods. The terms of the English statutes point out plainly this distinction. Thus that of 24 & 25 Vic. c. 96, s. 75, directed particularly to the case of agents and bankers, provides that "whosoever, having been intrusted, etc., as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or the proceeds, or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or to the use or benefit

Statute covers cases of trustees or agents fraudulently appropriating goods received *bona fide* for principal.

¹ R. v. Hodgson, 3 C. & P. 422; R. v. Bootyman, 5 Ibid. 300; State v. Cushing, 11 R. I. 313, 1873. Whart. Cr. Pl. & Pr. §§ 157, 702.

² *Supra*, § 1009.

³ *Supra*, § 964.

of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively ;” and also whosoever, being intrusted, etc., with any chattel or security, shall sell, negotiate, or pledge the same, “shall be guilty of a misdemeanor,” etc. Further sections apply to the cases of factors fraudulently obtaining advances on property of principals ; and of trustees who, “with intent to defraud, shall convert and appropriate” trust funds. The cases here enumerated are none of them larceny at common law.¹

§ 1050. If the case is larceny at common law, from the fact the possession of the goods was originally obtained by the bailee fraudulently, *animo furandi*, the prosecution for embezzlement, under these statutes, fails.² Failure of justice hereby is in some jurisdictions prevented by statutes authorizing in such cases convictions of larceny ; while in others, in which statutes overlap, the question of form is at the election of the prosecution.³

In New York and Alabama, if not in other American States, the question has been complicated by the loose and general terms in which the embezzlement statutes are couched, so that on their face they seem to include all fraudulent conversions by agents of all classes. But, if we look at the general object of the embezzlement statutes rather than at their mere terms, we must conclude, contrary to the decisions of the courts in the States just mentioned, that the statutes legitimately include only such cases of appropriations by agents as are not reached by common law prosecutions for larceny.⁴

¹ As to Georgia’s statute, see *Snell against the United States*, (citing *v. State*, 50 Ga. 219, 1873; *Hoyt v. U. S. v. Hudson*, 7 Cranch C. C. 32, State, 50 Ibid. 313, 1873. As to proof of fraud, see *infra*, § 1062. As to definition of trustees, see *infra*, § 1052. As to attorney, see *State v. Belden*, 35 La. An. 823, 1883.

against the United States, (citing *U. S. v. Hudson*, 7 Cranch C. C. 32, 1812; *U. S. v. Coolidge*, 1 Wheat. 415, 1816; 1 Am. Cr. L. § 163).

² *R. v. Hawkins*, 1 Den. C. C. 584; T. & M. 328. See *R. v. Murray*, 5 C. & P. 145, n.; 1 Mood. C. C. 276; and see *supra*, §§ 964, 1027 *et seq.*

³ *Supra*, §§ 27 a, 641 a.

In *U. S. v. Hall*, 98 U. S. 343, 1878, it was held that an indictment lies in the Circuit Court of the United States against a guardian for the embezzlement of pension money of his ward paid to him. It was further held that Congress has power to declare the embezzlement by a guardian, of pension money paid to him, to be an offence

⁴ See for reasoning sustaining this, *supra*, §§ 1027-9; and see, also, *State v. Coombs*, 55 Me. 477, 1867; *People v. Cohen*, 8 Cal. 42, 1857; *Fulton v. State*, 8 Eng. (Ark.) 168, 1852; *Cobletz v. State*, 36 Tex. 353, 1872.

§ 1051. The term "officer," when used alternatively with "cashier," or with any other phrase indicating it to be a *nomen generalissimum*, is to have a wide application. In Massachusetts, for instance, it has been held to embrace the president and the directors of a bank.¹

"Officer" may be a *nomen generalissimum*.

§ 1052. A trustee is one to whom certain property is given to hold and use for the benefit of a principal called a *cestui que trust*. The term, therefore, is more comprehensive than bailee, a bailee being simply the custodian of specific property, and is less comprehensive than that of agent, an agent being employed to acquire as well as to hold.² A trustee as such is only indictable for a violation of his trust; and if he be authorized to act venturously, or to mix the trust fund with his own, he is not indictable for so doing.³ But wherever there is an appropriation to the trustee's personal use of the trust fund, to the prejudice of the *cestui que trust*, there an indictment lies.⁴

Trustee is one holding property for another.

The term "trustee" has, in England, been held to include the case of a person who was the secretary, trustee, and treasurer of a saving bank, and who, by the rules of the bank, was required to hand over money deposited with him to the treasurer, who was then required to hand it over, when demanded, to the trustees, whose duty it was to invest it in the public funds.⁵

¹ Com. v. Wyman, 8 Metc. 247, 1844. been compelled to pay to make up a

² See Hutchinson v. Com., 82 Pa. 472, 1876. Under the Indiana statute a guardian may be indicted for embezzlement. Colvin v. State, 127 Ind. 403, 1890. But a partner is not such a trustee as to make him liable in case of misappropriation of funds, despite a statute calling him a trustee. State v. Reddick, 2 S. Dak. 124, 1891. But see, otherwise, under the Indiana statutes, State v. Matthews, 129 Ind. 281, 1891.

shortage in the principal's account.

State v. Adamson, 114 Ind. 216, 1887.

⁴ R. v. Christian, L. R. 2 C. C. 94;

12 Cox C. C. 469; R. v. Townshend,

15 Ibid. 466; Com. v. Butterick, 100

Mass. 1, 1868; State v. Orwig, 24 Iowa,

102, 1868. See Bingham v. Beckwith,

19 N. Y. Week. Dig. 422, 1884.

⁵ R. v. Fletcher, L. & C. 180; 9

Cox C. C. 189. See Com. v. Tenney,

97 Mass. 50, 1867. As to Alabama

statute, see *supra*, § 1029. As to Massa-

chusetts Statute of 1857, c. 233, see Com.

v. Hays, 14 Gray, 62, 1859. It is em-

bezzlement to fraudulently convert the

proceeds of a promissory note given to

the defendant to sell and pay over such

proceeds to a third person. It is other-

wise, in Massachusetts, if as broker

he had authority to mix the proceeds

with his own funds. Com. v. Foster,

³ People v. Howe, 2 N. Y. Sup. Ct. N. S. 388, 1873. See State v. Henry, 1 Lea, 720, 1878. A statute which makes an executor or administrator who fails to turn over the funds in his hands to the proper person guilty of embezzlement will not support a conviction upon refusal to pay to his bondsman an amount which he has

§ 1053. Insolvency, flight, falsification of accounts, or refusal to pay, are the usual and most effective evidences of conversion,¹ though these are not the sole facts from which embezzlement can be inferred.² It has been held a fraudulent conversion for a trustee to pay out of his trust funds £1409 to his private bankers; and then to draw out the whole with the exception of £28, and to pay out of the fund a private debt.³

It is sufficient under the Massachusetts statute to prove that the defendant, having received certain bonds from the maker of a note indorsed by the defendant, as security to protect the defendant in his indorsement, then, after payment of the note by the maker,

107 Mass. 221, 1871; *Com. v. Libbey*, 11 Metc. 64, 1846. But see *supra*, §§ 1016, 1033.

The Pennsylvania Revised Code, § 114, provides that if any person "being a banker, broker, attorney, merchant, or agent, and being intrusted, for safe custody, with the property of any other person, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use, or the use of any other person, such property, or any part thereof, he shall be guilty of a misdemeanor." This section is taken from act of 20 and 21 Vict. c. 54, which has been the subject of several of the adjudications already given under this particular statute. It is, therefore, clear that under it larceny is not included. *Com. v. Newcomer*, 49 Pa. 478, 1865. See *People v. Treadwell*, 69 Cal. 226, 1886.

In *U. S. v. Taintor*, 11 Blatch. 374, 1873, the defendant was indicted under the 55th section of the National Banking Act of June 3, 1864, (13 U. S. Stat. at Large, 116) for embezzling, abstracting, and wilfully misapplying the moneys and funds of a bank of which he was cashier, with intent to injure and defraud the bank. On the

trial it was shown that he took moneys and funds of the bank, and used them in stock speculations carried on in his own name, by depositing them with a stock-broker, as margins. The defendant offered to prove that such acts of his were known to the president and some of the directors of the bank, and were sanctioned by them, and that such dealings of his with the funds of the bank were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, although there was no resolution of the board of directors authorizing or sanctioning them. The evidence was offered only to disprove the averments in the indictment, that the acts were done "with intent to injure and defraud" the bank. It was held that the evidence was properly excluded.

¹ See *U. S. v. Taintor*, *supra*; *State v. Leonard*, 6 Cold. (Tenn.) 307, 1869; *Hoyt v. State*, 50 Ga. 313, 1873; *State v. Mims*, 26 Minn. 183, 1879, and fully, *supra*, § 1030; *infra*, § 1062 *a*.

² *State v. Tompkins*, 32 La. An. 620, 1880.

³ *Wadham v. Rigg*, 1 Drew. and Sm. 216.

fraudulently pledged the bonds thus taken as security in payment of his own personal indebtedness.¹

Mere false entries by an officer of a bank will not constitute such breach of trust, unless connected with an actual conversion of goods.²

A mere failure on the part of a borrower of money to properly account for it does not constitute embezzlement.³

§ 1053 a. The term "agent," as we have already seen,⁴ includes all cases where one person in a distinct capacity is authorized to represent another,⁵ whether such other "Agents."

¹ Com. v. Butterick, 100 Mass. 1, 1868.

² Com. v. Shepard, 1 Allen, 575, 1861.

Where wheat could not leave a warehouse except upon a shipping order issued by the defendant, who was in charge of the wheat, it was held to be a fraudulent conversion for him to set afloat in the market "grain-orders," and therefor issue "shipping orders," and appropriate the proceeds to his own use. Calkins v. State, 18 Ohio St. 366, 1868. See Raymond v. Cox, 44 N. J. Eq. 415, 1888.

³ Kribs v. People, 82 Ill. 425, 1876. See Lee v. Com., (Ky.) 1 S. W. Rep. 4, 1886, as to funds acquired and spent before assumption of fiduciary capacity.

⁴ *Supra*, § 1022.

⁵ See R. v. Cosser, 13 Cox C. C. 187; R. v. Brownlow, 39 L. T. (N. S.) 479; R. v. Bredin, 15 Cox C. C. 412. As to "servant," see Gravatt v. State, 25 Ohio St. 162, 1874. As to "clerk," see *Ex parte Ricord*, 11 Nev. 287, 1876. That a priest who appropriates money collected for his parish is an "agent," see Gerdeman v. Com., 11 Phila. 374, 1875.

In R. v. Christian, L. R. 2 C. C. 74, we have the following:

Blackburn, J.: "Before turning to the words of the statute, look at the facts. The prisoner, being an agent

within the meaning of the statute (for as to that no question is reserved), consents to act on the terms contained in his first letter of November 12th. He accordingly receives instructions to buy, and various securities are bought. It seems immaterial to consider whether any privity of contract was established between the prosecutrix and the sellers. There is at any rate no doubt that the prisoner must have made himself personally liable to them, and therefore he would have a right, after paying for shares, if he did pay, to refuse to hand them over till he was repaid. He would also have a right to require cash beforehand, so as to keep him out of advances. In this state of things he writes his letter of November 27th, and the prosecutrix her answer of the same date. Now, looking at the facts and writing down what seems to have been her meaning as to the cheque, I have no doubt as to what it must be: 'Inasmuch as there is a sum of £336 which I have to pay to get the Japanese bonds, get the proceeds of the cheque in the way most convenient to yourself and pay for the bonds.' I think if the prisoner had handed over the cheque itself, or handed over the actual notes received for it, he would have been within his instructions. I think he would have been so, also, if he had paid it into his own

person be a private individual or a corporation, either public or private.¹ "Clerks" and "servants" have been already distinctively discussed.²

bank *bond fide*, for the purpose of meeting a cheque of his own given to the seller, although a hundred things might intervene to prevent the cheque being actually met. I think, then, that the prosecutrix's letter was a direction to apply the cheque or its proceeds to getting the bonds for her free from any lien or claim on the part of the seller.

"Turning, then, to the statute, and applying its words to the facts of the case, we find that the prisoner was an agent, and he received a direction in writing to apply the cheque or its proceeds to a certain purpose. And the jury have found that in violation of good faith, and contrary to that direction, he applied them to his own use. I have no doubt, therefore, that he was rightfully convicted."

In *State v. Foster*, 37 Iowa, 407, 1873, Beck, C. J., thus writes: "The words indicating the relation that must exist between the accused and another, which is a necessary ingredient of the offence, are 'employer,' 'master,' 'employment.' We will, without notice of the word 'master,' consider the term 'employer' and 'employment.' They are not of the technical language of the law, or of any science or pursuit, and must, therefore, be construed according to the context and the approved usage of the language. Rev. Stat. § 29, p. 2.

"The words are defined as follows: '*Employment*—The act of employing or using. 2. Occupation; business. 3. Agency or service for another or for the public. *Employer*—One who

employs; one who engages or keeps in service.'

"The verb 'employ' is defined as follows, when used with a human being either as its subject or object: 'To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs.' Webster.

"It will be seen from the definition of these words that the statute contemplates the relation of agency, a contract for services, whereby the accused is bound to do or perform something in connection with the property embezzled, and that by virtue of such relation he acquired possession thereof. It by no means appears that the idea of bailment or bailee is excluded from these definitions, but without following the thought or relying upon it, we will inquire whether the evidence establishes a relation of agency or service existing between the accused and Furlong, and whether such relation is contemplated by the instructions above quoted. We think it is in each. The watch was received under an agreement that the accused was to act for Furlong in making a contract of sale of the property, i. e., exchanging the watch for a wagon. Can it be doubted that any proper contract of sale within the scope of the accused's authority would have bound Furlong? Certainly he would have been bound thereby; and one of the ingredients of the transaction creating it a binding contract upon him would have been the relation of agency existing between him and the

¹ *State v. Bancroft*, 22 Kans. 170, 1879.

² *Supra*, §§ 1021, 1022.

§ 1054. Agency cannot be regarded as constituted, under the statute, by the mere relation assumed by one member of a business association to another.¹ And a partner or person having an interest in property embezzled cannot ordinarily be convicted of embezzling it.² But a mere right to receive part payment in commissions, to be paid by the employer, the employé having no right to deduct the commissions from the sum received, does not create such an interest as precludes conviction.³

Copartners and members of common society not "agents."

§ 1055. The term bailee is one to be used, not in its large, but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods first *bona fide*,⁴ and then fraudulently convert.⁵ Any other construction would make larceny and embezzlement in part overlap.⁶ Hence it follows

"Bailee" to be used in restricted sense.

accused. We conclude that the idea of agency is clearly expressed, both by the language of the indictment and instructions, and the relation is established by the evidence, or rather that there was evidence tending to establish it rendering the instruction relevant and proper, upon which the jury may well have found its existence." *State v. Fournier*, 12 Mont. 235, 1892; *Cooksie v. State*, 26 Tex. App. 72, 1888; *R. v. Cronmire*, 54 L. T. (N. S.) 580, 1886.

A person is none the less an agent because the firm of which he is a member is the actual agent. *Carr v. State*, (Ala.) 16 So. Rep. 155, 1894. See *Shelburn v. Com.*, 85 Ky. 173, 1887, for agency under statutes of Kentucky.

¹ *R. v. Mason*, D. & R. N. P. C. 22. See *supra*, § 1022.

² *Supra*, §§ 922, 1033; *State v. Kent*, 22 Minn. 41, 1875; *Carter v. State*, 53 Ga. 326, 1874. See *Aldrich v. State*, 29 Tex. App. 394, 1891.

³ *Supra*, § 1014; *Com. v. Smith*, 129 Mass. 104, 1880. As to indictment against agent, see *Lycan v. People*, 107 Ill. 423, 1883; *Washington v.*

People, 72 Ala. 272, 1882. See *State v. Shadd*, 80 Mo. 358, 1883, as to agent for immoral purpose.

⁴ That a bailee is one who is to return to the depositor a specific article deposited with him, see *R. v. Clegg*, 11 Cox C. C. 212; *R. v. Aden*, 12 Ibid. 512; *R. v. Richmond*, Ibid. 495. See *Wallis v. State*, 54 Ark. 611, 1891. That this covers articles on which the bailee is to bestow certain work, see *Whart. on Neg.* §§ 435-478; *R. v. Daynes*, 12 Cox C. C. 514. As to "bailee accommodations," see *People v. Flores*, 64 Cal. 426, 1883.

⁵ *Krause v. Com.*, 93 Pa. 418, 1880. See *Watson v. State*, 70 Ala. 13, 1881.

⁶ *R. v. Hunt*, 8 Cox C. C. 495; *People v. Cohen*, 8 Cal. 42, 1857; *Leonard v. State*, 7 Tex. App. 417, 1879. *Supra*, §§ 1027, 1049, 1050. A recent English statute provides that "whoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any other person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be

that not only must the evidence show, but the indictment must aver, the facts distinguishing the case from larceny at common law.¹ And thus when it does not appear that any fiduciary duty is imposed on the defendant to restore the specific goods of which the alleged bailment is composed, a bailment under the statute is not constituted,² though it is otherwise when a specific thing, whether money, securities, or goods, is received in trust and then appropriated.³ Unlike embezzlement by servants of goods not yet come to their master's possession,⁴ it is the essence of this form of embezzlement that the offence should be limited to the particular article bailed or its proceeds; and if the agent have discretionary power over such article,⁵ then he is not a bailee under the statute. But, as will be seen, when a carrier delivers goods and embezzles the price, although he cannot be indicted for embezzling the goods, he may be for embezzling the money.⁶ And such is the case with a person appropriating goods given to him to effect a "trade,"⁷ or to obtain a loan,⁸ or to hold as a loan;⁹ and with other modes¹⁰ of

convicted thereof upon an indictment for larceny." 24 & 25 Vict. c. 96, s. 3. See *R. v. Loose*, Bell C. C. 259; 8 Cox C. C. 302; Fisher's Digest, (Am. ed.) p. 258; *R. v. Cosser*, 13 Cox C. C. 187; *R. v. Tatlock*, Ibid. 328; L. R. 2 Q. B. D. 157; *R. v. Tonkinson*, 14 Cox C. C. 603; 44 L. T. (N. S.) 821, 1881. See *People v. Johnson*, 91 Cal. 265, 1891. Compare *Baker v. State*, 6 Tex. App. 344, 1879. *Infra*, § 1057. As to Missouri statute, see *State v. Broderick*, 7 Mo. App. 19, 1879.

¹ *People v. Cohen*, 8 Cal. 42, 1857; *People v. Peterson*, 9 Ibid. 313, 1858. See, however, *People v. Poggi*, 19 Ibid. 600, 1862, taking a wider view. See *supra*, §§ 1009, 1027, 1050; *State v. Griffith*, 45 Kans. 142, 1891. But exact words need not be used if the description be generally complete. *State v. Combs*, 47 Kans. 136, 1891; *R. v. DeBanks*, 5 Crim. Law Mag. 844, 1884.

² *R. v. Hassell*, L. & C. 58; 8 Cox C. C. 491; 9 W. R. 708; *R. v. Garrett*, 8 Cox C. C. 368; 2 F. & F. 14; *R. v.*

Oxenham, 13 Cox C. C. 349; *Gaddy v. State*, 8 Tex. App. 127, 1880; *Webb v. State*, Ibid. 310, 1880.

³ *R. v. Aden*, 12 Cox C. C. 512; *R. v. Tonkinson*, 44 L. T. (N. S.) 821, 1881.

⁴ See *supra*, § 1016.

⁵ See *R. v. Hoare*, 1 F. & F. 647; *R. v. Hunt*, 8 Cox C. C. 495.

⁶ *R. v. Wells*, 1 F. & F. 109; *R. v. Aden*, 12 Cox C. C. 512. In *R. v. De Banks*, L. R. 13 Q. B. D. 29; 50 L. T. (N. S.) 427; 15 Cox C. C. 450, it was held that a person employed to take charge of a horse for a few days and then to sell it, was a bailee of the money. As to other cases, see *supra*, § 1027.

⁷ *State v. Foster*, 37 Iowa, 404, 1873.

⁸ *R. v. Tonkinson*, 44 L. T. (N. S.) 821, 1881.

⁹ *Com. v. Chatham*, 50 Pa. 181, 1865.

¹⁰ *Hutchison v. Com.*, 82 Pa. 472, 1876; *Com. v. Maher*, 11 Phila. 425, 1876. See *People v. Murphy*, 51 Cal. 376, 1876; *Baker v. State*, 6 Tex. App. 344, 1879.

fraudulent conversion by bailee. This includes a fraudulent conversion by an inn-keeper of baggage intrusted to him.¹

A person who, after being employed to discount negotiable paper, fraudulently appropriates the proceeds, is guilty of embezzlement;² but there must be, to sustain a conviction, proof of both bailment and conversion.³

§ 1056. It was once thought in England that a married woman, not being capable of contracting, could not be a bailee;⁴ but this was based hurriedly on the impression that a person not capable of contracting cannot be liable for a tort, which is an error, and the case may now be considered as overruled.⁵ An infant, not capable of contracting, may certainly be liable criminally for criminal non-performance of duty; and *a fortiori* is this the case with married women, under the present phase of legislation.

Person not capable of contracting may be bailee.

§ 1057. It is not essential under the English statute that the thing embezzled should have been received from the bailor.⁶ Thus indictments for embezzlement have been sustained where a carrier delivered goods committed to him by the prosecutor, and fraudulently converted their price;⁷ and where the carrier (an "expressman," as he would be called in the United States) received money from the prosecutor to buy goods to be returned to the prosecutor in the carrier's cart, and obtained the goods in his own name, and on his way to the prosecutor's abstracted some of them for his own use.⁸

Goods need not have been received directly from prosecutor.

¹ *People v. Husband*, 36 Mich. 306, 1877; and see *Bork v. People*, 91 N. Y. 5, 1888. And the consignee of goods on commission who pledges them for his own debt with intent to defraud the owner has been held guilty of embezzlement in *Morehouse v. State*, 35 Nebr. 643, 1892; *Epper-son v. State*, 22 Tex. App. 694, 1887.

² *R. v. Oxenham*, 46 L. J. 125; 13 Cox C. C. 349.

³ *R. v. Weekes*, 10 Cox C. C. 224; *R. v. Cosser*, 13 Ibid. 187. See comments in *London Law Times*, June 10, 1882, p. 95.

⁴ *R. v. Denmour*, 8 Cox C. C. 440, per Martin, B.

⁵ See *R. v. Robson*, L. & C. 93; 9 Cox C. C. 29; 10 W. R. 61.

⁶ Where the prosecutor, being "somewhat tipsy" and partly asleep, saw the defendant take his (the prosecutor's) watch out of his pocket, which he took no steps to prevent, believing that the defendant was acting solely from friendly motives, it was held by Crowder, J., that this was a sufficient bailment under the statutes. *R. v. Reeves*, 5 Jur. (N. S.) 716.

⁷ *R. v. Wells*, 1 F. & F. 109.

⁸ *R. v. Bunkall*, L. & C. 371; 9 Cox C. C. 419; 12 W. R. 414. See *State v. Lillie*, 21 Kans. 728, 1879.

In *Hutchison v. Com.*, 82 Pa. 472,

§ 1058. Subject to the qualifications above expressed, it is necessary, to sustain a conviction, that there should have been put in proof some act of conversion by the bailee, inconsistent with the terms of the bailment.¹ As an illustration of such breach of bailment may be mentioned an English conviction sustained on proof that the defendant, a carrier, employed by the prosecutor to deliver in his (the defendant's) cart a boat's cargo of coals to persons named in a list, and only to such persons, fraudulently sold some of the coals and appropriated the proceeds.²

1876, the evidence was that B. owned a large number of barrels of crude petroleum. This oil was in the tanks and pipes of a carrier, intermingled with and undistinguishable from thousands of barrels of other oil in the same tanks and pipes. B. held orders, accepted by the carrier, for the quantity of petroleum mentioned, which he delivered to the defendants for the purpose of having them store the petroleum, taking back from them a receipt setting forth that fact. The defendants deposited these orders to the credit of their general account with the carrier, as they did other like orders, and drew petroleum from the carrier thereon. The petroleum drawn was disposed of from time to time by them for their own benefit, until they became insolvent. B. then demanded his petroleum, but they were unable to deliver it, by reason of having nearly exhausted the quantity of oil they were entitled to draw from the carrier's pipes. The defendants were then indicted for larceny as bailees. The Supreme Court held, Mercur, J., dissenting, that (1) by the rules of the trade there was a delivery; (2) that there was a bailment; and (3) that the drawing of the petroleum and selling it on their own account by the defendants was a conversion to their own use.

According to Sir J. F. Stephen

(Dig. Crim. Law, art. 345), the 24 & 25 Vict. does not extend to an agent who disposes of a chattel, valuable security, or power of attorney according to unwritten instructions given to him, and subsequently misappropriates the proceeds thereof, unless (possibly) he is proved to have had an intention to misappropriate the proceeds at the time when he disposed of the chattel, valuable security, or power of attorney. This, he says, seems to be the effect of *R. v. Tatlock*, L. R. 2 Q. B. D. 157; and *R. v. Cooper*, L. R. 2 C. C. 123. In *R. v. Tatlock*, the judges were not unanimous.

¹ See *R. v. Jackson*, 9 Cox C. C. 505; *Larkin v. People*, 61 Barb. 226, 1871.

² *R. v. Davies*, 14 W. R. 679; 14 L. T. (N. S.) 491; *Calkins v. State*, 18 Ohio St. 366, 1868; *R. v. Aden*, 12 Cox C. C. 512. As to conversion by a solicitor, see *R. v. Fullerger*, 14 Ibid. 370; *R. v. Newman*, London Law Times, March 15, 1882; s. c. 46 L. T. (N. S.) 394. But merely marking a bale of cotton which was delivered to defendant to take to the gin-mill in the name of his son, and taking a receipt in the same name, is not sufficient. *Penny v. State*, 88 Ala. 105, 1889.

In the case of a city treasurer, any wilful or fraudulent disposition of

§ 1059. Some act of conversion or appropriation by the bailee or carrier must be alleged and proved to have taken place within the jurisdiction of the court.¹

Some act of conversion must be in jurisdiction.

§ 1060. In general, the rules laid down with regard to embezzlements by servants for appropriating goods which have not yet reached their masters, apply (with the exception of the averment as to the master's non-reception of the goods) with equal force to embezzlements by trustees and bailees.² The following points, peculiar to the last class of embezzlements, are now to be noticed.

Indictment must conform to statute.

§ 1061. The special conditions of particular statutes are to be expressed in the indictment. As these are what constitute the *differentia* of the offence, as distinguishing it from larceny, they must be set forth in the indictment.³

Special facts to be averred.

Hence the indictment must aver not merely the bailment or trust, but the special circumstances which make the case embezzlement under the statute.⁴ And so it is necessary to state in the indictment the purpose for which the defendant was intrusted with the property;⁵ and the specific act of fraud with which the defendant is charged.⁶

the funds for purposes other than those properly entitled to it will be embezzlement in Mississippi. *Hemingway v. State*, 68 Miss. 371, 1890.

¹ *Larkin v. People*, 61 Barb. 226, 1871; See *supra*, §§ 248-251, 1040, 1058; *State v. Bancroft*, 22 Kans. 170, 1879.

² See *supra*, § 1043.

³ *R. v. Golde*, 2 M. & Rob. 425; *Com. v. Smart*, 6 Gray, 15, 1856. See *Com. v. Hays*, 14 Ibid. 62, 1859; *Com. v. Simpson*, 9 Metc. 138, 1845; *Larkin v. People*, 61 Barb. 226, 1871; *People v. Tryon*, 4 Mich. 665, 1857; *People v. Bailey*, 23 Cal. 577, 1863. See *Heller v. People*, 2 Colo. App. 459, 1892; *People v. Hill*, (Utah) 2 W. Coast Rep. 476, 1884; *People v. Salors*, 62 Cal. 139, 1882.

⁴ *State v. Walton*, 62 Me. 106, 1873; *Com. v. Wyman*, 8 Metc. 247, 1844; *Wise v. State*, 41 Tex. 139, 1874; *State v. Longworth*, Ibid. 162, 1874. In Massa-

chusetts, the particulars of embezzlement need not now (by statute) be stated. *Com. v. Bennett*, 118 Mass. 443, 1875. See *Hodges v. State*, *infra*. See *State v. Grisham*, 90 Mo. 163, 1886, as to embezzlement of a chattel mortgage; *Aldrich v. State*, 29 Tex. App. 394, 1891; *Com. v. Beeby*, (Pa.) 3 Lanc. Law Rev. 358, 1886; *Lycan v. People*, 107 Ill. 423, 1883; *Queen v. Stansfeld*, 8 Leg. News, 123, 1885.

That value on gross to a number of articles is enough, see *State v. Mook*, 40 Ohio St. 588, 1884.

⁵ *Com. v. Smart*, 6 Gray, 15, 1856; *People v. Cohen*, 8 Cal. 42, 1857; *People v. Hill*, (Utah) 2 W. Coast Rep. 476, 1884; *Heller v. People*, 2 Colo. App. 459, 1892. But see *State v. Fournier*, 12 Mont. 235, 1892; *State v. Trolson*, (Nev.) 32 Pac. Rep. 930, 1893.

⁶ *Com. v. Wyman*, 8 Metc. 247, 1844. As giving a laxer view, see *State v.*

§ 1062. A mere common law indictment for larceny is not enough, unless made so specially by statute. In England at one time an opinion was ventured at *nisi prius* to the effect that a common law indictment for larceny would be good in embezzlements by bailees;¹ but this case was exceptional, and not only was disregarded in subsequent adjudications, but was practically overruled by a series of decisions already referred to, in which it was held that the special nature of the trust should be set forth. These were followed by the 24 & 25 of Victoria, c. 96, s. 3, which provided that in prosecutions of bailees fraudulently converting the bailed goods, an indictment for larceny should be sufficient. Where a statute to this effect is not in operation, it is essential in all cases of embezzlement as distinguished from larceny, that the fiduciary character and duties of the bailee should be set forth in the mode already specified.²

Stimson, 4 Zab. 9, 1853; *State v. Porter*, 26 Mo. 201, 1858; and see *Com. v. Newcomer*, 49 Pa. 478, 1865.

An indictment of B. for embezzling securities in money held by him from H. in "trust and confidence to be by B. safely kept for H. until H. shall call for the same," sets forth a trust on the part of H. with sufficient exactness to warrant a conviction of B. on proof of his fraudulent conversion of the trust funds so held. *Com. v. Butterick*, 100 Mass. 1, 1868.

In *Wright v. People*, 61 Ill. 382, 1871, it was held that the Illinois act of March 4, 1869, entitled an act for the protection of consignors of fruit, grain, flour, etc., to be sold on commission, which provides that any warehouseman, storage, forwarding or commission merchant, who, having converted to his own use the proceeds or profits arising from the sale of any goods, otherwise than as instructed by the consignor of the goods, on demand of the consignor, fails to deliver over the proceeds or profits of such goods, after deducting the usual per cent. on sales as commissions, shall be guilty of a misdemeanor, etc., being a penal

statute, must receive a strict construction; and an actual demand to be made by the consignor upon the commission merchant is an indispensable prerequisite to a conviction under it.

In a case under this statute, the prosecutor testified that, when he went to the place of the accused, the latter said: "I know what you have come for, but it is impossible for me to pay you anything now." The witness stated that the accused knew well enough what he had come for, and this was all the demand he claimed to have been made. It was held that while in a civil cause, where a demand was necessary, such evidence might be sufficient for a jury to find a waiver, it could not sustain a criminal prosecution. The demand for the latter purpose should be made in such a manner as to fairly apprise the merchant that he would be subject to the penalties of the statute if he failed to comply. *Ibid.* See *Heller v. People*, *supra*. But see *State v. Trolson*, (Nev.) 32 Pac. Rep. 930, 1893; *Hodges v. State*, 22 Tex. App. 415, 1886.

¹ *R. v. Haigh*, 7 Cox C. C. 403.

² *Supra*, § 1043. But where in an in-

We have already seen that counts for larceny may be joined with those for embezzlement.¹

§ 1062 *a*. The evidence in cases of embezzlement, both as to the nature of the trust, the embezzling act, and the ^{Evidence} intent, is inferential.²

dictment for embezzlement words are used which are descriptive of larceny they will be held to describe the former. *State v. Harris*, 106 N. C. 682, 1890.

¹ *Supra*, § 1047.

² *As to Nature of Trust*.—The acting in an office is sufficient proof of authority. *Whart. Crim. Ev.* §§ 834–5. Thus if a person receive money as a steward of another, this is sufficient evidence of his being a steward to support an indictment for embezzling such money. *R. v. Beacall*, 1 C. & P. 312; *R. v. Wellings*, *Ibid.* 454, 457.

The presumption of due appointment applies also to the person from whom goods are embezzled, if he be a trustee.

Where there has been a written agreement between master and servant, in which the nature of the service is defined, on an indictment for embezzlement against the latter, parol evidence of the service is inadmissible, unless notice has been given to produce the agreement. *R. v. Clapton*, 3 Cox C. C. 126.

Where a clerk to a savings bank was convicted on an indictment charging him with embezzlement, the property being laid in T.; and in order to prove that T. was a trustee of the bank, he was called, and stated that since the commission of the offence he had been acting as a trustee, but that before that date he had attended only one meeting, having on that occasion been requested to do so lest there should be a deficiency of trustees; but he was also a manager of the bank, and it did not appear that any act was

done by him at that meeting which he might not have done as a manager; it was held that this was insufficient evidence of acting to support the inference of the legal appointment of T. as a trustee, and that the conviction was wrong. *R. v. Essex, Dears. & B. C.* C. 369; 4 Jur. (N.S.) 15; 7 Cox C. C. 384.

An admission by a person indicted as servant to guardians of the poor of a parish, such admission being contained in the condition of his bond for the performance of his duties as treasurer, coupled with an act of parliament specifying those duties, is sufficient evidence of the nature of his appointment. *R. v. Welch*, 1 Den. C. C. 199; 2 C. & K. 296.

That a decoy has been used is no defence. *Supra*, §§ 149, 1039. Where B., a brewer, sent his drayman, S., out with porter, with authority to sell it at fixed prices only; and S. sold some of it to P. at an under price, but did not receive the money at the time; B., having heard of this, unknown to S., told P. to pay S. the amount, which P. did, and S., when asked for it by B., denied the receipt of the money; embezzlement was held to be made out. *R. v. Aston*, 2 C. & K. 418.

Intent may be inferred from absconding. Thus where S., a servant of M., being sent to receive rent due M., received it, and immediately went off with it to Ireland; it was held that this was evidence from which the jury might infer that S. intended to embezzle the money. *R. v. Williams*, 7 C. & P. 338. *Supra*, § 1030.

III. PUBLIC OFFICERS.

§ 1063. Public officers, under statutes varying in different jurisdictions, are made indictable for embezzlement. The statutes, however, are so various, abounding in such numerous distinctions, that it would exceed the limits of the present work to exhibit them in detail.¹ Holding office

Embezzlement by statutory officers.

Other acts of embezzlement may be introduced to prove intent. Whart. Crim. Ev. § 53. Thus where an indictment charged the prisoner with having embezzled three sums of twenty-one pounds, the moneys of his employers, he being a clerk or servant, evidence having been given of the embezzlement of these sums, it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled; and this was admitted to show that if it should be contended the sums charged in the indictment were subjects of a mistake in keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion. *R. v. Richardson*, 8 Cox C. C. 448; 2 F. & F. 343.

Denial of Receipt Necessary.—It is not enough to prove that a clerk has received a sum of money without entering it in his book, unless there is also evidence that he has denied its receipt. *R. v. Jones*, 7 C. & P. 833. But this denial may be inferential. See *R. v. Grove*, 7 C. & P. 635; 1 M. C. C. 447. *Supra*, §§ 1030, 1053. *U. S. v. Adams*, 2 Dak. 305, 1880. See *Perry v. State*, 22 Tex. App. 19, 1886, for insufficiency of evidence, and *Williams v. State*, 25 Tex. App. 733, 1888; *Harris v. State*, 21 Tex. App. 478, 1886; *Knight v. State*, (Tex.) 13 S. W. Rep. 598, 1890; *State v. Findley*, 101 Mo. 217, 1890; *State v. Samuels*, 111 Mo. 566, 1892; *Stallings v. State*, 29 Tex. App. 220, 1890; *Com. v. Sawtelle*, (Mass.) 7 Crim. Law Mag. 762, 1886; *State v. Halstead*, (Iowa) 10 Crim. Law Mag. 279, 1887; *R. v. Stephens*, 58 L. T. 776, 1888; *U. S. v. Camp*, 10 W. Coast Rep. 127, 1886.

¹ For rulings under such statutes, see *U. S. v. Cook*, 17 Wall. 168, 1872; *U. S. v. Taintor*, 11 Blatch. 374, 1873; *U. S. v. Bixby*, 10 Biss. 238, 1881; *U. S. v. Forsythe*, 6 McL. 584, 1855; *U. S. v. Voorhees*, 9 Fed. Rep. 143, 1881; *U. S. v. Lee*, 12 Ibid. 816, 1882; *U. S. v. Conant*, Lowell, J., 9 Cent. L. J. 129, 1879; *U. S. v. Bogart*, 3 Ben. 257, 1869; *State v. Walton*, 62 Me. 106, 1873; *State v. Boody*, 53 N. H. 610, 1873; *Com. v. Morrissey*, 86 Pa. 416, 1878; *Calkins v. State*, 18 Ohio St. 366, 1868; *State v. Newton*, 26 Ibid. 265, 1875; *People v. Bringard*, 39 Mich. 22, 1878; *State v. Hebel*, 72 Ind. 361, 1880; *State v. Brandt*, 41 Iowa, 593, 1875; *State v. Munch*, 22 Minn. 67, 1875; *State v. Baumhager*, 28 Minn. 226, 1881; *State v. Ring*, 29 Minn. 78, 1882; *State v. Smith*, 13 Kans. 274, 1874; *State v. Carrick*, 16 Nev. 120, 1881; *Hoyt v. State*, 50 Ga. 313, 1873; *Johnson v. Com.*, 5 Bush, 430, 1869; *State v. Leonard*, 6 Cold. 807, 1869; *State v. Bittinger*, 55 Mo. 596, 1874; *State v. Flint*, 62 Ibid. 393, 1876; *State v. Hays*, 78 Ibid. 600, 1883; *State v. Doherty*, 25 La. An. 119, 1873; *State v. Exnicios*, 33 Ibid. 253, 1881; *State v. Connelly*, 104 N. C. 794, 1889; *Stokes v. People*, 114 Ill. 320, 1885; *Hollingsworth v. State*,

is, in such cases, proof of official status, it not being necessary to prove institution or taking an official oath.¹ And in any view a *de facto* officer is indictable for the embezzlement of public money.²

Embezzlement from post-offices is hereafter distinctively considered.³

Under the term public officer, in State statutes, are included town collectors of taxes and selectmen.⁴ Mere retention of public

111 Ind. 289, 1887; *State v. Wells*, 112 Ind. 237, 1887; *State v. White*, 66 Wis. 343, 1886; *State v. Czizek*, 38 Minn. 192, 1888; *State v. Cowan*, 74 Iowa, 53, 1888; *State v. King*, 81 Iowa, 587, 1891; *Stropes v. State*, 120 Ind. 562, 1889; *Stanley v. State*, 88 Ala. 154, 1890; *Hemmingway v. State*, 63 Miss. 371, 1890; *People v. Hamilton*, (Cal.) 32 Pac. Rep. 526, 1893; see *U. S. v. Reilly*, (Nev.) 2 W. Coast Rep. 688, as to jurisdiction of circuit courts in United States; *U. S. v. Harper*, 33 Fed. Rep. 471, 1887; *U. S. v. Bornemann*, 36 Fed. Rep. 257, 1888; *State v. Govan*, 48 Ark. 76, 1886; *Malcolmson v. State*, 25 Tex. App. 267, 1888; *Crane v. State*, 26 Tex. App. 482, 1888; *Com. v. Lewis*, (Ky.) 12 S. W. Rep. 266, 1889; *State v. Archer*, 73 Md. 44, 1890; *U. S. v. Warner*, 26 Fed. Rep. 616, 1886; *U. S. v. Adams*, 2 Dak. 305, 1881; *Claassen v. U. S.*, 12 Sup. Ct. Rep. 169, 1891.

¹ Whart. Crim. Ev. §§ 164, 183; *Fortenberry v. State*, 56 Miss. 286, 1879; *State v. Mims*, 26 Minn. 183, 1879; *People v. Hamilton*, (Cal.) 32 Pac. Rep. 526, 1893; *U. S. v. Bornemann*, 36 Fed. Rep. 257, 1888; *Malcolmson v. State*, 25 Tex. App. 267, 1888; *State v. Findley*, 101 Mo. 217, 1890. See *State v. Bolin*, 110 Mo. 209, 1892.

² Ibid.; *R. v. Barrett*, 6 C. & P. 124; *State v. Goss*, 69 Me. 22, 1878; *State v. McEntyre*, 3 Ired. 171, 1842; *Diggs v. State*, 49 Ala. 311, 1873; *State v. Spaulding*, 24 Kans. 1, 1880.

³ *Infra*, § 1827.

⁴ In *State v. Walton*, 62 Me. 106, 1873, it was held not to be necessary, in an indictment against a town officer for the embezzlement or fraudulent conversion to his own use of moneys in his possession and under his control by virtue of his office, to allege to whom the money belonged, or that it was the property of another.

It was further held that under the statute (R. S. c. 120, § 7), which declares three different classes of offenders liable to be deemed guilty of larceny, it is not necessary to the validity of an indictment, under the provisions there found, to set out the various facts that would be necessary to constitute larceny as elsewhere defined. It is sufficient to allege the acts and facts which that section declares shall be deemed larceny.

It was further ruled that a town collector of taxes is a public officer within the meaning of that section, and cannot successfully object to the maintenance of an indictment under that section for the fraudulent conversion to his own use of moneys which have come into his possession and under his control, by virtue of his office, that he and his sureties are liable to account to the town for the money which he collects for it, according to his bond, and that the money is not the town's money until it is paid into the treasury.

In the opinion of the court it was said by Barrows, J.: "The case of *The People v. Bedell*, (2 Hill, 196, 1842) arose under a New York statute, which provides that 'where any duty is or

funds in their proper deposit, without appropriation or conversion, is not embezzlement ;¹ though it is otherwise where such retention

shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty . . . shall be a misdemeanor punishable as herein described.'

"The defendant was appointed collector of the Geneva Village Corporation, by the trustees, and gave bonds for the faithful discharge of his duty. Warrants and tax-bills were given him for collection. He finally went off a defaulter for from three to five hundred dollars, and was indicted under this statute. It was objected that the charter of the village corporation did not authorize the appointment by trustees, and, if it did, defendant was not a public officer within the meaning of the statute. The collector is not mentioned among the officers to be chosen for the corporation, but power is given to the trustees to appoint one attorney, street commissioner, fire-wardens, and certain other officers specially named, and also 'such other officers as shall be authorized by this act.' The collector is not named in any list of officers in the act; but one section provides that 'the collector shall collect all moneys which shall be ordered by the corporation to be raised by tax.' Hereupon, in an opinion drawn by Bronson, J., the court held: I. That the collector was one of the officers authorized by the act, and might be appointed by the trustees. II. That he was a public officer; and that officers of such a corporation are 'none

the less public officers because their powers are confined in narrow territorial limits.' The court remarked that he was required to take the oath and to give bail for the faithful performance of his duties, 'and he was not the less a public officer because the office is not mentioned in the statute enumeration and classification of public officers.'"

In *State v. Boody*, 53 N. H. 610, 1873, it was held that a selectman is a "public officer," and may be "a receiver of public money" within the intendment of c. 257, § 7, of the Maine General Statutes.

In the course of his opinion, Foster, J., said: "But the terms of the statute relating to embezzlements are not restricted nor defined by the application and definitions of the provisions of title xvii.; and, as used in § 8 of c. 258, Gen. Stats., the term 'public corporation' may properly be applied to a town.

"Of this there can be no doubt. Every municipal corporation is necessarily a public corporation. 'All corporations intended as agencies in the administration of civil government are *public*, as distinguished from private, corporations. Thus, an incorporated school district or county, as well as a city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a *municipal* corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political, or public corporations

¹ *State v. Hunnicut*, 34 Ark. 862, 1879; *Com. v. Lewis*, (Ky.) 12 S. W. Rep. 266, 1889; *Com. v. Este*, (Mass.) 7 Crim. Law Mag. 184, 1885; *People v. Clements*, 25 N. Y. Week. Dig. 184, 1886; *Fitzgerald v. State*, 50 N. J. L. 475, 1888.

is accompanied by refusal to pay over on the fraudulent excuse of non-possession of the money.¹ In such case the general refusal to pay over will sustain the charge.²

are not, in the proper use of language, municipal corporations.' *Dillon Mun. Corp.* § 10.

"In this State, public corporations are understood to include all those which are created for public purposes, and whose property is devoted to the object for which they are created. Such, it is said, are counties, towns, parishes, school districts, etc. Private corporations are those which are created for the immediate advantage of individuals. Such, it is said, are insurance and manufacturing companies, and such, also, are canals, turnpikes, toll-bridges, and railroads, although the uses of these latter are public. *Dartmouth College v. Woodward*, 1 N. H. 116, 117, 1817; *Eustis v. Parker*, *Ibid.* 275, 1818; *School District v. Blaisdell*, 6 *Ibid.* 197, 1833; *Concord Railroad v. Greeley*, 17 *Ibid.* 47, 1845; *Foster v. Lane*, 30 *Ibid.* 305, 1855; *Petition of Mt. Washington Road Co.*, 35 *Ibid.* 134, 1857." See *State v. Cleveland*, 80 Mo. 108, 1883, as to embezzlement by township trustee; *State v. Nicholson*, 67 Md. 1, 1887; *State v. Hays*, 78 Mo. 600, 1883.

In *Zschocke v. People*, 62 Ill. 127, 1871, a constable, having an execution placed in his hands, levied upon and took possession of certain goods belonging to the judgment debtor, and put them in possession of the judgment creditor. A short time afterward the constable took the goods away, with the consent of the judgment creditor, and sold them at private sale, receiving therefor the sum of \$55, which he converted to his own use. In a prosecution against the constable,

under an indictment charging him with having stolen divers United States notes and current bank bills for the payment of \$55, and of that value, of divers issues and denominations to the grand jury unknown, the personal goods and property of Mathias Eck, who was the judgment creditor, it was held the prosecution could not be maintained, under § 71 of the Criminal Code of Illinois, declaring the felonious conversion of money, goods, etc., by a bailee to be larceny, because in no sense could the constable be regarded as the bailee of the judgment creditor. Nor is a constable who fails to pay over fines collected by him guilty of embezzlement, as the Code of Illinois provides a different punishment for such an offence. *Stoker v. State*, 114 Ill. 320, 1885; see *People v. Royce*, (Cal.) 37 Pac. Rep. 630, 1894; *Crump v. State*, 23 Tex. App. 615, 1887; *State v. Manley*, 107 Mo. 364, 1891; *State v. Noland*, 111 Mo. 473, 1892.

As to clerk of board of county commissioners, see *State v. Denton*, (Md.) 22 Atl. Rep. 305, 1891.

A clerk in the employment of the trustees of the gas-works of the city of Philadelphia is an employé of the city of Philadelphia, and under the Act of June 2, 1878, (Pa.) can be convicted of embezzlement. See *Culp v. Comm.*, 42 Leg. Int. 288, 1885.

¹ *Supra*, § 1053; *State v. Mims*, 26 Minn. 183, 1879. See *Comstock v. Gage*, 91 Ill. 328, 1878; *Chaplin v. Lee*, (Nebr.) 21 Rep. 85, 1885; *U. S. v. Adams*, 2 Dak. 305, 1880.

² *State v. Ring*, 29 Minn. 78, 1882.

IV. RECEIVING EMBEZZLED GOODS.

§ 1064. Receiving knowingly embezzled goods is generally held
 Indictable a misdemeanor at common law wherever the embezzle-
 at common ment is made penal by statute. But, aside from this
 law. view, wherever embezzlement is made larceny by statute,
 there receiving embezzled goods stands on the same footing as re-
 ceiving stolen goods.¹ But where "receiving" is made a statutory
 offence, and is exclusively confined to goods *stolen*, this may pre-
 clude the receiving of *embezzled* goods from being indictable at com-
 mon law.² It is clearly otherwise where embezzlement is made
 larceny by statute.³

¹ *Supra*, § 996. See, however, *Leal v. State*, 12 Tex. App. 279, 1882. Receiving embezzled goods is a different offence from receiving stolen goods.

² See *supra*, § 994.

Com. v. Leonard, 140 Mass. 473, 1886.

³ *R. v. Frampton*, D. & B. 585. Re-

POINTS REQUESTED FOR THE DEFENCE IMPROPERLY REFUSED, AND ERRONEOUS CHARGES.

What Constitutes a Felonious Conversion.

To constitute the crime of embezzlement there must be a felonious intent to deprive the owner of the use of the goods and to convert them to the use of the defendant; therefore where the defendant hauled seven bales of cotton to a gin-mill for the owner and took the receipt for one bale in his own name, but the receipt for the rest in the name of the owner, and, when afterward questioned, he turned all the receipts over to the owner, it was error for the court to refuse to charge the jury that if they believed the evidence they must find the defendant not guilty. *Penny v. State*, 88 Ala. 105, 1889.

Merely Keeping the Property of Another from Him is Not Necessarily Embezzlement.

And for the same reason the following instruction was held erroneous: "If they (the jury) were satisfied beyond a reasonable doubt that the respondent was treasurer and received the money and spent it, then he was guilty under the information." *People v. Galland*, 55 Mich. 628, 1885.

The defendant requested the court to charge: "If the evidence satisfies the minds of the jury that Carr (the defendant) received the check or certificate for collection, and that he collected it through the New York bank and never brought it to Alabama, and that the money was never with bank or in possession of the defendant, then they will find the defendant not guilty." Refused. Held error. *Carr v. State*, (Ala.) 16 So. Rep. 155, 1894.

A Check as Such Not Subject to Embezzlement.

And in the same case, where the indictment charged the receipt of money by the defendant, it was held error for the court to refuse the following instruction as requested by defendant: "Gentlemen of the jury, a check is not money, and if you believe from the evidence that the defendant received from Mrs. Rice no money, then you must find him not guilty. If the State has failed to prove to the satisfaction of the jury, beyond all reasonable doubt, that the defendant was the agent of Mrs. Rice, and as such received her money, the jury will find him not guilty; and if the State has failed to prove beyond all reasonable doubt to the satisfaction of the jury, first, that Carr was the agent of Mrs. Rice; second, that Carr received bank notes to his own use, or embezzled the same, then the jury will find him not guilty." Carr v. State, *supra*.

